Summit Constr. Servs. Group, Inc. v City of New York
2015 NY Slip Op 31599(U)
August 20, 2015
Supreme Court, New York County
Docket Number: 155253/2015
Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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SUMMIT CONSTRUCITON SERVICES GROUP, INC.,

Index No. 155253/2015

Petitioner,

-against-

DECISION/ORDER

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

Respondents.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioner Summit Construction Services Group, Inc. ("Summit") brings the instant petition pursuant to Article 78 challenging respondent The Contract Dispute Resolution Board's ("CDRB") determination made on or about August 21, 2013, denying a claim made by petitioner regarding work on a construction project. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. On June 26, 2009, petitioner entered into a contract with respondent The New York City Department of Design and Construction ("DDC") (the "Contract") for the general construction of a public improvement project known as the Riverside Health Center located at 160 West 100th Street, New York, NY (the "Project"). In addition to Summit, there were three other "prime contractors" who entered into contract with the DDC for

the construction of the Project. One of these other "prime contractors" was Ark Systems Electric Corp. ("Ark") who entered into a contract with DDC to serve as the electrical contractor for the Project.

On or about March 20, 2013, petitioner filed a Notice of Dispute with the DDC seeking a determination that under the Contract it is not responsible for the installation of the control wiring for motorized shades. By letter dated February 20, 2013, DDC informed Summit that it had determined, after reviewing all contract documents, that control wiring for window shades was part of Summit's contract obligations and directed Summit to proceed with the work immediately. Following this determination, Summit filed a Notice of Claim with the Office of the Comptroller (the "OC") seeking to overturn DDC's determination. The OC denied Summit's claim on the ground that the dispute was waived as Summit failed to reserve its claim when filing its requests for extensions of time. Thereafter, Summit appealed the OC determination to the CDRB. By decision dated January 26, 2015, the CDRB denied Summit's appeal and dismissed its claim as waived. Specifically, the CDRB based its decision on the following facts. Following Summit's refusal to install the control wiring, Summit submitted four requests for partial time extensions. As part of the extension requests, Summit stated that it waived all claims except those expressly reserved in the requests. Although Summit reserved claims related to additional costs it incurred arising out of a previous delay, claims relating to proposed change orders and additional work due to changes, the extension requests did not mention a claim relating to the shade control wiring costs.

Summit has now brought the instant Article 78 petition to vacate the CDRB determination on the ground that it was affected by an error of law, was arbitrary and capricious

and an abuse of discretion.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v. Lewis*, 90 A.D.2d 748, 749 (1st Dept 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dept 2005); *see Pell v. Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974) ("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell,* 34 N.Y.2d at 231 (internal citations omitted).

Here, the petition is denied as the court finds that CDRB's determination was rational. Pursuant to Article 13 of the Contract, in any application for an extension of time Summit was required to either expressly reserve or waive any claims it had under the Contract. The evidence before the CDRB established that Summit had applied for four extensions, yet these extension requests did not mention a claim relating to the window shade control wiring costs. Thus, it was rational for the CDRB to determine that Summit's claim relating to the window shade control wiring costs had been waived.

To the extent Summit contends that the CDRB determination was arbitrary and capricious as it did not have to reserve the window shade control wiring issue because that was a

"dispute" and not a "claim," such contention is without merit. This exact argument was raised in the underlying proceedings and was rejected by the CDRB. Relying on a prior related decision, CDRB rationally found that the argument that a "claim" is different than a "dispute" is a distinction without a difference. Although Summit may disagree with this finding, its disagreement does not render the finding arbitrary and capricious.

Accordingly, the petition is denied. This constitutes the decision and order of the court.

Dated: 8/20/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.