SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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In the Matter of the Application of

CRANA ELECTRIC INC.,

Petitioner,

Index No. 159852/2016

For a Judgment Pursuant to Article 78 of the CPLR

DECISION AND ORDER

Sequence Number: 001

-against-

BENJAMIN JONES, Vice President of Internal Audit,
And BATTERY PARK CITY AUTHORITY d/b/a
HUGH L. CAREY BATTERY PARK CITY AUTHORITY,

Respondents.

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Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 through 3, were used on petitioner Crana Electric Inc.'s CPLR Article 78 Proceeding seeking to set aside the July 22, 2016 determination of respondent Benjamin Jones, Vice President of Internal Audit for the Battery Park City Authority, which denied petitioner's claims for delay damages incurred in connection with petitioner's electrical contracting work at Pier A for the Battery Park City Authority.

Papers Numbered

Notice of Petition – Affirmation - Exhibits 1
Affirmation in Opposition to Petition - Exhibits 2
Reply Affirmation 3

Upon the foregoing papers, the petition is denied.

Background

The petitioner in this proceeding is Crana Electric, Inc. ("Crana"), a New York corporation conducting business as an electrical contractor on municipal and other public works in and around the City of New York. The respondents in this proceeding are the Battery Park City Authority ("BPCA"), a public benefit corporation of the State of New York, and Mr. Benjamin Jones ("the Arbiter"), BPCA's Vice President of Internal Audit. BPCA owns real property, generally known as "Battery Park City," consisting of approximately 92 acres of land located on the west side of Lower Manhattan and including Pier A, located at 22 Battery Place.

On or about March 3, 2010, Crana and BPCA entered into a public construction contract ("the Contract") pursuant to which Crana agreed to provide core and shell electrical work associated with the restoration of Pier A for a stipulated sum of $1,380,812.00. According to the original terms of the Contract, Crana's work was scheduled to commence on February 4, 2010 and to be completed by April 30, 2011. However, after several factors delayed the project, the parties amended the completion date from April 30, 2011 to December 12, 2012.

On October 29, 2012, six weeks prior to the amended completion date, Hurricane Sandy hit the New York Metropolitan Area. As a result, floodwaters inundated Pier A, damaging the newly installed power system, electrical wiring and fire alarm devices. Between November and December 2012, Crana, at the direction of BPCA, performed change-order work to address the hurricane damage, installed and maintained temporary power, and restored permanent power to Pier A. Between January and September 2013, Crana fixed the electrical and fire-alarm systems, which were damaged by the hurricane flooding. On September 3, 2013, Crana received a final inspection and release from the NYC Department of Buildings and on September 6, 2013, Crana received a letter of substantial completion from the project architect.

BPCA paid Crana paid an additional $842,460.00 for change orders, bringing the total amount received to roughly $2.2 million. Nevertheless, Crana alleges that BPCA failed properly to manage the project, especially in the wake of Hurricane Sandy, causing Crana to suffer delay and inefficiency damages in the amount of $1,551,129.18. BPCA disputes the allegation. The Contract contains a dispute resolution provision, pursuant to which BPCA's Vice President of Internal Audit is appointed as the Arbiter required to render a "final and binding decision" regarding disputes between the parties. The Contract further provides that the Arbiter's decision can be challenged under Article 78 of the CPLR in a court of competent jurisdiction in New York County, State of New York. On October 4, 2013, Crana served BPCA and its Arbiter with a Notice of Claim for recovery of alleged delay damages.

On July 22, 2016, the Arbiter denied Crana's claims for delay damages, finding that such claims were precluded by the "no damages for delay" provision contained in the Contract, with the exception of Crana's claims for uncompensated change orders in the amount of $20,910.34.

Instant Proceeding

On November 22, 2016, petitioner commenced the instant CPLR Article 78 Proceeding, seeking to set aside the July 22, 2016 determination of the Arbiter as arbitrary and capricious.

Discussion

In an Article 78 Proceeding, the scope of judicial review is limited to whether the administrative agency had a rational basis for its determination. See Matter of Pell v Board of Educ., 34 NY2d 222, 230-1 (1974). See also China v New York City Bd. Of Standards and Appeals, 97 Ad3d 485, 487 (1st Dept 2012) ("the agency's interpretation is entitled to great deference and must be upheld as long as it is reasonable.") Judicial review of an administrative determination is limited to a consideration of whether the determination is supported by substantial evidence on the record as a whole. See Ridge Rd. Fire Dist. V Schiano, 16 NY3d 494, 499 (2011) ("This Court has defined 'substantial evidence' as such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.")

Petitioner alleges that that the Arbiter's decision was arbitrary and capricious for three reasons:

(1) The Arbiter ignored evidence of "uncontemplated" delays;
(2) The Arbiter allowed BPCA to introduce late submissions during the arbitration process, without providing Crana a legitimate opportunity to rebut or contest the conclusions set forth therein;
(3) The Arbiter ignored the evidence submitted by Crana of its incurred costs.

The Court has considered these arguments and finds them to be unavailing.

First, the Court finds that the Arbiter's determination that delays related to Hurricane Sandy were "contemplated" by the Contract is rational and supported by the record. Article 3.1(a) of the Contract is a standard "no damages for delay" clause that is commonly enforced in connection with New York State public works projects:

> Contractor agrees to be bound by and comply with the completed dates and the progress schedule for completion and the progress of the Project (the "Project Schedule") established by Construction Manager from time to time and waives its right to charge or claim damages or any increased cost, charges or expenses against Owner, Construction Manager, or Architect for delays or disruptions from any cause whatsoever.

New York courts do recognize a limited exception to enforcing a "no damages for delay" clause for delays that were "uncontemplated" at the time the parties entered into their contract. See Corrino-Civetta Construction Corp. v City of New York,67 NY2d 297, 309 (1986). However, New York courts consistently hold that causes of delay are deemed to have been "contemplated" if the possibility of their occurrence is mentioned in the contract. See Blue Mechanical Corp. v City of New York, 158 AD2d 373, 375 (1st Dept, 1990) (delays deemed contemplated by parties when they arise from circumstances that are cited in the contract); See also Plato Gen. Constr. Corp. v Dormitory Authority of the State of New York, 89 AD3d 819, 824 (2nd Dept, 2011) (where contract provided for change orders and extra work, delays "were, on their face, contemplated by parties").

Crana contends that the delays it experienced were "uncontemplated" and therefore beyond the scope of the "no damage for delay" clause, arguing that the number of change orders, changes in BPCA's construction manager, changes in the other contractors performing work on the project, the duration of the delay, and the occurrence of Hurricane Sandy were all outside the scope of the Contract. After considering this argument, the Arbiter found that Crana's delay claims related to Hurricane Sandy were barred by the "no damages for delay" clause in Article 3.1(a) of the Contract, because the Contract explicitly contemplates delays due to "acts of God," "floods" and "unusually severe weather." In the words of the Arbiter, "[t]o overcome the no damages for delay clause, Crana was required to state, with respect to each type of delay it complains of, why the nature of the delay is one that the parties could not have contemplated when they entered into the contract. Crana failed to meet this burden." The delays were contemplated and the Arbiter's determination was neither arbitrary nor capricious, but rational and consistent with the terms of the Contract.

With respect to the second reason, the Court finds that the Arbiter's acceptance of BPCA's written submissions during the arbitration process was authorized under the Contract and that Crana was given a sufficient opportunity to reply. In his decision, the Arbiter explains:

> By letter dated June 8, 2016, I advised counsel for the parties that I would hear oral argument on the matter, and that each side could submit additional documentation to me, not to exceed five pages, to further summarize their respective positions. On June 24, 2016, written statements were submitted to me by both sides. BPCA's written statement, however, was accompanied by additional documentation, including a two-page cost analysis from its consultant. After an objection by Crana to BPCA's submission, I wrote counsel reiterating the five-page limit but allowed the parties to request an increase of the page limit. By letter dated June 27, 2016, counsel for BPCA sought permission to increase the page limit. On June 28, I determined to allow BPCA's full submission, but further allowed Crana to submit a rebuttal equal to the volume of BPCA's submissions. Crana submitted its supplemental papers to me on July 5, 2016.

Article 27.12 (c) of the Contract provides that the Arbiter may "seek any such additional oral and/or written argument or materials from either or both parties to the Dispute as he deems fit. The Arbiter shall have the discretion to extend the time for submittal required hereunder." The Arbiter acted wholly within the scope of his authority in allowing the parties to submit additional documentation beyond the original five-page papers. Furthermore, Crana's claim that it was given insufficient time to submit its reply is belied by the fact that Crana never requested additional time to submit a reply to BPCA's written submission.

Third, the Court finds that the Arbiter did not ignore the evidence submitted by Crana of its incurred costs and was neither arbitrary nor capricious in its consideration of that evidence. The Arbiter explicitly states that he reviewed the following submissions by the parties: the Contract; the October 2013 claim submission from Crana (an analysis submitted by consultants from the Leffer Brophy Group and three binders of accompanying exhibits); the June 24, 2016 "Plaintiff's Statement" submitted by Farrell & Fritz, P.C.; the July 5, 2016 "Reponse to [Consultant's] Letter" submitted by consultants from the Leffer Brophy Group on behalf of Crana, along with accompanying documentation; and Crana's "Revised Home Office Overhead" power-point presentation. The Arbiter challenged the methodology Crana used to calculate its damages and rationally concluded that Crana failed properly to support its damage claims. More importantly, however, is the Arbiter's rational determination that the details of Crana's cost analysis are irrelevant in light of the conclusion that Crana's claims for delay damages are barred by the "no damages for delay" clause of the Contract. Accordingly, the Arbiter was neither arbitrary nor capricious in his determination that Crana was not entitled to damages for delays.

The Court reiterates that it is for the administrative agency (in this case, that is the Arbiter) to weigh the evidence in a proceeding before it. See Jane St. Co. v DHCR, 165 AD2d 758, 560 NYS2d 193 (1st Dept) *leave to appeal denied,* 77 NY2d 801, 566 NYS2d 586 (1991). Issues as to credibility and weight of the evidence are for the administrative body to determine as a trier of fact. See Stork Restaurant, Inc. v Boland, 282 NY 256, 26 NE2d 247 (1940). The Arbiter acted wholly within his powers and was neither arbitrary nor capricious in his decision. Thus, the Court finds that the decision is entitled to judicial affirmance and hereby denies petitioner's Petition.

Conclusion

Petition denied. The clerk is hereby directed to enter judgment denying and dismissing the petition.

Dated: 3/15/18

Arthur F. Engoron, J.S.C.