Classic Electric, Inc. v. Dep't of Citywide Admin. Services

OATH Index No. 214/03, mem. dec. (Apr. 21, 2004), *aff'd in part, modified in part, and remanded*, *Classic Electric Inc. v. Contract Dispute Resolution Bd.*, Sup. Ct. N.Y. Co. Index No. 112065/04 (Mar. 28, 2005), **appended**

Contractor filed appeal with Contract Dispute Resolution Board for compensation on four construction contracts with respondent. Agency head denied claim for contract balances. The Board found that agency acted in bad faith. The record did not support the agency's claim that the contractor's work was defective. Therefore, the contractor was awarded $1,441,773 for amounts approved and certified for payment, unprocessed payment requisitions, unexplained deductions, and retainage. Other amounts for labor costs and other items were denied under the provisions of the contract. On appeal, the court adopts certain findings of the Board, modifies others and remands for further explanation from the Board concerning rulings on two issues.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

CONTRACT DISPUTE RESOLUTION BOARD

In the Matter of

CLASSIC ELECTRIC, INC.

Petitioner

- against -

DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES

Respondent

MEMORANDUM DECISION

SUZANNE P. CHRISTEN, *Administrative Law Judge/ Chair*

ELISA VELAZQUEZ, *General Counsel, Mayor's Office of Contracts*

KENNETH McCALLION, **ESQ.,** *Prequalified Panel Member*

Pending before the Contract Dispute Resolution Board is the claim of Classic Electric, Inc., seeking wage payments, contract balances, retainages and security deposits in the amount of

$3,457,327[1], and attorney's fees, costs, and interest from respondent, the Department of Citywide Administrative Services ("DCAS"), for heating, ventilation and air conditioning (HVAC) and mechanical work throughout the City. The Board has been asked to determine whether petitioner is entitled to the additional compensation.

BACKGROUND

Petitioner's claim arises out of four "labor and materials" contracts entered into with DCAS and its predecessor agency, the Department of General Services (DGS): (1) Contract No. 9574665 for "furnishing all labor, materials and equipment necessary and required to perform all mechanical work at 100 Gold Street," Manhattan (Resp. Ex. L) (the "Gold Street contract"); (2) Contract No. 9684269 to "furnish all labor, materials and equipment necessary and required to perform all mechanical work for the Comptroller's Office at One Centre Street," Manhattan (Resp. Ex. S) (the "Centre Street contract"); (3) Contract No. 98D4683 for "labor and material necessary and required for performing mechanical work as part of major space renovation throughout the five boroughs of the City of New York" (Resp. Ex. I) (the "Various Locations contract"); and (4) Contract No. 97B5761 for "mechanical work as directed by the Department of General Services at 130 Stuyvesant Street, Staten Island" (Resp. Ex. C) (the "Stuyvesant contract").[2]

Petitioner was awarded the Gold Street contract on May 12, 1995. Pursuant to the order to commence, the contract period was 730 consecutive calendar days and the completion date was August 29, 1997 (Pet. Ex. 3D). Subsequently, the scope of the work under the Gold Street contract was expanded to include mechanical work at two additional locations: 2 Lafayette Street and 253 Broadway (Pet. Ex. 3E). On December 3, 1996, the contract amount was increased by $1,000,000 to $3,000,000 (Pet. Ex. 3F). The completion date was extended to August 27,1998 (Pet. Ex. 3H).

Petitioner was awarded the Centre Street contract on May 11, 1995. The contract amount was not to exceed $4,400,000 and the contract period was for a total of 730 consecutive days. (Pet.

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[1] In the petition dated July 18, 2002, petitioner sought $3,367,750. This amount is taken from petitioner's post-argument memorandum dated October 31, 2003 ($3,524,309 + $1,003,623 + $979,395- $2,050,000 = $3,457,327) and oral argument (Tr. I 9).

[2]The relevant facts to this proceeding are taken from the petition, response, post-argument memoranda, and transcripts of the oral arguments.

Ex. 3S). Petitioner commenced work on the project on or about February 6, 1996. Mr. Batsidis, petitioner's president, was informed in October 1996 that the City intended to expand the scope of work under the Centre Street contract to include additional mechanical work involving other locations and projects, including 25 Elm Place, the Probation Program, the Mayor's Office, the Emergency Command Center, and the DCAS-DGS/ Personnel Merger. On November 14, 1996, DCAS approved a request for contract change in the amount of $4,400,000, doubling the contract amount to $8,800,000 (Pet. Ex. 3U). The contract period was unchanged.

On June 2, 1997, petitioner was awarded the Various Locations contract, based upon its bid of $18,288,400. The contract period was for a total of 611 consecutive days (Pet. Ex. 3BB). Petitioner commenced work on the project around October 17, 1997.

On December 12, 1996, petitioner was awarded the Stuyvesant contract to provide all mechanical work at 130 Stuyvesant Place, Staten Island. Work was to commence on January 1, 1997. The contract provided that the period was 730 consecutive days and the contract amount was not to exceed $7,200,000 (Pet. Ex. 3JJ). On August 6, 1997, petitioner received a contract extension, which expanded the scope of work under the contract (Pet. Ex. 3KK).

There is no dispute that the bid specifications issued by the agency for the Gold Street and Centre Street contracts contemplated a blended hourly labor rate for mechanic and one helper. Nor is there any dispute that petitioner submitted its bid based on a blended hourly rate, as did other contractors on the projects. It is clear from the record that the agency promulgated bid specifications for numerous contracts using a blended or "team rate" despite the fact that prior to September 1996, DCAS was aware that the Comptroller's Office might take enforcement action against contractors working for DCAS under contracts bid in this manner, based on the Comptroller's Office's determination that the blended rate was inappropriate (Pet. Exs. 3G, 3V). In at least one such case, an electrical contractor was given a change order by the agency (Pet. Exs. 3G, 3V). In fact, in the spring of 1998, the Comptroller's Office began an investigation into whether petitioner was underpaying its workers on the four contracts by virtue of its use of the blended rate that had been specified by the agency. During the course of its investigation, the Comptroller requested, by letter dated June 22, 1998, that DCAS withhold $750,000 from payments to petitioner (Resp. Ex. T). Ultimately, petitioner entered into a stipulation of settlement with the Comptroller. In that

stipulation, petitioner admitted that it failed to pay prevailing wages and supplements on all four contracts, in the aggregate amount of $1,878,002.52. Petitioner also consented to pay the City a $171,997.48 civil penalty, for a total of $2,050,000. The parties agreed that petitioner's failure to pay prevailing wages and supplements was a willful violation for each of the four contracts. In addition, petitioner agreed that the full settlement amount would be paid out of contract monies earned by petitioner and withheld by DCAS (Pet. Ex. 3A).

History of Partial Payments and Billing

Each of the four contracts at issue provided for periodic submission of bills by the contractor for all mechanical work completed, including materials installed, during the previous 30 days (Resp. Ex. L, Article 40, Specifications Section 16010 at 15, Item 1.23; Resp. Ex. S, Article 40, Specifications Section 16010 at 16, Item 1.23; Resp. Ex. I, Article 41, Specifications at 14, Item 1:23; Resp. Ex. C, Article 41, Specifications Section 16010 at 15, Item 1:23) and provided for periodic payments to the contractor for all work completed and approved each month (Resp. Ex. L, Articles 40, 42, Specifications Section 16010 at 16, Item 1.24; Resp. Ex. S, Articles 40, 42, Specifications Section 16010 at 17, Item 1.24; Resp. Ex. I, Articles 41, 41A, Specifications at 15, Item 1:24; Resp. Ex. C, Articles 41, 41A, Specifications Section 16010 at 16, Item 1:24). Respondent does not dispute the factual history of partial payments and billing presented by petitioner with respect to the four contracts.

Gold Street

As to the Gold Street contract, respondent approved, certified, and made payment on Partial Payment Requisitions Nos. 1-21, withholding only 5 percent in retainage. On July 3, 1998, Mr. Batsidis submitted petitioner's estimate for Partial Payment No. 22 on the Gold Street contract in the amount of $76,659. Asok Chakrabarti, P.E., DCAS' engineer on the project, recommended a deduction in the amount of $41,891 for labor costs because petitioner was required to include the cost of installation of duct work in the unit price (Pet. Ex. 3M).

On July 31, 1998, petitioner submitted final estimate for Partial Payment No. 23 in the amount of $135,855. Mr. Chakrabarti recommended a reduction by $58,223 for duct work installation costs and $15,682 for one liebert unit (Pet. Ex. 3N). Although $62,350 was approved

on partial Payment Requisition No. 23, only $61,950 was paid (Pet. Ex. 3N). After receipt of Mr. Chakrabarti's recommendations on Requisitions Nos. 22 and 23, petitioner took the position that "installation" was a labor cost and was to be bid separately from materials and that Section 16010 of the Specifications contained a typographical error in that the word "insulation" should have been used in lieu of "installation" (Pet. Ex. 3O).

Petitioner's final Payment Requisition No. 24 was for the balance of funds allegedly due and owing in the amount of $462,924 for: (1) $229,316 value of work performed since Payment Requisition No. 23 was submitted; (2) $100,114 for labor cost payments deducted from Payment Requisitions Nos. 22 and 23; (3) $400 payment shortfall from the approved amount of Payment Requisition No. 23; and (4) $133,094 held as retainage under the contract (Pet. Ex. 3P). According to petitioner, Payment Requisition No. 24 was never paid or reviewed by DCAS (Pet. Ex. 3, Batsidis Aff. at para. 28; Pet. Ex. 3P).

Centre Street

On January 3, 1998, Mr. Batsidis submitted petitioner's Payment Requisition No. 15 under the Centre Street contract for $329,042. Ovidiu Lazar, DCAS' resident engineer on the project, approved payment in the amount of $324,235. DCAS issued payment warrants to petitioner in the amount of $64,235 (Pet. Ex. 3W), leaving an unpaid approved balance in the amount of $260,000.

Mr. Batsidis submitted petitioner's final Payment Requisition No. 16 on February 17, 1998, for the balance due under the Centre Street contract, $213,087. Mike Nicolici, DCAS' engineering representative on the project, issued a report dated July 6, 1998 recommending a $200,084 reduction. Mr. Nicolici approved payment in the amount of $13,003 and directed that the balance due and owing be transferred along with the retainage to the Various Locations contract (Pet. Ex. 3X). On July 29, 1998, DCAS issued a payment warrant to petitioner in the amount of $12,593. The remaining amounts were not paid.

On July 12, 1999, Mr. Batsidis resubmitted petitioner's final Payment Requisition No. 16 for the balance of funds under the Centre Street contract, $348,276 for: (1) $260,410 approved and not paid under Payment Requisitions Nos. 15 and 16; (2) $204,891 for funds not approved under Payment Requisitions Nos. 15 and 16; (3) $48,975 in retainage held by DCAS under the contract; (4) minus a $166,000 credit to DCAS for rigging costs (Pet. Ex. 3AA). According to petitioner,

DCAS never responded to this payment requisition (Pet. Ex. 3, Batsidis Aff. at para. 48).

Various Locations

On February 23, 1998, Mr. Batsidis submitted Payment Requisition No. 1 on the Various Locations contract for $259,737. Ovidiu Lazar, DCAS' engineering representative, approved payment in the amount of $258,081. On April 15, 1998, a payment warrant was issued to petitioner in that amount (Pet. Ex. 3DD). This was the only payment made to petitioner on this contract. According to petitioner, DCAS never explained why it withheld $1,656 (Pet. Ex. 3, Batsidis Aff. at para. 51).

Payment Requisitions Nos. 2, 3, 4, 5, and 6 (submitted between March 15 and July 31, 1998) sought payment in the amount of $1,343,585 for the value of labor and materials provided by petitioner and $100,000 for the security deposit under the Various Locations contract. Although DCAS' representatives had approved payment as of August 13, 1998, in the total amount of $1,004,949.74 (Pet. Ex. 3EE), petitioner was never paid any of these funds (Pet. Ex. 3, Batsidis Aff. at para. 54).

In August 1998, petitioner submitted its final Payment Requisition No. 7 for the balance of funds under the Various Locations contract for $209,473. This requisition was never processed. In July 1999, petitioner submitted its final estimate for Payment Requisition No. 7, which included amounts for Requisitions Nos. 2-7, and reimbursement for $166,245 in retainage under the contract and $100,000 for its security deposit.

Stuyvesant

DCAS started to withhold payments to petitioner on its payment requisitions for the Stuyvesant contract in early 1998 (Pet. Ex. 3, Batsidis Aff. at para. 70).

On February 20, 1998, petitioner submitted Payment Requisition No. 8 on the Stuyvesant contract in the amount of $398,793. Ovidiu Lazar certified that the work conformed to the contract. On March 19, 1998, DCAS issued a payment warrant in the amount of $298,793, without explanation for withholding the balance (Pet. Ex. 3LL).

On March 23, 1998, petitioner submitted Payment Requisition No. 9 on the Stuyvesant contract, in the amount of $351,403. DCAS approved $351,237 for payment. On April 30, 1998, DCAS issued a payment warrant on this requisition for $329,263 (Pet. Ex. 3MM).

Between April 10 and August 15, 1998, petitioner submitted Payment Requisitions Nos. 10 through 14 for a total of $1,186,235 for labor and materials for work done from March 14 and August 15, 1998. Between May 11 and September 23, 1998, DCAS' representatives approved payment of these requisitions as follows: $107,902 on May 11, 1998; $465,119 on June 30, 1998; $115,582 on July 2, 1998; $127,557 on August 6, 1998, and $47,152 on August 18, 1998. None of this money, totalling $863,312, was ever paid. One of the deductions made by DCAS representatives, in the amount of $220,995.81, was for labor costs associated with the "installation" of ductwork pursuant to the specifications, to which petitioner took exception on the same grounds as noted above for the Gold Street contract (Pet. Exs. 3NN; 3OO).

Petitioner's final estimate for Payment Requisition No. 15 for the balance of funds under the contract was for $104,926. This requisition was never processed.

On July 12, 1999, petitioner resubmitted Payment Requisition No. 15 in the amount of $2,116,262, including: (1) $100,000 for funds not paid to petitioner under Payment Requisition No. 8; (2) $22,145 for funds not paid to petitioner under Payment Requisition No. 9; (3) $1,291,251 for amounts not paid to petitioner under Payment Requisitions Nos. 10 through 15; and (4) $702,866 in retainage held by DCAS under the contract (Pet. Ex. 3TT). DCAS did not respond to this requisition (Pet. Ex. 3, Batsidis Aff. at para. 92).

Performance of Contracts in 1998 and 1999

The withholding of payments from petitioner that appears to have begun in early 1998 prompted protests from petitioner beginning in March 1998. In a letter dated March 25, 1998, petitioner informed DCAS that it had experienced severe cash flow problems that forced it to cut workforce on all work with DCAS "due to repeated delays in payment by your agency and an unfair investigation by the Comptroller's office." Petitioner stated that DCAS owed it $651,517, of which $551,517 was owed under the Centre Street contract. Petitioner added that it would resume work as soon as monies due were paid and as soon as the Comptroller ceased to withhold monies on unmerited complaints (Pet. Ex. 3I). Robert Granick, DCAS' Director of Fiscal Affairs, responded by letter dated July 31, 1998. Mr. Granick stated that all payments on the Centre Street contract were up-to-date and that any actions taken by the Comptroller's Office were beyond the authority of DCAS

(Pet. Ex. 3Y).

By letters dated June 5 and 10, 1998, DCAS ordered petitioner to staff-up on the Various Locations, Gold Street, and Stuyvesant contracts. DCAS informed petitioner that failure to meet staffing levels would result in initiation of default procedures (Pet. Ex. 3J).

Gold Street

On June 16, 1998, DCAS directed petitioner to appear at a meeting to show cause why it should not be held in default of the Gold Street contract under Article 45. Petitioner was also advised that it "failed to progress the job and repeatedly failed to maintain a sufficient work force to complete the work in accordance with the contract" (Pet. Ex. 3K). The parties entered into an agreement dated June 29, 1998 regarding staffing levels and to complete all work on the project by August 21, 1998. Petitioner waived any contractual right to have an opportunity to be heard on two days' notice prior to being declared in default if it did not complete the work (Pet. Ex. 3L). According to petitioner, it met its staffing and performance obligations on the Gold Street project (Pet. Ex. 3, Batsidis Aff. at para. 20).

On July 23, 1998, petitioner submitted a status report on the Gold Street contract but stated that if the bank did not approve its loan application, it would be "forced to stop all work as of August 7, 1998" (Pet. Ex. 3GG). By letter dated August 27, 1998, counsel for petitioner informed respondent that petitioner had received no payments since the beginning of April 1998 "despite having numerous employees working and the purchase of expensive materials as demanded by the City" and despite the City's promises to expedite payment of the delayed funds. The August 27, 1998 letter also informed respondent that since the Gold Street contract had not been renewed, and expired by its terms on August 27, 1998, petitioner would cease all work at Gold Street (Pet. Ex. 3GG). By letter dated October 3, 1998, petitioner informed DCAS that its insurance for the Gold Street contract expired as of August 28, 1998 (Resp. Ex. D).

By letter dated December 24, 1998, DCAS forwarded to petitioner an unsatisfactory performance evaluation on the Gold Street project. The comments section of the evaluation form states, among other things, that "errors will cost City of New York additional money." Petitioner objected to the evaluation (Pet. Ex. 3Q). On July 12, 1999, Mr. Batsidis inquired about the status of Payment Requisition No. 24 (Pet. Ex. 3R), to which he had not received a response.

Stuyvesant

On June 16, 1998, DCAS Assistant Commissioner Joseph Wagner ordered petitioner to appear at a meeting "to show cause why [it] should not be held in default," and was advised that its work was unsatisfactory by failing to progress the job and repeatedly failing to maintain a work force to complete the work in accordance with the contract (Pet. Ex. 3PP). Pursuant to an agreement reached by the parties on June 29, 1998, petitioner agreed to complete all contract work by October 30, 1998 (Pet. Ex. 3L). Petitioner contends that it met its performance obligations under the agreement (Pet. Ex. 3, Batsidis Aff. at para. 82).

On July 23, 1998, petitioner submitted a status report on the Stuyvesant contract but stated that if the bank did not approve its loan application, it would be "forced to stop all work as of August 7, 1998" (Pet. Ex. 3GG). A later letter, dated August 27, 1998, from counsel for respondent, referred to respondent's failure to make any payments since April 1998, and stated that unless arrears were brought current, petitioner would not perform further work (Pet. Ex. 3GG).

A DCAS memorandum dated September 1, 1998, addressed to all contractors, indicated that all work on the Stuyvesant project was suspended as of September 1, 1998. Petitioner was directed not to appear at the work site as of September 2, 1998. After this, by letter dated September 21, 1998, petitioner was notified that it was being declared in breach of contract on the Stuyvesant contract, based on having advised the Commissioner, by letter dated July 23, 1998, that Classic would discontinue work and based on having, in fact, discontinued all work and left all contract sites (Pet. Ex. 3RR). In a letter dated October 3, 1998, petitioner informed DCAS that its insurance policy for the Stuyvesant contract expired as of August 28, 1998 (Resp. Ex. D).

On June 25, 1999, DCAS forwarded an unsatisfactory evaluation of petitioner's performance on the Stuyvesant contract (Pet. Ex. 3SS).

Various Locations

On June 16, 1998, DCAS directed petitioner to show cause why it should not be held in default of the Various Locations contract (Pet. Ex. 3FF). On June 29, 1998, the parties met regarding staffing levels on the contract. An agreement was reached regarding staffing and performance deadlines (Pet. Ex. 3L). According to petitioner, it met those performance obligations under the agreement (Pet. Ex. 3, Batsidis Aff. at para. 60). According to respondent, petitioner failed to

comply with the agreement (Resp. at para. 34).

By letter dated July 23, 1998, Mr. Batsidis provided DCAS with status reports on its work and informed DCAS that 90 days had passed since it had received a substantial payment from DCAS. In addition, petitioner informed DCAS that if its bank did not approve its loan application, it would be "forced to stop all work as of August 7, 1998" (Pet. Ex. 3GG). Respondent was informed, in a letter dated August 27, 1998, that continued failure by the City to pay arrears would result in petitioner ceasing to work (Pet. Ex. 3GG).

Petitioner was declared in breach of the contract on September 21, 1998 (Pet. Ex. 3RR). In a letter dated October 3, 1998, petitioner informed DCAS that its insurance policy for the Various Locations contract expired as of August 28, 1998 (Resp. Ex. D). By letter dated February 2, 1999, DCAS sent petitioner an unsatisfactory evaluation on the Various Locations contract (Pet. Ex. 3HH).

Centre Street

The Centre Street contract expired by its terms on February 5, 1998 (Pet. Ex. 3S). Petitioner's overall performance under the Centre Street contract was also rated unsatisfactory in November 1998, approximately nine months after the contract had ended. Petitioner disagreed with the rating (Pet. Ex. 3Z).

Procedural History

On January 10, 2001, Classic filed a notice of dispute on the four contracts. By supplemental submission dated March 12, 2001, petitioner argued that it was entitled to $3,367,750 because it did not breach its contracts with DCAS and there was no support that it failed to progress the projects in a timely manner. Petitioner contended that DCAS did not reject its work but rather accepted and approved payment. In addition, petitioner maintained that DCAS' allegation that it spent more than $2 million to correct petitioner's work was without support. Petitioner also argued that it should have been provided a change order for increased wage payments under the Gold Street and Centre Street contracts once "the Specifications were deemed invalid by the Comptroller because of the utilization of the category "Helper" and that contractors were required to pay workers higher wages based upon the Comptroller's directive" (Pet. Exs. 1, 2).

On May 16, 2001, DCAS denied petitioner's claim for contract balances. The agency head determination stated:

> My examination of the records of the performance of the four contracts indicates that Classic's work was not satisfactory. Work performed by Classic on the Requirements Contract (No. 98D4683) and the three site specific Contracts was frequently defective and often required corrective work which the Agency has performed at its own expense. Additionally it appears that Classic was not adequately staffing the job sites.

DCAS determined that the corrective work cost the agency "in excess of two million dollars." Regarding the increased wage payments, the determination stated "under the New York State Labor Law, a contractor on a public project is required to pay prevailing wages to its employees. The public owner pays the contractor on the basis of the contractor's bid." The determination further stated that "Classic's claim on this issue is especially inappropriate in view of the fact that the prevailing wage violation to which it has admitted (see Claimant's Exhibit "A"), stemmed from Classic's falsification of its payroll records" (Pet. Ex. 4).

Petitioner filed a notice of claim with the Comptroller's Office on June 19, 2001. After several supplemental submissions, the parties met at a settlement conference at the Comptroller's Office on June 11, 2002.[3] The Comptroller's Office denied petitioner's claim on June 18, 2002. The Comptroller Determination found that petitioner was not entitled to compensation because an extensive amount of defective work performed by petitioner had to be corrected, exceeding the amounts earned by petitioner and resulting in a credit to the City totaling $2,313,194. The Comptroller Determination also concluded that petitioner had been paid the cash retainage for the substitution of the bonds. The Comptroller's Office also found that petitioner was not entitled to additional wage payments because it was required to strictly comply with the Labor Law and that petitioner never inquired about the prevailing wage for helper from the agency or the Comptroller's Office prior to bidding (Pet. Ex. 10).

Petitioner filed a petition with this Board on July 18, 2002. A response was filed on October 23, 2002. On November 6, 2002, petitioner moved to suppress certain exhibits that were not disclosed to petitioner as having been reviewed by the Comptroller. By conference call and letter

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[3] According to respondent, the City was prepared to show petitioner documentation substantiating the corrective work performed on the contracts, which it claims it was entitled to deduct by virtue of petitioner's defaults under the contracts. We do not reach these claims. First, petitioner was never declared in default with respect to the Gold Street or Centre Street contracts. Therefore, the set-off provisions that respondent relies upon, which become operative only in the event of a default, are not available as to these two contracts. Second, with respect to the two contracts for which petitioner was declared in default by the agency, we find that respondent breached the contracts before respondent could have defaulted. Petitioner's "defaults" were the direct consequence of the City's bad faith.

decision dated January 2, 2003, the Chair of this Board ruled that third-party materials that were not reviewed by the agency head and that were never identified as having been reviewed and relied upon by the Comptroller, were not properly part of the record before the CDRB unless the panel decided to consider such material pursuant to 9 RCNY section 4-09(g)(3). *See Classic Electric, Inc. v. Dep't of Citywide Admin. Services*, OATH Index No. 214/03 (Jan. 2, 2003).

On August 14, 2003, the Board convened for oral argument. On that date, respondent requested that the CDRB consider the previously suppressed exhibits. The Board accepted the exhibits into the record and agreed to accept supplemental memoranda from the parties. On October 31, 2003, respondent offered twelve boxes of documents (four for each panel member), allegedly substantiating the costs to correct the defective work on the projects. On petitioner's request, the Board convened for further oral argument on January 8, 2004 and asked for supplemental submissions on that date addressing whether there was evidence that some or all of the documents contained in the twelve boxes had been relied upon by the agency in reaching its determination of May 16, 2001. The record in this matter closed on January 23, 2004.

JURISDICTION

The Board's authority to resolve this dispute is set forth in the Procurement Policy Board's rules ("PPB rules"), title 9 of the Rules of the City of New York and the dispute resolution provision of the contracts, Article 26 (Gold Street and Centre Street) and Article 27 (Stuyvesant and Various Locations). The parties agreed to this method of dispute resolution when they entered into the contracts at issue. Pursuant to a written request by petitioner and with the consent of the Law Department, the parties consented to be governed by the provisions of PPB amended rule 4-09. The amended rule changed the composition of the Board. Under the new rule, the composition of the three member Board consists of the Chief Administrative Law Judge of the Office of Administrative Trials and Hearings (OATH) or his designee, who is to act as the chairperson, the City Chief Procurement Officer, or her designee, and a third panelist who is not affiliated with the City and is selected by the presiding administrative law judge from a prequalified list. In this matter, Chief Administrative Law Judge Roberto Velez designated Administrative Law Judge Suzanne Christen to chair the panel. Elisa Velazquez, Esq., General Counsel of the Mayor's Office of Contracts, sat on the panel, as did Kenneth McCallion, Esq., who was selected as the third panelist. The Board's

decision is final and binding on the parties, except to the extent that it may be reviewed by a court of competent jurisdiction of the State of New York, County of New York. 9 RCNY § 4-09(g)(6).

ANALYSIS

Determination of this dispute turns, in large part, on whether petitioner defaulted on one or more of its contracts with DCAS or whether DCAS breached the covenant of good faith and fair dealing.

Contrary to respondent's assertion as "undisputable record fact" that petitioner walked off all four contract job sites before the contracts were completed (Resp. at 2; Tr. II 23-24), there is no evidence in the record that petitioner walked off either the Centre or Gold Street contracts on August 7, 1998; rather, these two time and materials contracts expired by their own terms on February 5, 1998 and August 27, 1998 (Pet. Exs. 3S, 3H). The evidence in the record shows that petitioner was still on site at Gold Street from August 5 to August 27, 1998 (Pet. Ex. 3P) and that no report of defective work was generated until months after the expiration date of the contract (Pet. Ex. 3Q; Resp. Ex. F). Further, the record shows that petitioner was ordered off the Stuyvesant contract – along with all other contractors on that project – as of September 1, 1998 (Pet. Ex. 3RR). We note that the agency head decision dated May 16, 2001 failed to indicate that petitioner walked off the job sites.

Implicit in every contract is an implied covenant of good faith and fair dealing. *See Goodstein Construction Corp. v. City of New York*, 111 A.D.2d 49, 489 N.Y.S.2d 175 (1st Dep't 1985), *aff'd*, 67 N.Y.2d 990, 502 N.Y.S.2d 994 (1986). The implied covenant of good faith encompasses any promises which a reasonable person in the position of the promisee would be justified in understanding were included in the agreement, and prohibits either party from doing anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *1-10 Industry Associates, LLC v. Trim Corp. of America*, 297 A.D.2d 630, 747 N.Y.S.2d 29 (2d Dep't 2002). Failure to pay sums promised under a contract constitutes a breach of the implied covenant of good faith and fair dealing under New York law. *See H/R Stone, Inc. v. Phoenix Business Systems, Inc.*, 660 F.Supp. 351, 359 (S.D.N.Y. 1987), citing *Filner v. Shapiro*, 633 F.2d 139, 143 (2d Cir. 1980).

The majority of the Board finds that DCAS breached the fundamental covenant of good faith and fair dealing beginning in early 1998 when it withheld partial payments that had been approved and certified. Further, we find that respondent breached its covenant of good faith when it failed to process partial payment requisitions and then demanded that petitioner staff up projects. We are not persuaded by respondent's claim that payments were withheld at the request of the Comptroller, in view of the fact that the Comptroller's request that DCAS withhold $750,000 in payments to petitioner was not made until June 22, 1998, well after DCAS had failed to make payments that had been certified and approved. Moreover, nothing in the Comptroller's request barred DCAS from processing petitioner's requisitions, or paying amounts owed above $750,000.

We find further evidence of the agency's bad faith in its unsupported assertions of defective work, and its unfounded assertion that petitioner falsified payroll records. As to the former issue, the agency head's determination dated May 16, 2001 failed to reference any support for its position that petitioner's work was defective and required corrective work. The record shows that petitioner's work on the Gold Street and Centre Street contracts was not declared defective until after those contracts expired by their terms; that petitioner's work on the Stuyvesant contract was not declared defective until after petitioner was ordered off the project; and that petitioner's work on the Various Locations contract was not declared defective until after failure to pay anything on approved requisitions between April and August 1998 forced petitioner to abandon the work on the contract. As to the latter issue, the claimed falsification of payroll records is unsupported by any evidence before the Board, including the stipulation of settlement with the Comptroller's Office. It is also inconsistent with the evidence in the record that supports petitioner's claim that the prevailing wage violation concerned only the use of a helper rate that was not reflected in the Comptroller's schedule of prevailing wage rates.

In sum, we find that petitioner was improperly defaulted under Article 45 on the Stuyvesant and Various Locations contracts after being ordered off the Stuyvesant project and being forced off the Various Locations project because of respondent's bad faith failure to make partial payments. Therefore, respondent's set-off claims on those contracts were asserted improperly. Respondent's set-off claims on the Gold Street contract, on which petitioner was not defaulted, but which expired by its own terms, are also asserted improperly.

Work Certified by DCAS Representatives and Approved for Payment

Respondent argues that petitioner's work was defective and, therefore, DCAS was justified in charging costs associated with correcting the work and deducting them from amounts payable under the contracts pursuant to Article 48. The Board is not persuaded that petitioner's work was defective. First, petitioner's payment requisitions show that DCAS approved and certified its work as conforming to the contracts (Pet. Ex. 3). Second, petitioner was never notified by DCAS that its work was defective prior to receiving the performance evaluations generated long after DCAS's withholding of payments commenced. Notably, petitioner's work was never rejected while petitioner was on the job. The only issue addressed in the June 29, 1998 agreement was staffing levels and not quality of work.

The evidence offered by respondent in support of its claim that petitioner's work was defective consisted of a reference in meeting minutes from an August 5, 1998 meeting with various contractors and the outside engineering consultants that had been hired by DCAS that "new HVAC duct sizes and locations not as specified and indicated on the drawings"(Resp. Ex. N). Nothing in these minutes demonstrated that petitioner performed defective work on this time and materials contract. Respondent also submitted undated and unsworn executive summaries, which were assigned little weight. The rest of the exhibits which respondent submitted in support of its argument that petitioner's work was defective suggest that there were subsequent design changes. Because respondent failed to identify any specific documents from the twelve boxes of documents submitted by respondent on October 31, 2003 as having been relied upon by the agency head in reaching his decision that petitioner performed defective work, and because the agency head decision itself referenced no exhibits, the Board declined to consider the boxes of documents.

Respondent argues that Article 43 of the contracts allowed DCAS to correct the estimates in the partial payment requisitions. While the Board agrees with respondent's argument as a general proposition, respondent may not hide behind this provision to justify its bad faith conduct after the fact.

In addition, respondent argues that the no estoppel clauses of the contracts prevented binding the City to initial determinations by DCAS representatives. In *Central Park Plaza Corporation v. City of New York*, 26 N.Y.S.2d 241 (Sup. Ct. N.Y. Co. 1941), a property owner sued the City when its property was damaged by a water main break. The City impleaded a subway contractor, alleging

that it negligently performed its work under the contract, causing the plaintiff's damage, although the City had accepted the contractor's work. The City argued that the contractor was responsible for the damage, contending that the contract's no estoppel clause provided that no acceptance of work relieved the contractor from providing sound work. The Court reasoned that before the no estoppel clause could become operative in any way, it was incumbent upon the City of New York to establish by proof that the contractor either failed to furnish sound material or sound work or both. *See Central Park Plaza Corp. v. City of New York*, 26 N.Y.S.2d 241, 248 (Sup. Ct. N.Y. Co. 1941). As previously noted, respondent failed to demonstrate that petitioner did not provide sound material or sound work.

Thus, the Board determines that petitioner is entitled to $2,185,045.74 under the contracts at issue, representing amounts approved and certified for payment.

Contract	**Payment Requisition**	**Approved Amount**
Gold Street	23	$400
		Subtotal = $400
Centre Street	15	$260,000
	16	$410
	16R	($166,000)
		Subtotal = $94,410
Various Locations	2	$235,278
	3	$200,645
	4	$249,248.12
	5	$174,372.12
	6	$145,406.62
	7F	$100,000
		Subtotal = $1,104,949.74
Stuyvesant	8	$100,000
	9	$21,974
	10	$107,902
	11	$465,119
	12	$115,582.32
	13	$127,557
	14	$47,152
		Subtotal = $985,286
		TOTAL = $2,185,045.74

Unprocessed Payment Requisitions and Deductions from Payment Requisitions

Petitioner seeks $1,003,623, of which $528,433 represents amounts for unprocessed payment requisitions and $428,992 represents deductions taken by DCAS staff on its payment requisitions.

With respect to the unprocessed payment requisitions, petitioner contends that it is owed $214,034 on the Gold Street project (Pet. Ex. 3P), $209,473 on the Various Locations project (Pet. Ex. 3II), and $104,926 on the Stuyvesant project (Pet. Ex. 3TT). Respondent failed to process these payment requisitions and failed to dispute that respondent was entitled to these amounts at the time they should have been reviewed. The Board finds that the failure to review these payment requisitions constituted bad faith, and a breach of its obligations under the payment provisions of the contracts. The Board finds that petitioner is entitled to $528,433.

Petitioner contends that $321,109[4] is due and owing for labor cost deductions improperly taken on the Gold Street and Stuyvesant Street contracts with regard to labor costs related to the installation of materials associated with the ductwork (Pet. Exs. 3M, 3N). Respondent contends that the bid unit price covers both fabrication and installation of ductwork, and not separate charges as petitioner argues.

Section 16010 of the Specifications state:

> Bidder shall submit a bid per pound, for the fabrication and installation of [150,000 lbs of ductwork throughout 130 Stuyvesant Street and 65,000 lbs of ductwork at 100 Gold Street] in the City of New York. The bid shall cover costs of supports, hangers, take-offs, volume and deflecting dampers, visiting panels, flexible connections, flexible duct associated with the installation of diffusers. Diffusers, Return Grilles, Louvers, and Fire Dampers shall be considered as materials and shall be covered by Item A (Resp. Ex. L, Specifications Section 16010 at 14, Item C; Resp. Ex. C, Specifications Section 16010 at 14, Item E).

We agree with respondent, that the Gold Street and Stuyvesant Street contract specifications reasonably can be construed to include costs for both fabrication and installation. Even if the language was ambiguous and petitioner had doubts about this specification, it had an obligation to seek clarification from the agency prior to submitting its bid. It failed to do so. Therefore, petitioner

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[4] With respect to the Gold Street contract, DCAS deducted $41,891 on Payment Requisition No. 22 and $58,223, for a total of $100,114. On the Stuyvesant contract, DCAS deducted $26,439 on Payment Requisition No. 12, $98,826 on Payment Requisition No. 13, and $95,730 on Payment Requisition No. 14, for a total of $220,995.

is bound by respondent's reasonable construction of the language of the provision. *See Thalle Construction Co., Inc. v. City of New York*, 256 A.D.2d 157, 158, 681 N.Y.S.2d 522, 523 (1st Dep't 1998) (where contractor failed to clarify ambiguity before submitting bid, it was bound by City's interpretation).

Petitioner also seeks $13,295 for deductions for which respondent offered no explanation. Petitioner seeks $4,807 on the Centre Street contract (Payment Requisition No. 15- Pet. Ex. 3W); $1,656 (Payment Requisition No. 1- Pet. Ex. 3DD), $201 (Payment Requisition No. 2- Pet. Ex. 3EE), $2,040 (Payment Requisition No. 3-Pet. Ex. 3EE), and $4,183 (Payment Requisition No. 4-Pet. Ex. 3EE) on the Various Locations contract; and $171 (Payment Requisition No. 9- Pet. Ex. 3MM) and $237 (Payment Requisition No. 10-Pet. Ex. 3NN) on the Stuyvesant contract. The Board finds that petitioner is entitled to $13,295. The requisitions at issue fail to explain the reasons for these deducted amounts as was the clear practice.

Petitioner argues that it is entitled to $18,500 for lifting and rigging expenses on the Various Locations ($16,500- Pet. Ex. 3EE) and Stuyvesant contracts ($2,000- Pet. Ex. 3MM). The Board cannot conclude from the record that these deductions were made in bad faith given that petitioner failed to submit necessary invoices. We are also unable to determine the amount that petitioner incurred for this work.

Last, petitioner seeks $19,911.41 from Payment Requisition No. 12 under the Stuyvesant contract for an invoice for materials (Pet. Ex. 3NN). The Board determines that petitioner is not due this amount. It is unclear from Payment Requisition No. 14 that a credit was actually given to the agency for this item as petitioner claims.

In sum, the Board finds that petitioner is owed $541,728 for unprocessed payment requisitions and unexplained deductions from its requisitions.

Change Order for Increased Labor Costs on Gold Street and Centre Street Contracts

Petitioner argues that it was entitled to a change order in the amount of $979,395 for increased labor costs on the Gold Street and Centre Street contracts after the Comptroller's Office found the blended hourly rate in the specifications, which contemplated a "helper" rate to be in violation of the Labor Law. In support of its argument, petitioner points out that an electrical

subcontractor on the same projects, who also used a blended rate including a helper, received change orders.

Respondent contends that petitioner may not be reimbursed for the increased labor costs on these contracts because it had an independent contractual obligation to comply with the prevailing wage requirements.

The Board finds that petitioner is not entitled to a change order. Petitioner was required to "comply with all local, State and Federal law, rules and regulations applicable to the contracts." *See* Gold Street, Centre Street contracts Art. 5 (Resp. Exs. L, S at C4). Furthermore, the contracts required petitioner to strictly comply with all applicable provisions of the New York State Labor Law. *See* Gold Street, Centre Street contracts Art. 36 (Resp. Exs. L, S at C32-C35).

Petitioner was required to pay its workers prevailing wages. Article 36, which set forth petitioner's obligation to pay prevailing wages, states:

> The wages to be paid for a legal day's work to laborers, workmen or mechanics employed upon the work contemplated by this Contract or upon any materials to be used thereon shall not be less than the "prevailing rate of wage" as defined in Section 220 of the Labor Law, and as fixed by the Comptroller in the attached Schedule of Wage Rates and in updated schedules thereof. The prevailing wage rates and supplemental benefits to be paid are those in effect at the time the work is being performed.
>
> Request for interpretation or correction under Subsection A of Section No. 3 in the Information of Bidders includes all requests for clarification of the classification of trades to be employed in the performance of the work under this contract. In the event that a trade not listed in the classification of trades required to be used at the time of the award of the contract is in fact employed during the performance of this contract, the Contractor shall be required to obtain from the agency the prevailing wage rates and supplementary benefits for the trades used and to complete the performance of this contract at the price at which the contract was awarded.

Petitioner's use of a blended labor rate for mechanic and one "helper," although consistent with the agency's bid specifications (see, e.g., Resp. Ex. L, Specifications Section 16010 at 13, 1.22, Item B), did not conform to the Comptroller's published schedule of wage rates that petitioner had an independent contractual duty to follow. The City cannot be held financially responsible for petitioner's underpayment of its workers. *See Brian Hoxie's Painting Co., Inc. v. Cato-Meridian Central School District*, 76 N.Y.2d 207, 213, 557 N.Y.S.2d 280, 283 (1990). Nor was the City

obligated to notify petitioner that its bid might not have been calculated to cover payment of prevailing wages. *See New York Surety Co. v. City of New York*, 220 A.D.2d 334, 335, 633 N.Y.S.2d 16, 17 (1st Dep't 1995).

Thus, petitioner is not entitled to a change order for increased labor costs under the Gold Street and Centre Street contracts.

Retainage

The Board finds that petitioner is due $758,000 in retainage (consisting of $110,000 for the Gold Street contract, $231,000 for the Centre Street contract, and $417,000 for the Stuyvesant contract) that is held in a bank account to which respondent acknowledged at oral argument had never been released to petitioner, as respondent had previously claimed (Pet. Post-Argument Mem. Ex. F; Tr. II 49). Upon careful review of the submissions, the Board concludes that petitioner has not established its entitlement to the additional $574,264 in claimed retainage.

Interest and Attorney's Fees

Petitioner is not entitled to pre-award interest under the Procurement Policy Board rules. *See* 9 RCNY § 4-09(g)(5); 9 RCNY § 4-06. Furthermore, the Board is not empowered to award petitioner attorney's fees.

CONCLUSION

The Board finds that petitioner is entitled to $3,484,773.74 for its claim, less the $2,050,000 it agreed to have deducted pursuant to its stipulation with the Comptroller, for a total of $1,434,773.74. Of this amount, we direct the Comptroller to release the $758,000 in retainage to petitioner. The foregoing constitutes the final decision of the Board.

Elisa Velazquez, Esq. filed a concurring opinion.

Suzanne P. Christen
Administrative Law Judge/ Chair

April 21, 2004

Concurring opinion by Elisa Velazquez, Esq.:

I concur with the Board that petitioner is entitled to $3,484,773 for its claim, less the $2,050,000 petitioner agreed to have deducted pursuant to its stipulation with the Comptroller, for a total of $1,434,773. However, I do not agree that DCAS acted in bad faith. DCAS has contractual obligations to pay for work duly performed by the petitioner and DCAS breached those obligations in this case. DCAS has not established sufficient proof of its claims that any or all of the work performed by petitioner under the four contracts in question was defective, or that petitioner falsified payroll documents. Therefore, the petitioner is entitled to the above amounts.

Elisa Velazquez, Esq.

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Supreme Court New York County, Index No. 112065/04, March 28, 2005

APPLICATION OF CLASSIC ELECTRIC, INC.
Petitioner

- against -

THE CONTRACT DISPUTE RESOLUTION BOARD OF THE CITY OF NEW YORK
and
THE CITY OF NEW YORK
Respondents

For an Order Pursuant to Article 78 of the CPLR

DECISION, ORDER AND JUDGEMENT

MICHAEL D. STALLMAN, *Supreme Court Judge*

Petitioner Classic Electric, Inc. (Classic) brings this proceeding, pursuant to Article 78 of the CPLR, to modify an April 23, 2004 decision (Decision) (OATH Index No. 214/03) of respondent New York City Contract Dispute Resolution Board (CDRB).

In the proceeding before the CDRB, petitioner sought wage payments, contract balances, retainage, and security deposits, plus attorney's fees, costs, and pre-award interest, from the Department of Citywide Administrative Services (DCAS), for heating, ventilation, and air conditioning (HVAC) and mechanical work performed pursuant to four "labor and materials" contracts (Contracts) that petitioner had entered into with DCAS and with its predecessor agency, the Department of General Services.

The CDRB found that DCAS had acted in bad faith in withholding payments that had been approved and certified, and in failing to process certain of petitioner's partial payment requisitions, and in then demanding that petitioner staff-up certain projects. The CDRB also found that the record did not support either DCAS's claim that petitioner's work was defective, or its claim that petitioner had falsified payroll records. The CDRB determined that petitioner was entitled to $2,185,045.74

under the Contracts, representing the amounts approved and certified for payment. The CDRB also awarded petitioner $528,433 for payment requisitions that DCAS had not processed, $ 13,295 for unexplained deductions that DCAS took from petitioner's invoices, and $758,000 in retainage. From these sums, the CDRB deducted $2,050,000, pursuant to a stipulation, discussed below, between petitioner and the Comptroller, resulting in a total award of $1,434,773.74. The CDRB explained that it lacked jurisdiction to award attorney's fees, and that pre-award interest was barred by 9 RCNY §§ 4-09 (g) (5) and 4-06.

Petitioner challenges the following seven determinations of the CDRB: (1) the determination to award petitioner $13,295, rather than $115,669.59, for unexplained deductions taken by DCAS; (2) the determination that DCAS had properly deducted $321,109 in labor costs; (3) the determination that DCAS properly denied petitioner's request for a change order to cover increased labor costs in the sum of $979,395.00; (4) the determination that petitioner was entitled to only $758,000 in retainage, and not to an additional $574,264; (5) the determination that DCAS properly deducted the sum of $18,500 (rather than $10,000) for lifting and rigging; (6) the determination that DCAS properly deducted the sum of $19,911.41 (rather than $2,139.83) for materials; and (7) the determination denying petitioner pre-award interest.

In addition, co-respondent City of New York (City) challenges the CDRB finding that DCAS acted in bad faith, and claims that the CDRB lacked jurisdiction to review DCAS's finding that petitioner had defaulted.

The Decision recites that, in the proceeding before the CDRB, petitioner was seeking $1,003,623 in unprocessed payment requisitions and deductions from payment requisitions, of which $528,433 represented unprocessed payment requisitions, and $428,992 represented deductions that DCAS took on those requisitions that it did process. Verified Answer, Exh. "B", at 17. As an initial matter, $528,433 plus $428,992 equal $957,425, not $1,003,623. The CDRB awarded petitioner the full $528,433 that, it held, was due on the unprocessed requisitions. Id. at 17. Accordingly, it appears that the total sum of deductions that petitioner sought to recover was $475,190 ($ 1,003,623 minus $528,433), not $428,992. The CDRB claims that any computational error in the Decision was introduced by petitioner's post-argument submission. However, as a decision-making body, the CDRB is no more justified in blindly repeating a computational error than this Court would be

justified in repeating a party's misstatement as to the holding of a case. Indeed, that would be arbitrary and capricious and contrary to law.

The Decision upheld a total of $359,520.41 in specified deductions taken by DCAS (id. at 17-18), and awarded petitioner $13,295 for deductions that DCAS had failed to explain. Id. at 18. Thus, the Decision addressed a total of $372,814.41 ($359,520.41 allowed + $13,295 disallowed) of the deductions that DCAS had taken. While it may be inferred from the Decision that DCAS had failed to explain the remaining $102,375.59 ($475,190 - $372,814.41) that petitioner sought, and that, by the logic of the Decision, that sum should have been awarded to petitioner, the Decision is silent as to that sum. Accordingly, this matter will be remanded to the CDRB for a decision as to the $102,375.59 that the CDRB failed to discuss. Without a decision, and an explanation of its basis, this Court cannot determine if there was a rational basis for the determination.

Petitioner's second claim concerns the $321,109 deduction for labor costs that the CDRB allowed in connection with two of the four construction projects. The costs in question were payments to sheetworkers for the installation of ductwork. DCAS contended that such payments were included in the bid for ductwork, and should not be included in petitioner's charges for labor. The governing bid specification provided that:

> Bidder shall submit a bid per pound, for the fabrication and installation of [150,000 lbs of ductwork throughout 130 Stuyvesant Street and 65,000 lbs of ductwork at 100 Gold Street] in the City of New York.

Petitioner contends that "installation" is a typographical error, and that the word should be "insulation"; that its bids on the two projects listed labor charges for sheetworkers separately; that, unlike the paragraph quoted above, the paragraphs that immediately precede and follow it contain explicit references to labor costs; and that, on the other two projects, DCAS took no deductions for labor costs, although the relevant bid specifications were similar to the two quoted above.

The CDRB notes that the bid specifications include "installation" in the bid per pound, and that petitioner sought no explanation of that apparent anomaly prior to submitting its bids. Accordingly, citing Acme Builders, Inc. v. Facilities Dev. Corp. (51 NY2d 833 [1980] [contractor who failed to question job requirements bound by architect's determination]) and Cipico Constr,. Inc. v. City of New York (279 AD2d 416 [1st Dept 2001] [petitioner who failed to raise ambiguity

before bidding bound by City's interpretation]), the CDRB argues that the Decision cannot be said to be arbitrary or irrational, insofar as it held petitioner to be bound by that language.

It is undisputed that petitioner's bid listed wages to be paid to sheetworkers separately from the costs that would be incurred by supplying the ductwork. It is also undisputed that the ductwork was installed by sheetworkers. Having accepted petitioner's bid, with its explicit listing of sheetworkers' wages, DCAS should not have been allowed to take a deduction for a portion of the sheetworkers' wages, on the ground that such charges were already included in the charges for ductwork.

The increased labor costs, for which petitioner sought a change order, arose from the Comptroller's determination, in approximately January 1996, that, although the bid specifications for petitioner's four contracts, like those for at least one other contractor on the projects, called for labor costs that included the cost of journeymen and "helpers" in a blended, or "team" rate, "helper" is not a recognized title in the construction trades, and that, accordingly, petitioner had violated the Prevailing Wage Law, Labor Law § 220, et seq. The Comptroller and petitioner entered into a stipulation, dated November 27, 2000, pursuant to which petitioner acknowledged multiple willful violations of the Prevailing Wage Law, acknowledged that it owed its workers $1,878,002.52 in wages and interest, and agreed to pay a civil penalty of $171,997.48. The CDRB held that, regardless of the bid specifications, petitioner had an independent duty to comply with the provisions of the Prevailing Wage Law, and the City should not have to pay petitioner's increased labor costs. Petitioner points out that an electrical contractor, working on the same jobs, had also submitted a blended rate, in conformity with the bid specifications, and then had been granted a change order to cover the increased rate of labor costs.

It appears from certain documents that petitioner has obtained from DCAS that the first time that the Comptroller took the position that a blended rate, which includes a wage rate for "helpers," violates the Prevailing Wage Law was in 1996, during the pendency of petitioner's contracts. Indeed, the CDRB pointed out that petitioner's use of a blended rate was consistent with DCAS's bid specifications. This Court is mindful of the instruction of the Court of Appeals that "the unmistakable aim of the entire enforcement scheme [of the Prevailing Wage Law is] to place all liability for violating the prevailing wage requirements upon the noncomplying contractor" (Brian Hoxie's Painting Co. v. Cato-Meridian Central School District, 76 NY2d 207, 213 [1990]).

Petitioner's argument that it should have received a change order to cover the new and higher wages that petitioner was required to pay by its stipulation with the Comptroller is an attempt to pass along to the City petitioner's expense of complying with the Prevailing Wage Law, something that it was always required to do and that it should have built into its original bid. This Court cannot say that CDRB's conclusion, i.e. that petitioner was not entitled to a change order, was arbitrary or capricious.

Moreover, although the Decision did not rely on this ground, Article 25 of petitioner's contracts provides, in relevant part, that "[c]hanges may be made to this contract only as duly authorized by the Agency Chief Contracting Officer (ACCO) or his or her designee." See Supplemental Exhibits to Verified Answer, Vol 11, Exh. "F" (1), at C- 14, mistakenly stamped C-16. Petitioner acknowledged, in the proceeding before the CDRB, that, although it continued to perform work under the contracts until September 1, 2001, it failed to submit a change order to the ACCO. Indeed, it appears that, prior to raising the matter in this proceeding, petitioner raised it exclusively in the context of the dispute resolution procedures that are provided for in the Contracts, initially in a December 18, 2000 letter to the Deputy Commissioner of DCAS, approximately five years after the Comptroller's change in the wage rate. See Supplemental Exhibits to Verified Answer, Vol 1, Exh. "E" (3) (B). It could not have been arbitrary or capricious not to give petitioner a change order that petitioner failed to submit, pursuant to the Contracts.

Petitioner's claims as to the deductions of $18,500 (rather than $10,000) for lifting and rigging, and $19,911.41 (rather than $2,139.83) for materials are based on petitioner's contention that those deductions should have been reduced by credits of, respectively, $8,500 and $17,771.58, that petitioner gave DCAS. As to the former, the CDRB found that petitioner had failed to submit necessary invoices, and that it could not determine from the record the amount that petitioner had incurred for the work. In view of that finding, petitioner's argument as to the credit that it claims to have given to DCAS is irrelevant. Moreover, petitioner's papers refer to its counsel's rebuttal argument to the CDRB. That argument is not evidence presented to the CDRB. In the course of his argument, petitioner's counsel referred to a letter that he had written to the Comptroller's office. That letter, also, is not evidence. To be sure, Exhibit "K" to the Petition clearly shows a credit of $8,500. It does not appear, however, that that exhibit was submitted to the CDRB, and, accordingly, it may not be considered here. 9 RCNY § 4-09 (g) (6).

As to the deduction for material, the CDRB found that the record did not clearly show that petitioner had given DCAS a credit of $17,771.58. Again, Exhibit "L" to the petition shows such a credit, but it does not appear that that exhibit was submitted to the CDRB.

Retainage is a contractually specified percentage of payment that the City may temporarily withhold from the invoice. See 9 RCNY § 4-06 (b). Here, the City retained $1,332,264, of which, as noted above, the CDRB awarded petitioner $758,000. The CDRB's sole discussion of the remaining $574,264 claimed by petitioner is the following statement:

> Upon careful review of the submissions, the Board concludes that petitioner has not established its entitlement to the additional $574,264 in claimed retainage.

This Court does not doubt that the CDRB carefully reviewed petitioner's claim. However, without some further explanation from the CDRB, it is impossible for this Court to determine, as it must, whether the CDRB's conclusion was arbitrary or irrational. Accordingly, this matter, too, must be remanded to the CDRB for an explanation of the basis of its conclusion.

In any event, the amount of retainage to which petitioner and DCAS are respectively entitled depends on the amount of deductions upheld. As indicated above, that amount cannot be determined until after the CDRB rules on the missing $102,375.59 of deductions taken by DCAS.

9 RCNY § 4-06 (d) (3) provides, in relevant part, that:

> Interest shall not be paid where ... payment on the invoice is delayed because of a disagreement between an agency and a supplier over the amount of the payment and other issues concerning compliance with the terms of a contract. Payments shall be made, and as required by these Rules, interest shall be paid on undisputed amounts.

Inasmuch as all the sums that the Decision awarded to petitioner had been in dispute, petitioner was not entitled to pre-award interest.

The City's objections in point of law and affirmative defenses are largely based on the City's contention that DCAS withheld payments from petitioner at the direction of the Comptroller. Leaving aside the question of whether DCAS commenced withholding approved payments before it received any notice from the Comptroller, when such notice arrived, it called for DCAS to withhold $750,000. To the extent that DCAS withheld sums exceeding that amount, the City's argument, that the CDRB had no basis for concluding that DCAS had acted in bad faith, fails. For

the rest, the City merely disagrees with the Decision. Such disagreement does not show that the Decision is arbitrary or capricious.

With regard to the City's jurisdictional argument, 9 RCNY § 4-09 (a) (2) provides that:

> this section [providing, among other things, for petitions to the CDRB] shall apply ... to disputes about the scope of work delineated by the contract ... the conformity of the supplier's work to the contract, and the acceptability and quality of the supplier's work; such disputes arise when the Engineer (defined in the contract) makes a determination with which the supplier disagrees.

Clearly, a determination by DCAS that a supplier has defaulted comes within the ambit of a dispute about "the conformity of the supplier's work to the contract, and the acceptability and quality of the supplier's work."

Accordingly, it is hereby

ORDERED and ADJUDGED that the Decision, OATH Index No. 214/03, is modified to the extent that the award to the petitioner is increased by the amount of $321,109; and it is further

ORDERED that this matter is remanded to the CDRB for decision with explanation on the $102,375.59 in DCAS deductions which are not discussed in the Decision, and for an explanation of the CDRB's denial of petitioner's claim for an additional $574,264 in retainage.

This decision constitutes the order and judgment of the Court.

Dated: March 28, 2005
New York, New York

ENTER:

MICHAEL D. STALLMAN, *Supreme Court Judge*, New York County