# *Triton Structural Concrete, Inc. v. Dep't of Design & Construction*

OATH Index No. 2362/16, mem. dec. (Jan. 18, 2017)

On appeal, CDRB denied contractor's claim because it was waived in contractor's partial time extension requests.

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

**CONTRACT DISPUTE RESOLUTION BOARD**
*In the Matter of*
**TRITON STRUCTURAL CONCRETE, INC.**
*Petitioner*
*- against -*
**CITY OF NEW YORK DEPARTMENT OF DESIGN AND CONSTRUCTION**
*Respondent*

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## MEMORANDUM DECISION

**KARA J. MILLER,** *Administrative Law Judge/Chair*

**STEPHANIE RUIZ, ESQ.,** *Mayor's Office of Contract Services*

**CHARLES M. KASS, ESQ.,** *Prequalified Panel Member*

Pending before the Contract Dispute Resolution Board ("CDRB" or "Board") is an appeal by Triton Structural Concrete, Inc. ("Triton") seeking extra compensation from the City of New York Department of Design and Construction ("City" or "DDC"). The dispute involves the amount of $105,003,443.02 "Phase 3 Beach Front Restoration" project, Contract No. 20131421425 ("Contract"), to rebuild and repair various beach front structures in Brooklyn, Queens, and Staten Island following the aftermath of Hurricane Sandy.

Triton requests $790,125.36 for alleged extra work to replace concrete piles deemed nonconforming by DDC. Oral argument was held before the Board on December 1, 2016. The record was closed on December 21, 2016, following the submission of additional materials requested by the Board. For the reasons set forth below, the Board denies Triton's claim.

## BACKGROUND

The Contract provided that Triton install prefabricated modular buildings on driven pile foundations across several beachfront locations (Pet. at 1-2). Triton's concrete subcontractor for this work was Recine Materials Corp. ("Recine") (Pet. Ex. 1). To secure the various components, the concrete had to be poured through a hole in steel embed plates on each pile. According to Triton, because the pours were to be completed in quick intervals over many piles, it added Delvo, an extender that would slow the drying process of the concrete and allow it to be used for longer periods of time (Pet. at 3).

In letters dated June 25, 2013, the Engineer of Record ("EOR") alerted the City's resident Construction Manager that the concrete in pile foundations at several sites did not meet Contract requirements (Post-Tr. Exs.; Pet. Ex. 4). A summary of the EOR's review indicates that the majority of the piles were rejected for "overtime pours," meaning that it took longer than the standard 90 minutes to pour the concrete, and a few piles were rejected for strength issues (Resp. Ex. A). The EOR notified Triton that it needed to replace the nonconforming concrete (Post-Tr. Exs.; Pet. Ex. 4). By letter dated June 26, 2013, Triton immediately advised Recine that over 200 concrete piles had been rejected and that Recine would need to defend its work product (Post-Tr. Exs.; Pet. Ex. 4).

At issue is whether Triton properly reserved its claim in four Partial Time Extension Requests submitted to DDC between July 2013 and June 2014, regarding the concrete in the pile foundations deemed to be non-conforming by the EOR. The timeline is as follows: after the exchange about the concrete piles in June 2013, Triton submitted Partial Time Extension Request 2 on July 25, 2013 (Resp. Ex. B). In August of 2013, Recine indicated to Triton in several letters that it disagreed that the concrete piles were nonconforming (Post-Tr. Exs.; Pet. Ex. 4). During a meeting between Triton, Recine, and the Construction Manager on September 26, 2013, Recine was told that the piles must be repaired or replaced (Pet. Ex. 4). Recine advised Triton on October 31, 2013, that they would be seeking change orders for costs associated with this work (Pet. Ex. 4).

On November 4, 2013, Triton submitted Partial Time Extension Request 3 (Resp. Ex. B). Recine then submitted a Notice of Claim to Triton on December 30, 2013, for $746,232.13 in costs for work on the piles (Pet. Ex. 4). Triton submitted two additional time extension requests, Partial Time Extension Requests 4 and 5, on February 6, 2014 and June 6, 2014, respectively (Resp. Ex. B). On August 21, 2014, Triton submitted a change order request (RCO 163) to DDC

for the concrete repairs and thereafter, submitted Partial Time Extension 6 on September 29, 2014 (Pet. Exs. 4, 6).

In an e-mail dated April 28, 2015, DDC's Project Manager rejected the change order for the concrete repairs (Pet. Ex. 5). Triton subsequently sent a Notice of Dispute to the Commissioner of DDC on May 13, 2015 (Pet. Ex. 1). After requesting additional materials related to the contested concrete work, DDC denied the Notice of Dispute due to a lack of response by Triton on July 7, 2015 (Pet. Ex. 2).

Triton proceeded to file a Notice of Claim with the Comptroller on August 21, 2015, after being granted an extension of time (Pet. Exs. 3, 4). On April 18, 2016, the Comptroller issued a determination that the claim was untimely because Triton failed to file its Notice of Dispute with DDC within 30 days of receiving written notice of the determination. The Comptroller further found that the claim had been waived when Triton failed to reserve it in Partial Time Extension Requests 2 through 5, after the dispute arose in June 2013 (Pet. Ex. 4). Triton filed an appeal with the CDRB on June 6, 2016.

## ANALYSIS

The Board's authority to resolve contract disputes between the City and a vendor is set forth in the Procurement Policy Board rules ("PPB rules"). The PPB rules were incorporated into Article 27 of the Contract. The PPB rules and Article 27.1.2 of the Contract authorize the Board 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 2016).

On appeal, Triton argues that its claim regarding the concrete that was deemed nonconforming has not been waived in Partial Time Extension Requests 2 through 5. According to Triton, the present claim did not need to be reserved until after Triton submitted a change order for the concrete work in September 2014, because there was no clear dispute about the amount of money owed prior to this time (Pet. at 10-11). Triton notes that after it submitted the change order, it specifically reserved its concrete pile claim in Partial Time Extension 6 on September 29, 2014 (Pet. at 11). Alternatively, Triton suggests that the claim was not actually

ripe until the April 28, 2015 written determination from DDC rejecting the change order for the concrete work (Pet. Rep. at 2).

In response, the City argues that Triton waived its claim in Partial Time Extension Requests 2 through 5 because Triton failed to specifically refer to its dispute with the EOR's determination that some of the concrete was non-conforming (Resp. at 9-10).

After hearing oral argument and reviewing the record, the Board finds that Triton has waived its claim. Under the PPB rules, the Board's decision must be consistent with the terms of the Contract. 9 RCNY § 4-09(g)(4). Here, Article 13.8 of the Contract provided that in an application for an extension of time, the contractor shall set forth in detail "[a] statement that the Contractor waives all claims except for those delineated in the application, and the particulars of any claims which the Contractor does not agree to waive" (Pet. Ex. A).

Courts in New York have consistently enforced waiver of claims in connection with extensions of time. *See Almar Plumbing & Heating Corp. v. Dormitory Auth. of the State of New York*, 2008 N.Y. Misc. LEXIS 6135 at 22-23 (Sup. Ct. Kings Co. Oct. 22, 2008) (for public policy reasons "[t]he requirement that contractors must specifically reserve claims or release them . . . is imperative for" a public body "for purposes of financial planning, budgeting for future public projects, [and] reporting accurately to . . . institutions for which it constructs projects . . . ."); *see also Honeywell, Inc. v. J.P. Maguire Co.*, 1999 U.S. Dist. LEXIS 1872 at *27 (S.D.N.Y. Feb. 22, 1999), *modified in part, adhered to in relevant part,* 2000 U.S. Dist. LEXIS 3699 (S.D.N.Y. Mar. 17, 2000); *Mars Assoc., Inc. v. City of New York*, 53 N.Y.2d 627 (1981), *aff'g*, 70 A.D.2d 839 (1st Dep't 1979); *Herman H. Schwartz, Inc. v. City of New York*, 100 A.D.2d 610, 612 (2d Dep't 1984); *E.M. Substructures, Inc. v. City of New York*, 73 A.D.2d 608 (2d Dep't 1979).

In cases interpreting Article 13 waiver requirements, the Board has repeatedly held that once a contractor is on notice of a dispute about specific Contract work, it must reserve potential claims related to this work in subsequent time extension requests. *See Summit Construction Services Group, Inc. v. Dep't of Design & Construction*, OATH Index No. 456/15, mem. dec. at 4-5 (Jan. 26, 2015), *aff'd*, Index No. 155253/2015 (Sup. Ct. N.Y. Co. Aug. 20, 2015) (agency gave contractor notice at a site visit in December 2012 that it disagreed about who was responsible for electrical work and contractor did not reserve its claim about the work in time extension requests from March 2013 on); *Commodore Maintenance Corp. v. Dep't of*

*Transportation*, OATH Index No. 1118/14, mem. dec. at 5, 7-8 (Apr. 3, 2014) (contractor had notice of disagreement with agency about who was responsible for temporary decking in June 2012 and did not reserve claim about decking in extension requests in August 2012 and January 2013); *Ferreira Construction Co., Inc. v. Dep't of Transportation*, OATH Index No. 1619/12, mem. dec. at 12-13 (Nov. 16, 2012) (contractor "was well aware from June of 2011 that there was a problem" after receiving a letter from the agency indicating that it disagreed with contractor's cost saving calculations and subsequently failed to reserve claim about cost savings in a time extension request submitted in October 2011).

Here, the record establishes that Triton was on notice of the present dispute in June 2013 after the EOR told the construction manager in its letter that the concrete piles were nonconforming. The letter from the EOR clearly stated in bolded text that "concrete at pile extensions . . . does not meet the contract requirements." The EOR emphasized that the contractor must "provide a method to replace the out of conformance concrete for review and approval" (Post-Tr. Exs.).

The next day, on June 26, 2013, Triton referred the nonconformance issue to its subcontractor, Recine. In its letter to Recine, Triton stated that the pile cap rejections marked "a significant setback to the project and a significant potential cost impact to Recine," and directed Recine to provide a detailed plan to defend its work product by the following day (Post-Tr. Exs.). Triton's immediate action and strong language indicates that Triton understood that the nonconforming concrete was a serious problem that needed to be resolved (Post-Tr. Exs.). Despite Triton's focus on the cost to Recine, Triton's responsibility as the prime contractor for the actions of the subcontractor was clearly set out in the Contract in Section 17.7, which provided that the "Contractor shall be solely responsible to the City for the acts or defaults of its Subcontractor." On these facts, it is apparent that in June 2013 Triton was aware of the concrete piles dispute and knew that it could bear additional costs as a result.

Despite having notice of this dispute, Triton subsequently submitted four time extension requests in July 2013, November 2013, February 2014, and June 2014, reserving only the following claims:

- The costs or impacts that may have occurred or that will occur from the ongoing interferences, obstructions, disruptions, etc., as set forth above.

- Any pending change orders tentatively approved but being currently reviewed and negotiated as to a final dollar amount, as summarized in [the] . . . letter dated May 16, 2013. . . .
- Any change order for extra costs incurred for transportation/shipping of the modular units.
- Installation and all costs associated with on-site completion of shipped modular units, on site retrofit of long lead time doors, windows, electrical fixtures, gates, etc.
- Any work that may become the subject of a dispute.

(Resp. Ex. B). Notably, none of these reservations refer to the concrete piles at issue here. Therefore, the present claim has been waived.

It is reasonable to expect that as a sophisticated contractor that secured a $105,003,443 Contract with the City, Triton should have reserved this claim in accordance with the waiver requirements of the Contract. *See LAWS Construction Corp. v. Dep't of Parks & Recreation*, OATH Index No. 2230/14, mem. dec. at 6 (Jan. 14, 2015), *aff'd*, Index No. 154730/2015 (Sup. Ct. N.Y. Co. Jan. 4, 2016) (noting that for "a sophisticated contractor working on a multi-million dollar contract," it was incumbent on it to reserve its claim from waiver with clarity).

Triton attempted to excuse its failure to clearly delineate this claim by arguing that the claim could not be reserved until the parties had determined the specific monetary amount at issue. This argument, however, is without merit. A claim about disputed Contract work must be reserved regardless of whether or not there is an exact dollar amount associated with the claim. *See Pavarini McGovern, LLC v. Dep't of Parks & Recreation*, OATH Index No. 1565/14, mem. dec. at 6-7 (June 20, 2014) (contractor sought determination about whether it was responsible for certain work under the Contract; Board held that the fact that contractor "did not assert an exact dollar amount as part of its claim does not negate that it was required to set forth the particulars of the claim in its request for an extension of time").

Furthermore, where the claim must be reserved with particularity, Triton's reservation of "any work that may become subject of a dispute" in time extension requests in July 2013, November 2013, February 2014, and June 2014, is too broad to reserve the present claim. *See Mars Assocs., Inc.*, 53 N.Y.2d at 629 (contractor waived claim where it failed to "state its intentions with clarity" in exemption); *NorthE Group, Inc. v. Dep't of Design & Construction*, OATH Index No. 158/15, mem. dec. at 4-6 (Dec. 23, 2014) (contractor waived claim where it only reserved "claims asserted by us to the City, but not yet paid by the City" and claims for the "extra costs for labor and material" and "overhead and profit"); *Pavarini*, OATH 1565/14 at 4-5

(contractor waived claim where it broadly reserved "additional and increased costs of construction" and "payment of all contract monies now due or to become due under the contract").

Finally, the Comptroller's determination stated that one of the grounds for rejecting Triton's claim was due to Triton's failure to file its Notice of Dispute with DDC within 30 days of receiving written notice of the determination. Triton disagrees and maintains that its Notice of Dispute was timely because it did not have a written determination on the dispute until the April 28, 2015 e-mail from DDC's project manager rejecting the change order. Triton filed its Notice of Dispute on May 13, 2015, within 30 days of this determination (Pet. at 9). The City, however, has not raised the Comptroller's timeliness argument in response to Triton's appeal. Therefore, the Board will not address the matter of timeliness here. *See A.J. Pegno Construction Corp. /Tully Construction Co., Inc. for Titon Roofing, Inc. v. Dep't of Environmental Protection*, OATH Index No. 1436/08, mem. dec. at 4 (May 21, 2008) (declining to address apparent timeliness issues where City did not raise timeliness as an affirmative defense).

In sum, because Triton failed to reserve this claim in four time extension requests submitted after June 2013, when the dispute around the concrete piles arose, the claim has been waived. As such, the Board does not reach the merits of the appeal. Triton's appeal is denied with all panel members concurring.

Kara J. Miller
Administrative Law Judge/Chair

January 18, 2017

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