

***Pile Foundation Construction Co., Inc. v. Dep't of
Environmental Protection***

OATH Index No. 1785/09, mem. dec. (Apr. 15, 2009), *aff'd*, 2010 NY Slip Op 31067(U), 2010 N.Y. Misc. LEXIS 1965 (Sup. Ct. N.Y. Co. 2010)

On appeal, CDRB determined that contractor was not entitled to a credit for deleted work. Claim denied.

Affirming the decision, the court finds it was not improper for the Board to exclude parole evidence as it was barred by the contract's merger clause. The court agreed with the Board's finding that the Commissioner had the power under the contract to issue a forced change order, which the contractor could (and did) challenge.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

CONTRACT DISPUTE RESOLUTION BOARD

In the Matter of
PILE FOUNDATION CONSTRUCTION COMPANY, INC.
Petitioner
-against-
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Respondent

MEMORANDUM DECISION

ALESSANDRA F. ZORNIOTTI, *Administrative Law Judge/Chair*

KEVIN HANRATTY, *Deputy General Counsel, Mayor's Office of Contracts*

ROBERT D. LANG, *Prequalified Panel Member*

Pending before the Contract Dispute Resolution Board ("Board") is the petition of Pile Foundation Construction Company ("Pile"), disputing a change order by the New York City Department of Environmental Protection ("Department" or "DEP") that eliminated dredging work from a contract between the parties. Pile alleged that DEP improperly issued a "forced change order" and failed to credit the income Pile anticipated from the sale and/or reuse of the dredge material. DEP argued that use of a "forced change order" was proper and that the credit should be denied because reuse of the material is a violation of the contract and related permit.

Oral argument was held on March 11, 2009. The record was open until April 6, 2009, for

the filing of additional documents and post-hearing briefs. The Board finds that the Department's use of a "forced change order" was proper and that pursuant to the terms of the applicable contract, Pile was required to dispose of the dredge material and not reuse it. Since Pile is not entitled to a credit, the appeal is denied.

BACKGROUND

This claim arises out of Contract No. CSO-4B for the Paerdegat Basin Water Quality Facility Plan ("Contract"). According to the Project Overview, this is one of several projects by the Department to abate combined sewer overflows ("CSO") to New York State waters. The purpose of this project is to build a CSO facility at the head of Paerdegat Basin, a canal which is part of the Jamaica Bay system. The Project Overview states that prior water quality evaluations indicated the Basin was "excessively polluted" due to raw sewage and rain water and that it was in need of "remedial water pollution control methods" to comply with New York State Department of Environmental Conservation ("DEC") water standards. Part of the project involved dredging the canal and removing the dredge material by barge. The project required extensive environmental reviews and approvals from various federal, state, and city agencies.

The Contract's "General Specification 02325 - Dredging" provides in paragraph 1.01A that the contractor "shall furnish all labor, materials, tools, equipment and incidentals required for the removal and disposal of all materials encountered by dredging." Although the Project Overview indicates that the sediment was tested and found to be nonhazardous, paragraph 3.02A provides that "[b]efore disposing of the dredged sediments," the contractor shall perform tests to determine whether the sediment is considered hazardous. Paragraph 3.02D states "[a]ll materials resulting from the dredging will become the property of the Contractor. The materials shall be removed from the site to the Contractor's place of disposal at the Contractor's expense in conformance with the applicable laws and regulations." Paragraph 3.02C requires "disposal of the excavated materials shall be in accordance with the requirements of the permits issued by" the United States Department of the Army, New York District Corps of Engineers ("USACE") and DEC.

Pursuant to the DEC/USACE Joint Application for Permit dated April 23, 2001 ("Permit Application"), under the Method of Dredging, "[t]he dredged material would be placed on barges and transported to a permitted facility for treatment and disposal. Barbella Environmental Technology Inc. (CTI Clean Earth) of Somerville NJ has agreed to take the dredge material at

their facility for treatment and disposal.” The Permit Application requires that within 10 days of receipt of the award of the contract the contractor must “submit to DEP and DEC the name of the disposal site for the dredge material.” *See also* Contract General Specification 02325 paragraph 1.04B. Moreover, the Permit Application requires that prior to dredging, the contractor submit an Engineering Report which “must describe the method of dredging, sediment treatment, and disposal.” *See also* Contract General Specification 02325 paragraph 1.04C, D, E.

Pile bid on the Contract to perform the work of excavating and installing foundations and substructures for the CSO storage facility, as well as the dredging. Pile’s bid was 20% below DEP’s estimate and 17% below the second lowest bidder. As required for bids 15% below the estimate, DEP met with Pile for a pre-award meeting to discuss the bid as well as Contract compliance requirements. On October 22, 2001, DEP sent Pile a letter summarizing the parties’ October 17, 2001, conversation and in particular Pile’s explanation for its pricing on major work items including:

Soil excavation and disposal The contractor stated that he can realize substantial savings by having “marginal” soil excavation from the Paerdegat site classified for beneficial re-use in one of his large projects in Manhattan. He will not have to pay for this disposal and he will not need to purchase fill material for his Manhattan project. A follow-up call to Hazen’s environmental subconsultant confirmed that this is possible under current regulations. The difference between estimate and bid is approximately \$5 million.

Dredging The difference between estimate and bid is approximately \$3 million. A follow-up call to one of the two disposal facilities mentioned by the contractor yielded only a partial confirmation of Pile Foundations’ explanation.

(Resp. Ex. K).

The Department awarded Pile the Contract on June 24, 2002. Pile commenced work in October 2002.

On September 9, 2004, the Department issued a change order that deleted a substantial portion of the dredging from the Contract and required that the remaining dredge material be transported by truck not barge. Pile was instructed to submit a cost proposal for the change order within seven days of receipt and that if it did not do so, the change order “will be forced.” DEP also stated that a “credit will be taken for the deleted work and a net cost difference will be included for transporting the dredged materials to your upland disposal site by truck in lieu of barges” (Pet. Ex. 1).

On June 19, 2005, Pile notified DEP that the remaining dredge material would be disposed of at NYC-DEP Fountain Avenue Landfill or Clean Earth of North New Jersey.

By letter dated June 14, 2005, DEP notified Pile that it needed to provide documentation from the intended disposal site(s) confirming that the dredge material was approved for disposal at that site. Moreover, Pile had not yet provided the dredging plan as required. Pile responded that day and stated it had a beneficial use designation (“BUD”) to send dredge material to the Fountain Avenue Landfill and Pennsylvania Avenue Landfill. Moreover, any material not sent to those landfills would be disposed of at Clean Earth of North New Jersey. Pile also described the equipment for the dredging operation and how the operation would proceed.

By letter dated June 15, 2005, DEP notified Pile that the BUD referred to in the June 14 letter was for native soil, not dredge material. DEP reiterated its request that Pile provide documentation from the intended disposal site(s) that the dredge material was approved for that site. DEP also stated that it was reviewing Pile’s dredging plan and that once it was found acceptable Pile would have to submit it to DEC for approval.

By letter dated September 1, 2005, Allied Environmental Group, Inc., stated that it “was capable of the disposal of the material” from “Paerdegat Basin-CSO-4B” as non-hazardous based on the information provided but that additional analysis “may be necessary to facilitate the disposal” (Resp. Ex D).

On February 24, 2005, Pile submitted a proposal that valued the cost of the canceled work at \$1,118,775.19. Pile claimed that pursuant to the Contract the dredge material was the property of the contractor and that elimination of the dredging resulted in a \$600,000 loss, as Pile anticipated reusing the material for other projects it was working on. Pile asked for a credit in that amount and proposed that the Department issue a change order for \$518,775. Pile indicated the parties discussed at the pre-award meeting that it intended to resell the dredge material for use on other projects, that DEP stated certain permits were necessary do so, and that Pile agreed to obtain them. Pile provided calculations including the cost of purchasing fill for future projects and an estimate that the amount of remaining dredge material was 7,500 cubic yards which would be trucked to “Riverside South” (Pet. Ex. 2).

On August 31, 2006, the Department notified Pile to appear on September 8, 2006, to show cause why it should not be found in default of the Contract. DEP stated, *inter alia*, that Pile had reduced its work force to a number that was insufficient to complete the remaining work

in accordance with the Contract's schedule and that it had willfully violated the Contract. A hearing on the default was held on September 29, 2006, and continued to April 12, 2007.

On November 13, 2006, the Department issued a "forced change order" for the deleted dredging for \$2,101,561.25, because the parties could not agree on a negotiated credit cost. DEP rejected Pile's proposal asserting that reuse of dredge material on other projects was a violation of the Contract and Permit Application. The Department also noted that while Pile planned to use Allied Environmental Group, Inc., an approved facility, Pile estimated that 7,500 cubic yards of dredge material would be disposed of at Riverside South, a non-approved facility. The Department asserted that the use of a non-approved facility was also a violation of the Contract.

On December 11, 2006, Pile submitted a notice of dispute to the Department's Commissioner. Pile asserted that it was unfamiliar with the term "forced change order" and that no such term exists in the Contract. Moreover, Pile claimed that the change order did not account for the gain it expected from the sale of the deleted material and that it would now be responsible for the cost of disposing material that it dredged. The Contract provided that the dredge material belonged to Pile and that its only obligation was to dispose of it in conformance with the law. Pile contended that none of the applicable documents prohibit it from reusing the material. Moreover, Pile justified its low bid at the pre-award meeting by explaining that it intended to reuse the material and that it would obtain the necessary permits. Pile asserted that DEP acknowledged that with DEC approval, Pile's reuse of the material would not violate the Contract or Permit Application. Pile requested that any change order include a credit for the income it would have received from the sale of the deleted dredge material and that any disposal costs deducted reflect that Pile intended to reuse the materials.

By letter dated March 16, 2007, the Department upheld its prior determination that a change order would be forced in the amount of \$2,101,561.25. The letter stated that the term "forced change order" is used to describe a contract change authorized by the Commissioner pursuant to Article 25 of the Contract when the parties cannot agree on a price adjustment. The Department contended Pile's position that the dredge material belongs to Pile fails to consider that the Permit Application requires that it be transported to a permitted facility for treatment and disposal. Moreover, the Department contended that Pile represented at the pre-award meeting that its bid was based on a substantial savings it realized from soil excavation, not dredge material. According to the Department, further support that Pile intended to dispose of the

dredge material could be found in prior correspondence where the parties discussed various facilities and whether they were capable of disposing of the material.

Pile appealed the Commissioner's decision to the Comptroller of the City of New York ("Comptroller") on April 23, 2007. Pile objected to the use of a forced change order and alleged, *inter alia*, that under the terms of the relevant documents the dredge material belongs to Pile and that a credit for its reuse should be included in the change order.

On November 7, 2008, the Comptroller denied Pile's claim and found no evidence to support the assertion that at the time it entered into the Contract, Pile intended to sell the dredge material. The Comptroller found, "it appears that Pile did not raise its intent to sell the dredged material until after the agency deleted dredging work and requested that Pile submit a credit change order proposal." The Comptroller stated that because the Contract required dredge material to be disposed of in accordance with applicable laws and regulations, Pile would have had to identify and get approval from DEC to reuse the dredge material before it could sell any of it. Pile did not provide any proof that it had taken the necessary steps to obtain such approval. With regard to DEP's use of the forced change order, the Comptroller stated that it was a legitimate administrative process utilized when a contractor and the City cannot agree on the value of a change order. The order remains subject to challenge, correction, or further negotiation under the administrative review process, and therefore does not prejudice the contractor (Pet. Ex. 7; Resp. Ex. F).

On December 6, 2007, the Department declared Pile in default for its failure to timely complete its responsibilities. Pile's surety was called to complete the Contract.

On December 5, 2008, Pile filed this appeal seeking review of the Department's issuance of the forced change order denying the credit. Pile requested that the Board reverse the determinations of the Department and the Comptroller and that the matter be remanded to consider the amount of the change order, taking into account the value of the dredge material and the impact to Pile resulting from DEP's delay and improper use of a forced change order.

ANALYSIS

The Board's authority to resolve disputes between the City and a vendor that arise by virtue of a contract between them is set forth in Procurement Policy Board rule ("PPB rule") 4-09. The parties agreed to this method of dispute resolution in Article 27 of the Contract. The

PPB rules grant the Board authority to hear claims “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 vendor’s work to the contract, and the acceptability and quality of the vendor’s work” 9 RCNY § 4-09(a)(2) (Lexis 2009) (emphasis added). The Board’s “decision must be consistent with the terms of the contract.” 9 RCNY § 4-09(a)(4) (Lexis 2009).

The dispute whether the Department can issue a forced change order and whether Pile is entitled to a credit for the loss of the sale and/or reuse of the deleted dredge material falls squarely within the Board’s jurisdiction because it involves interpretation of the Contract and the related Permit Application. 9 RCNY § 4-09(a)(2). *See also Dart Mechanical Corp. v. Dep’t of Sanitation*, OATH Index No. 1815/06, mem. dec. at 5 (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 Dep’t 2008) (issue of contract interpretation is for Board to decide). The Board is reviewing DEP’s decision and does not have jurisdiction to review findings made by the Comptroller. 9 RCNY § 4-09(g). *See also Kreisler Borg Florman General Construction Co. on behalf of A & F Fire Protection Co., Inc. v. Dep’t of Design & Construction*, OATH Index Nos. 800/06, 801/06, 802/06, 803/06 and 1154/06, mem. dec. at 6 (Apr. 12, 2006) (Board reviews record analyzed by the agency head).

First, Pile argues that the Department had no authority to issue a “forced change order.” Pile provides no support for this claim but instead relies on the absence of this term from the Contract and applicable law and rules.

Article 25 of the Contract, entitled “Changes,” provides in section 25.1 that:

Changes may be made to this Contract only as duly authorized in writing by the Commissioner in accordance with the Laws. All such changes, modifications and amendments will become a part of the Contract.

Under this provision, the Commissioner is authorized to make changes to the Contract. These changes are normally issued in the form of a written change order. Although the term “forced change order” is absent from the Contract and PPB Rules, it is still a written change order authorized by the Commissioner and is not inconsistent with Article 25. Practically speaking, there is no difference between a change order and one that is forced. Like a change order, Pile had the option of accepting the forced order or disputing it as provided by the Contract and PPB Rules. Almost every dispute that comes before this Board involves a forced change order in that

a contractor objects to a commissioner's unilateral decision about the scope of work. While most disputes involve a commissioner's denial of a contractor's request for additional funds relating to work performed, a change order by a commissioner valuing deleted work is no different because both involve a contract modification which is being imposed upon the contractor. Since the instant "forced change order" is subject to review under the PPB rules and is consistent with the Contract, we find that Pile's objection is without merit.

Pile next argues that the change order failed to include a credit for the income it would have received for the sale and/or reuse of the dredge material. Pile relies on General Specification 02325, paragraph 3.02D for the proposition that upon dredging, the material becomes the property of the contractor and argues that it had the right to obtain a permit to reuse the material.

All relevant paragraphs in the Contract refer to the "disposal" of the dredge material, including the section Pile relies on. Although the term disposal standing alone could mean something other than permanently discarding, paragraph 3.02C provides, "disposal of the excavated materials shall be in accordance with" the permits issued by USACE and DEC (Resp. Ex. G). The Permit Application states the "dredged material would be transported by barge *to a permitted facility for treatment and disposal*" and identified Barbella Environmental Technology Inc., as a facility which had agreed to take the dredge material for this purpose (Resp. Ex. J, emphasis added). The Permit Application also allowed the contractor to substitute its own approved facility and Pile's correspondence indicates that it identified other landfills authorized to accept the material. While DEP acknowledged that Pile could have sought a permit from USACE and DEC to reuse the dredge material, Pile did not do so. Since the Contract and the related Permit Application expressly require Pile to transport the material to an approved facility for disposal and there are no relevant Contract provisions or existing permits allowing for its reuse, we find no basis to grant Pile a credit. *Cf. Dart Mechanical Corp.*, OATH 1815/06 (Board denied contractor's claim for increased cost of chillers because there was no escalator clause in the contract); *SNF Holding Co. v. Dep't of Citywide Administrative Services*, OATH Index No. 1612/06, mem. dec. (Sept. 14, 2006) (Board denied contractor's claim for increased compensation because there was no basis in the contract to change the price index used to set the cost of water treatment chemicals).

Pile also argues that it informed the Department at the pre-award meeting that its bid incorporated the expected proceeds it would receive from the sale and/or reuse of the dredge material. The Department alleged that Pile claimed it would realize substantial savings by its reuse of excavated soil, not the dredge material. To the extent this raises a dispute which requires a factual determination it is beyond the scope of the Board's mandate. *See Weeks Marine, Inc. v. Dep't of Sanitation*, OATH Index No. 1296/00, mem. dec. at 5 (May 2, 2000), *aff'd sub nom. Weeks Marine, Inc. v. City of New York*, 291 A.D.2d 277 (1st Dep't 2002) (the Board provides "an informal and expedited dispute resolution process" and "is not empowered to function as a trial court fact-finder").

However, there is no reason to remand this matter for an evidentiary hearing. Even if there were a finding that the parties had a pre-contract understanding that Pile intended to reuse the dredge material, the result would be the same. Pile cannot rely upon any agreements outside the Contract because of the merger clause and the parol evidence rule.

Article 73 of the Contract, entitled "Merger Clause," provides:

The Written Contract herein, contains all the terms and conditions agreed upon by the parties hereto, and no other agreement, oral or otherwise, regarding the subject matter of this Contract shall be deemed to exist or to bind any of the parties hereto, or to vary any of the terms herein.

Merger clauses "require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing." *Primex International Corp. v. Wal-Mart Stores, Inc.*, 89 N.Y.2d 594, 599 (1997); *see also Jarecki v. Shung Moo Louie*, 95 N.Y.2d 665, 669 (2001); *Solid Waste Services, Inc., d/b/a J.P. Mascaro & Sons v. Dep't of Environmental Protection*, OATH Index No. 1488/03, mem. dec. at 10-11 (Feb. 2, 2004). A "merger clause accomplishes this objective by establishing the parties' intent that the Agreement is to be considered a completely integrated writing." *Primex Int'l Corp.*, 89 N.Y.2d at 599-600; *see also W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990) (evidence outside the four corners of the agreement as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing).

The Board finds no reason to depart from the merger doctrine. Given that the dredge material is potentially hazardous, that its removal and disposal are highly regulated, and that its value speculative, the parties should have included in the Contract the right to reuse the material if this was their intent. Since the parties' mutual understanding regarding the contractor's

obligation to dispose of the dredge material in an approved facility is clearly and unambiguously stated in the Contract, its merger clause prevents importation of any alternative terms.

Therefore, Pile's request that the Board reverse the Department's determination and remand for further consideration concerning the amount of the credit is denied.

This constitutes the final decision of the Board. All panel members concur in this decision.

Alessandra F. Zorziotti
Administrative Law Judge/Chair

Dated: April 15, 2009

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