Ferreira Construction Co., Inc. v. Dep't of Transportation

OATH Index No. 1619/12, mem. dec. (Nov. 16, 2012)

CDRB determined that contractor's calculation of additional payment for cost savings on pedestrian bridge project must be dismissed as time-barred and waived, and otherwise must be denied on the merits based on contract interpretation. Undisputed cost savings of $46,505.75 was the correct amount due the contractor.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

CONTRACT DISPUTE RESOLUTION BOARD
In the Matter of
FERREIRA CONSTRUCTION CO., INC.
Petitioner
- against -
DEPARTMENT OF TRANSPORTATION
Respondent

MEMORANDUM DECISION

JOAN R. SALZMAN, *Administrative Law Judge/Chair*

DAVID SUGARMAN, **ESQ**., *Assistant General Counsel*, *Mayor's Office of Contract Services*

PAUL D. WEXLER, ESQ., *Prequalified Panel Member*

This dispute involves the application of a contractor initiated value engineering change ("CIVEC") provision in a Department of Transportation ("DOT" or "respondent") contract to reconstruct the pedestrian bridge at East 78th Street, in Manhattan at the FDR Drive. The CIVEC clause here gave the contractor an incentive to propose innovations by allowing for an award to the contractor of 50% of the cost savings if the proposal was accepted by DOT. Here, the contractor, Ferreira Construction Co., Inc. ("Ferreira" or "petitioner"), proposed, and DOT accepted, that 18" shafts, with a unit price of $3,100, be replaced by 12" shafts, which had a unit price of $2,150. The parties agree that Ferreira's proposal saved money for DOT. The dispute centers on the calculation of exactly how much money was saved.

Pending before the Contract Dispute Resolution Board (the "CDRB" or "the Board") is the Petition of Ferreira for an award of $126,160.25 in extra compensation from the DOT (Notice of Claim at 1). Petitioner contends that its CIVEC proposal saved DOT $252,320.50, and that under the contract petitioner is entitled to 50% of the savings, $126,160.25. DOT contends that petitioner's CIVEC proposal saved the agency only $93,011.50, and that, therefore, petitioner is entitled to only $46,505.75 in extra compensation. DOT concedes that Ferreira is due the lesser amount of $46,505.75, and represents that it is processing payment in that amount to Ferreira. City's Response to the Petition, dated June 4, 2012 at 16 n.5 ("Resp.").[1] Once that undisputed amount is paid, the net amount Ferreira is seeking would be $79,654.50.

Ferreira's use of smaller shafts was definitely cheaper than the estimate in the bid using larger ones. The parties did not address whether the CIVEC proposal raised the quality of the construction. Rather, the focus of this case is the amount of cost savings that resulted from the proposal. Nonetheless, Ferreira's submissions provide the following background as to what the proposal was intended to accomplish; the proposal is summarized here as an aid to understanding. Ferreira's cost-saving idea was that the smaller drilled shafts would be an advantage because they would be "more readily seated into the existing rock … [and] provide a better seal against ground water infiltration during concrete/grout replacement in the shafts" (Notice of Claim Final CIVEC Proposal #1 for the Re-Design of the Drilled Shafts, "Notice of Claim," Dec. 22, 2011, Ex. 8). In addition, the smaller diameter shafts would create fewer vibrations and help prevent the possibility of undermining the adjacent FDR Drive and Esplanade. Among other advantages, the smaller shafts would maintain their verticality during installation in boulders, debris, and sloping bedrock, and help prevent the possibility of undermining the brick sewer station nearby (Notice of Claim Ex. 8). In essence, because these proposed shafts were narrower (about 12" in diameter), more of them would be needed compared with the fewer, larger (18") shafts contemplated in the bid, but the smaller shafts were cheaper per unit. The CIVEC proposal would address concerns about undermining the existing promenade (Letter from A.J. Burns, P.E., Intercoastal Foundations and Shoring, to P. Mastrola,

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[1] At the time of oral argument, counsel for the City undertook to inquire of DOT and advise petitioner's counsel of the status of the payment (Tr. 47).

P.E., Ferreira, Sept. 23, 2010, Notice of Claim Ex. 8). Ferreira characterized its proposal as a "re-design" of the drilled shafts (Letter from Mastrola to Y. Fawzy, P.E., Oct. 1, 2010, Notice of Claim Ex. 8). The Resident Engineer from AECOM wrote that the smaller, 12" shafts would displace fewer boulders than the 18" shafts bid, and would be more secure and leave more large boulders in place (Notice of Claim Ex. 8).

Following oral argument on September 21, 2012, and final written submissions requested by the Board, the record was closed on October 26, 2012. For the reasons set forth below, the Board finds that petitioner's claim must be dismissed as time-barred. Were it not time-barred, this claim was waived when petitioner submitted a request for an extension of time without reserving the CIVEC Proposal No. 1 claim. Finally, were the claim neither time-barred nor waived, it must be denied on the merits.

BACKGROUND

On or about March 14, 2010, petitioner entered into an $11.9 million contract (No. HBMCO29R) (the "Contract") (Resp. Ex. R) with respondent to reconstruct the pedestrian bridge at East 78th Street in Manhattan over the FDR Drive (Resp. at 1). The contract contained a provision for CIVEC proposals that invited the contractor to submit its cost saving proposal to DOT (Resp. Ex. S, Notice to Bidders, § 8 at N-8 through N-11). If DOT approved the proposal, the contractor would be entitled to 50% of the cost savings. Notice to Bidders § 8(D)(2) (Resp. Ex S).

On November 16, 2010, petitioner presented to DOT CIVEC Proposal No. 1 (Notice of Claim Ex. 8). The proposal was captioned "Final CIVEC Proposal #1 for the Re-Design of the Drilled Shafts." It called for the substitution of 11.875" (about 12") diameter "mini caissons" for the contract specified 18" diameter drilled shafts on the East Ramp foundations along the waterfront esplanade. Savings would result from the lower unit price for smaller drilled shafts ($2,150), compared to the unit price of the larger, 18" drilled shafts ($3,100 specified in the bid documents). Ferreira claimed its proposal would save DOT about $256,000, of which it would be entitled to half: about $128,000 (Notice of Claim Ex. 8: Letter from Mastrola to Fawzy, Nov. 16, 2010).

According to Ferreira, DOT accepted its proposal to substitute mini caissons in December 2010. Work commenced in January 2011 and was completed in April 2011 (Notice of Claim). On May 27, 2011, Ferreira submitted its final cost savings analysis to DOT, claiming

that DOT saved $252,320.50, of which Ferreira said it was entitled to $126,160.25 (Notice of Claim Ex. 7). The contract bid projected a quantity of 262 of the larger, different 18" shafts at a unit price of $3,100 per shaft (Resp. Ex. T). Ferreira's innovation was to use more shafts, but smaller (12") and cheaper ones. Once the proposal was approved, Ferreira actually installed 313.39 shafts of 12" diameter at the lower price of $2,150 per unit. The actual cost of the work done was undisputed. But in calculating its share of the cost savings, Ferreira combined the "as built" quantity of 313.39 of the actually used 12" shafts with the estimated price of the 18" shafts ($3,100), though it used no 18" shafts in fact, for its determination of the cost of the work required by the contract bid (Notice of Claim Ex. 4). This calculation is the focus of the dispute.

On June 17, 2011, Yasser Fawzy, P.E., Deputy Director of DOT's Bureau of Roadway Bridges Manhattan & Brooklyn ("BRB"), notified Ferreira in writing that BRB calculated the cost savings resulting from Ferreira's proposal to be only $93,130.50, of which Ferreira's share was $46,595.25 (Notice of Claim Ex. 5). Mr. Fawzy calculated the cost savings to be shared by Ferreira and the City to be "the cost of work as per contract bid minus the cost of work performed as per CIVEC proposal negotiated prices" (Notice of Claim Ex. 5). When calculating Ferreira's share of the savings, DOT used the original bid quantity, 262, multiplied by the unit price in the bid for the original, specified 18" drilled shaft, $3,100, when calculating "the cost of the work as per contract bid" (Notice of Claim Ex. 5).

In the June 17th letter, Mr. Fawzy also gave Ferreira the option to submit an ordinary change order to seek additional compensation for the CIVEC work; however, if Ferreira chose this option, it would not share in the contract savings (Notice of Claim Ex. 5; Reply, July 20, 2012, at 3). In the same letter, Mr. Fawzy asked Mr. Mastrola to "confirm that we are to proceed with incorporating this work into the contract through a CIVEC CCR" (Notice of Claim Ex. 5).

On July 15, 2011, Ferreira's Vice President, Peter M. Mastrola, P.E., wrote Mr. Fawzy to convey Ferreira's "complete disagreement" with Mr. Fawzy's calculation of savings in the June 17th letter (Notice of Claim Ex. 4). Mr. Mastrola closed the letter by asking Mr. Fawzy to review Ferreira's CIVEC cost savings analysis again and to notify Ferreira of the "'final written notice of your determination' in order for us to proceed under Article 27, 'Resolution of Disputes' under the terms of our contract" (Notice of Claim Ex. 4).

On August 2, 2011, Mr. Fawzy confirmed in writing to Mr. Mastrola that he was adhering to the position set forth in his June 17, 2011 letter. He directed Ferreira "to follow

Contract provision under Article 27 - Resolution of Disputes in obtaining Final Notice form [*sic*] NYCDOT" (Notice of Claim Ex. 3).

Ferreira submitted its Notice of Dispute to DOT Commissioner Janette Sadik-Khan on October 10, 2011 (Notice of Claim Ex. 2).

On November 28, 2011, Commissioner Sadik-Khan's designee, Deputy Commissioner/Agency Chief Contracting Officer ("ACCO") Nancy Carolan, denied Ferreira's claim on the merits (Notice of Claim Ex. 1). Deputy Commissioner Carolan agreed with BRB's calculation of the total savings resulting from Ferreira's proposal.

Ferreira filed its Notice of Claim with the Comptroller on December 22, 2011 (Notice of Claim). On January 9, 2012, the Comptroller's Senior Counsel, Robert D. Palmer, wrote to Mr. Mastrola, to inform him that Ferreira's claim "appears to be untimely, waived or both" (Correspondence with the Comptroller's Office: Letter from Palmer to Mastrola, Jan. 9, 2012). Mr. Palmer cited to section 4-09(d)(1) of the Procurement Policy Board's (PPB) rules and Article 27.4 of the contract, which requires a vendor to present its Notice of Dispute in writing to the Agency Head within 30 days of receiving written notice of the determination or action that is the subject of the dispute. Mr. Palmer outlined the chronology of events as follows:

- July 15, 2011, Ferreira asked DOT to reconsider its June 17, 2011 review of the CIVEC proposal, or issue a "final written notice of your determination."

- August 2, 2011, DOT reaffirmed its June 17, 2011 position and advised Ferreira to proceed pursuant to Article 27 of the Contract.

- October 10, 2011, Ferreira filed its Notice of Dispute with DOT.

Mr. Palmer also noted that under Article 13 of the contract, governing extensions of time, all claims except those specifically delineated in an application for extension of time are waived (Contract Art. 13 § 13.82(c)), and that in its "Exceptional Time Extension No. 2," dated October 4, 2011, Ferreira reserved other claims but failed to mention this CIVEC claim. He gave Ferreira an opportunity to provide a detailed explanation showing why the Comptroller's office should entertain its claim, in light of the timeliness issue and apparent waiver (Correspondence with the Comptroller's Office: Letter from Palmer to Mastrola, Jan. 9, 2012).

Ferreira responded in writing on January 18, 2012. In that letter, Ferreira conceded that more than 30 days had passed from the August 2, 2011 letter to the October 10, 2011 Notice of Dispute. "The timeline you presented indicates a breach in the allowable 30 day response time period between the DOT letter dated August 2, 2011 and [Ferreira's] letter dated October 10, 2011." However, Ferreira argued that the time frame should be tolled because "throughout that time period, the DOT and [Ferreira] were continuing dialogue via meetings and emails in an attempt to resolve the matter in hopes of negating the need for filing a claim" (Notice of Claim Correspondence with the Comptroller's Office: Letter from Mastrola to Palmer, Jan. 18, 2012).

On February 1, 2012, Mr. Palmer provided Ferreira with an opportunity to document its assertion that Ferreira and DOT were in a continuing dialogue to resolve the matter during the period August 2 through October 10, 2011 (Correspondence with the Comptroller's Office: Letter of Palmer to Mastrola, Feb. 1, 2012). Mr. Palmer invited Ferreira to specify the time and place of each meeting and the personnel involved in the ongoing dialogue Ferreira contended had occurred, and to submit copies of correspondence and emails between Ferreira and DOT documenting any such dialogue.

Ferreira responded in writing on February 15, 2012, by providing contact information for persons who attended DOT-Ferreira meetings during the relevant time frame. Ferreira contended that the meetings continued until September 19, 2011, when it received an e-mail from Resident Engineer Lyle Mayer, P.E., of AECOM, that DOT "maintained [its] position" regarding Ferreira's CIVEC No. 1 proposal (Correspondence with the Comptroller's Office: Letter from Mastrola to Palmer, Feb. 15, 2012). All Mr. Mayer's email did, however, was attach a memorandum dated September 12, 2011, entitled "Summary – Extra Work/ Potential Extra Work/Overruns/CIVEC." The one-page memorandum was a status report and gave the "Current Status" of six items, the last of which said, "CIVEC No. 2 is approved and in process and CIVEC No. 1 is under dispute" (Correspondence with the Comptroller's Office: Mem. from Mayer to Mastrola, Sept. 12, 2011). Ferreira submitted no other documentation of ongoing meetings or discussions that could have tolled the 30-day time period.

James Cox, Deputy Director of Settlements and Adjudications, of the Office of the Comptroller, issued his decision denying Ferreira's claim as time-barred on March 9, 2012 (Resp. Ex. N). The Comptroller found that the 30-day time-frame for Ferreira to file a notice of dispute with the Commissioner began to run on August 2, 2011, when DOT re-affirmed its June

17, 2011 determination. Therefore, the Comptroller found, Ferreira's Notice of Dispute, filed on October 10, 2011, was more than one month late.

Ferreira filed its Petition with the CDRB on April 5, 2012. After receiving a 30-day extension of its time to answer, on consent, DOT filed its response on June 6, 2012. DOT moved to dismiss the petition because Ferreira had failed to file its Notice of Dispute timely with the Agency Head. DOT also argued that Ferreira waived its claim when it applied for an extension of time to finish the work and challenged Ferreira's calculation of savings. On July 20, 2012, Ferreira replied to DOT's response. DOT responded to Ferreira's reply on August 1, 2012. Oral argument was held on September 21, 2012. On October 26, 2012, after counsel for both sides submitted additional information requested by the Board about the contract terms, the record was closed.

ANALYSIS

Time-Bar

DOT argues that the Petition must be dismissed as time-barred because Ferreira did not file its notice of dispute within 30 days of the determination with which it disagreed, as required by the applicable contract provision and PPB rule. Ferreira argues that the two letters upon which DOT relies are ambiguous and indefinite and, therefore, do not constitute "determinations" that started the 30-day clock under the alternative dispute resolution provision in the contract and PPB rule.

It is clear that to invoke the conflict dispute resolution procedure under a City contract, the contractor and the agency are obliged to act promptly. The time frames for dispute resolution established by the contract and the PPB rules may not be disregarded without good cause. *Crescent Contracting Corp. v. Dep't of Citywide Admin. Services*, OATH Index No. 1030/12, mem. dec. at 5 (Apr. 13, 2012); *Start Elevator, Inc. v. Dep't of Correction*, OATH Index No. 1160/11, mem. dec. at 3 (Feb. 28, 2011), *aff'd*, Index No. 104620/11 (Sup. Ct. N.Y. Co. Jan. 9, 2012); *Delcor Assoc. v. Dep't of Housing Preservation & Development,* OATH Index No. 1872/10, mem. dec. at 2 (Apr. 13, 2010) (deadline missed by more than a month); *Kreisler Borg Florman v. Dep't of Design & Construction,* OATH Index Nos. 338/07, 339/07 & 340/07, mem. dec. at 4 (Jan. 26, 2007); *Alta Indelman, Architect/Builders Group, LLC v. Dep't of Sanitation*, OATH Index No. 1092/05, mem. dec. at 7 (June 16, 2005).

Article 27.4 of the contract and section 4-09(d)(1) of the PPB rules required Ferreira to submit its notice of dispute in writing to the agency head "within thirty days of receiving written notice of the determination or action that is the subject of the dispute." 9 RCNY § 4-09(d)(1) (Lexis 2012). The parties agree (Tr. 15-16; Resp. at 9; Reply at 4) that "[t]he statutory period for challenging a determination commences when unambiguous notification is issued." *Maracap Construction Industries, Inc. v. Dep't of Transportation*, OATH Index No. 711/08, mem. dec. at 5 (May 9, 2008). The parties disagree over when Ferreira received unambiguous written notification that DOT had rejected Ferreira's calculation of the CIVEC cost savings. DOT argues that Ferreira received written notification that DOT rejected its calculation of cost savings as early as July 17, 2011, the date of Mr. Fawzy's letter to Ferreira (Tr. 27). In any event, DOT contends, Ferreira received written notification of the adverse determination by no later than August 2, 2011, when Mr. Fawzy informed Ferreira that he was adhering to his prior decision and he directed Ferreira to follow the dispute resolution procedures of Article 27 of the Contract (Resp. Ex. F; Tr. 35). Therefore, DOT argues, Ferreira's Notice of Dispute, dated October 10, 2011, was submitted more than 30 days after August 2, 2011, the latest possible date that Ferreira received written notice of the unambiguous determination, and the Petition must be dismissed as time-barred.

Ferreira contends that neither the June 17, 2011 letter nor the August 2, 2011 letter, alone or in tandem, constitutes unambiguous written notification that started the 30-day clock, citing the CDRB's decision in *Glove USA, Inc. v. Department of Citywide Administrative Services*, OATH Index No. 2603/10, mem. dec. (Sept. 27, 2010) (Tr. 15-16). According to Ferreira's counsel, the parties continued to discuss the matter through August and into September 2011, and it was not until September 19, 2011 -- when Ferreira received an e-mail from AECOM, the Resident Engineer, attaching a status memorandum which summarized the status of a number of items, including a notation, listed as the sixth bullet point at the end of the memo under "Current Status" of various outstanding items, that "CIVEC No. 1 is under dispute" (Resp. Ex. M: E-mail from Mayer to Mastrola, Sept. 19, 2011) -- that Ferreira "realized, I guess, the end of the road had been reached and they should file" the Notice of Dispute with the DOT Commissioner (Tr. 20-21). Therefore, Ferreira contends, its Notice of Dispute, dated October 10, 2011, was timely.

Ferreira claims that the June 17th letter was ambiguous because it offered Ferreira two alternatives for handling its CIVEC proposal (Tr. 16: "By its nature, a letter that throws out two

possibilities is really not a determination"): (i) accept DOT's lower calculation of the cost savings (about $93,000) and Ferreira's 50% share (about $46,500) or (ii) submit an ordinary change order to seek additional compensation for the work. Under the second option, Ferreira would not share in the cost savings which resulted under CIVEC. Ferreira argues that the August 2 letter is likewise not an unambiguous determination because it merely states that it is adhering to its position as described in the June 17th letter. In addition, Ferreira contends, neither letter addressed the merits of Ferreira's arguments (Reply at 3).

The Board is not persuaded by Ferreira's argument that neither letter provided unambiguous written notice that DOT had rejected Ferreira's calculation of the cost savings. Although the June 17, 2011 letter does mention that Ferreira could submit a change order in lieu of pursuing its CIVEC claim, that reference does not render the letter ambiguous. As DOT points out, the June 17th letter unambiguously informed Ferreira that DOT had rejected its calculation of the CIVEC savings and provided detailed reasoning in an attached table of calculations. Further, the availability of the second option became moot when Ferreira elected to pursue the CIVEC option. Ferreira's July 15, 2011 letter was silent about the option of accepting an ordinary change order. Ferreira clearly was pursuing only the CIVEC option at that point. Moreover, the mere offer of a second option does not create an ambiguity because both options clearly conveyed DOT's rejection of Ferreira's calculation. In its July 15 letter, Ferreira asked Mr. Fawzy to review Ferreira's analysis of the cost savings and to "notify us of your 'final written notice of your determination' in order for us to proceed under Article 27 'Resolution of Disputes' under the terms of our contract" (Resp. Ex. E). Although Mr. Fawzy was not required under the contract to reconsider his prior calculation, his August 2, 2011 letter informed Ferreira that he adhered to his prior decision. In addition, the August 2, 2011 letter specifically directed Ferreira "to follow Contract provision under Article 27 – Resolution of disputes" (Notice of Claim Ex. 3). That invocation of Article 27 was a red flag. Hence, Ferreira was told on August 2, 2011, in writing, to follow the dispute resolution procedure set forth in Article 27 of the Contract. That procedure includes the requirement that Ferreira file a notice of dispute with the agency head within 30 days of receiving the written determination with which it disagreed, but Ferreira failed to do so, and in fact did not file its Notice of Dispute until October 10, 2011, more than a month late.

Asked at oral argument if it would have been prudent for Ferreira to appeal from (in effect, to dispute formally) the August 2, 2011 letter, counsel for Ferreira conceded: "It would have been prudent and the belt and suspenders approach to do that. There's no question. I have to be candid and say that" (Tr. 18, 43-44).

Glove USA, cited by Ferreira, is distinguishable. *Glove USA* involved a much more complicated dispute than the one presented here. That case involved a requirements contract between Glove USA and the Department of Citywide Administrative Services ("DCAS") to supply Fire Department/EMS personnel with examination gloves. The contract had a price adjustment provision which was keyed to the producer price index ("PPI") for rubber gloves and clothing as determined by the U.S. Department of Labor ("DOL"). The PPI for rubber gloves and clothing was later discontinued by DOL. DCAS had issued an adjusted price in November 2008 ($54.9823), but in February 2009, DCAS' Assistant Commissioner Green retracted the adjustment on the ground that it was issued in error, replaced it with a lower price ($51.3675) and stated that the lower adjusted price was effective July 1, 2008. On February 10, 2009, Glove USA e-mailed Mr. Khan of DCAS seeking a price increase to $53.754. Mr. Khan responded by stating that for gloves already ordered the price was $51.3675, but he suggested that Glove USA ask for an increase for prospective orders. Glove USA made the request for the increase, which DCAS granted, but for prospective orders only; prior, outstanding orders would be paid at the lower rate of $51.3675. At the same time, DCAS was complaining about Glove USA's repeated failure to deliver timely all the goods ordered. DCAS formally declared Glove USA to be in default on April 14, 2009, and put the gloves contract out for bid. Glove USA filed its notice of dispute on May 13, 2009. After Glove USA filed its petition with the CDRB, the City moved to dismiss the petition as time-barred, arguing that the 30-day clock started when Glove USA was notified, by e-mail dated February 11, 2009, that the City disagreed with its contention that the $53.754 price adjustment was retroactive to July 1, 2008. In these particular circumstances, "under these facts" -- unlike the facts of record here -- the CDRB, found ambiguity as to when DCAS made the decision triggering a time bar:

> While it is possible that Glove could have filed a notice of dispute earlier, it seems unreasonable to conclude that the City's formal declaration of default on April 14 did not give rise to a claim for damages and underpayment under the contract, even though portions of the claim might rest upon disagreements which

> had surfaced earlier. Notably, even after the DCAS's declaration of default in January 2009, DCAS continued to negotiate with Glove to obtain additional supplies of goods and, in fact, revised its past pricing calculations as requested by Glove. Where, as here, after a spirited written exchange as to the merits of a contractual issue, a vendor persists in its efforts to persuade agency representatives as to its views, it seems unfair to isolate a single written communication as a "notice of determination" giving rise to a single opportunity to file a notice of dispute. The e-mail in question did not state that it was "determination" or make it apparent that Mr. Khan, the author, had authority to make a final determination.

Glove USA, OATH 2603/10 at 8 (citing *Maracap Construction Industries, Inc. v. Dep't of Transportation,* OATH Index No. 711/08, mem. dec. at 4-5 (May 9, 2008); *Dell Tech Enterprises, Inc. v. Dep't of Environmental Protection,* OATH Index No. 427/07, mem. dec. at 4 (Nov. 22, 2006); *Ajet Construction Corp. v. Dep't of Parks & Recreation*, OATH Index No. 1418/01, mem. dec. (June 28, 2001); *cf. Gateway Demolition Corp. v. Dep't of Housing Preservation & Development*, OATH Index No. 1093/05, mem. dec. at 3-4 (June 9, 2005) (where agency report denying payment is subject to approval by others in the agency, it is not a final determination and does not trigger the 30-day window to dispute)).

Unlike the February 2009 correspondence between DCAS and Glove USA, which never referenced the contract dispute resolution provision in the contract, here, by contrast, in the June-August 2011 correspondence between Ferreira and DOT, both parties invoked Article 27 of the contract. In fact, Mr. Fawzy's August 2, 2011 letter to Ferreira expressly directed Ferreira to pursue its remedies under Article 27. That Mr. Fawzy advised Ferreira to proceed under Article 27 and added the phrase, "in obtaining the Final Notice [from] NYCDOT" (Notice of Claim Ex. 3),[2] did not render the notice defective because petitioner is deemed to have knowledge of the contract terms and the PPB rules. *See Ajet Construction Corp. v. Dep't of Parks & Recreation*, OATH Index No. 1418/01, mem. dec. at 9-10 (June 28, 2001) (Chief Engineer's letter that

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[2] Clearly, Mr. Fawzy was telling Ferreira to file its Notice of Dispute so that it could then proceed to obtain a decision from the Commissioner under the Article 27 Dispute Resolution process. Although it was Ferreira that first wrote in its July 15, 2011 letter that it sought "final written notice" of Mr. Fawzy's determination (Notice of Claim Ex. 4), the word "final" does not appear in Article 27.4 in the context of the agency's initial determination that triggers a Notice of Dispute. Rather, under Article 27.4.3, the Commissioner considers the Notice of Dispute, and then issues a "final" determination, subject to review by the CDRB (Resp., Contract; Tr. 29-31). Mr. Fawzy used the term "final" correctly in his letter.

advised petitioner that the agency denied all payments that exceeded the original contract cost was a determination that started the period under the contract for the contractor to file its Notice of Dispute with the agency head, even though the letter erroneously advised petitioner to appeal to the Comptroller).

It is important to note that Ferreira was not lulled into inaction by DOT's correspondence rejecting its CIVEC calculation. These were sophisticated parties operating under an $11.9 million contract (Resp. Ex. R). Ferreira argued in its correspondence with the Comptroller that the time frame should be tolled by the parties' "continuing dialogue via meetings and emails" (Letter from Mastrola to Palmer, Jan. 18, 2012). But at oral argument, Ferreira's counsel acknowledged that his client was not "induced" by DOT to refrain from filing its notice of dispute earlier than it did (Tr. 18-19).

As for Ferreira's claim that the 30-day clock should be tolled because it met with DOT during the period from August 2 to October 2011, to discuss the dispute and other matters, first, it should be noted that Ferreira did not present a written record of such meetings, such as contemporaneous memoranda or correspondence, despite being given the opportunity to do so by the Comptroller's Office. Further, such discussions, if they did occur, would not toll the 30-day time-frame. *See Gilbert Frank Corp. v. Federal Insurance Co.*, 70 N.Y.2d 966, 968 (1988) ("Evidence of communications or settlement negotiations . . . either before or after expiration of a limitations period . . . is not, without more, sufficient to prove waiver or estoppel"); *Manuel Elken Co., P.C. v. Dep't of Design & Construction*, OATH Index No. 1010/07, mem. dec. at 4 (Feb. 22, 2007) ("it is clear that ongoing settlement discussions do not suspend a contractor's obligation to file a notice of dispute").

Nor does the fact that the DOT Commissioner denied the claim on the merits, and did not refer to the time-bar in her decision waive the applicability of the contractual time frame. *See Alta Indelman, Architect/Builders Group, LLC v. Dep't of Sanitation*, OATH Index No. 1092/05, mem. dec. at 7 (June 16, 2005) ("Nor is respondent restricted in making its arguments here by any arguments or decisions made at earlier stages of this dispute resolution proceeding.")

The claim is time-barred.

Waiver

Even if the claim here were not time-barred, petitioner waived it when it applied in early October 2011 for an extension of time and failed to reserve this claim. Pursuant to Article 13 of

the Contract, when Ferreira applied for an extension of time, it was required to reserve potential claims. Failure to reserve the claims is a waiver. Article 13.8 of the contract provides in pertinent part:

> 13.8.2. In addition, the application for an extension of time shall set forth in detail: . . .
>
> 13.8.2(c) 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.

(Resp. Ex. Q.) On October 4, 2011, Ferreira submitted a "Request for Approval of a Partial Time Extension #2" to DOT, due to delays in necessary renewals of project permits. Ferreira expressly reserved a number of other claims, but said nothing about the CIVEC No. 1 claim at issue here (Resp. Ex. R). In that application, Ferreira wrote that in consideration of the granting of the extension of the contract time fixed in Contract No. HBMC029R, "*we agree to and hereby waive and release any and all claims including, but not limited to, damages for delay or any other cause whatsoever which we may have against the City of New York in connection with the aforesaid contract except the items of claim which we hereby reserve . . .*" (Resp. Ex. R) (emphasis supplied). Nowhere in this application for extension of time is CIVEC No. 1 mentioned.

Ferreira was well aware from June of 2011 that there was a problem, indeed a dispute, about its calculation of the cost savings under CIVEC 1. Its assertion that there was no need to reserve the claim as of October 4, 2011, because it had not yet received Assistant Commissioner Carolan's November 28, 2011 letter and, therefore, was not aware of a final determination (Correspondence with the Comptroller's Office: Letter from Mastrola to Palmer, Jan. 18, 2012), is without merit (Resp. Exs. H, K). At the latest, the CIVEC No. 1 claim ripened on August 2, 2011, and Ferreira failed to reserve its claim at its peril.

"New York courts have consistently enforced waiver of claims in connection with extensions of time." *ADC Contracting & Construction, Inc. v. Dep't of Parks & Recreation,* OATH Index No. 1010/04, mem. dec. at 3 (June 24, 2004); *see also Honeywell, Inc. v. J.P. Maguire Co.***,** 1999 U.S. Dist. LEXIS 1872, at *27, 22-32 (S.D.N.Y. Feb. 2, 1999), *modified in part, adhered to in relevant part,* 2000 U.S. Dist. LEXIS 3699 (S.D.N.Y. Mar. 17, 2000) (similar waiver language held clear, valid, and enforceable: "both federal and state courts in this Circuit have repeatedly found clauses conditioning extensions of time to complete performance of a

construction contract on waivers of the contractor's claims to be valid and enforceable where the waiver is clear on its face"); *Mars Assocs., Inc. v. City of New York*, 53 N.Y.2d 627 (1981), *aff'g*, 70 A.D.2d 839 (1st Dep't 1979) (similar clause enforced); *Naclerio Contracting Co. v. Environmental Protection Admin.*, 86 A.D.2d 793, 794 (1st Dep't 1982)(same).

Ferreira waived this claim. For this additional, independent reason, the claim must be dismissed.

Merits

As noted by the Comptroller, "The purpose of a CIVEC proposal is to encourage [contractors] to share with the Department their ingenuity and experience to achieve cost savings and efficiencies through alternative construction methods" (Correspondence with the Comptroller's Office: Letter from Palmer to Mastrola, Mar. 9, 2012 n.1, citing Notice to Bidders § 8A, Resp. Ex. S). Value Engineering Change Provisions ("VECP"), like the CIVEC provision at issue here, are featured in federal, state, and local government contracts. *See Sayco Ltd. v. Dalton*, 1996 U.S. App. LEXIS 8442, *reported at*, 86 F.3d 1173 (Fed. Cir. Apr. 3, 1996) (court affirmed Armed Services Board of Contract Appeals' award of $151,747.19 to contractor as its share of cost savings for VECP proposals as accepted by the Navy in contracts for submarine connector plugs); *Frank L. Ciminelli Construction Co., Inc. v. New York State Thruway Auth.*, 157 Misc. 2d 188, 190 (Ct. Claims of N.Y. (1992) (in a state contract to rehabilitate bridges, contractor was not entitled to share of savings under value engineering and bonus provisions of the contract where contractor's suggested method of operation was an option under the contract and hence not innovative).

Such clauses are "designed to spur the contractor on to find better and more efficient ways of doing things by rewarding him with a share of the savings." *Morse Diesel International, Inc. v. General Services Admin.*, 97-1 B.C.A. (CCH) P28,634, 1996 GSBCA LEXIS 256 at *9 (Oct. 31, 1996), *corrected*, 97-1 B.C.A. (CCH) P28,677, 1996 GSBCA LEXIS 298 (Dec. 13, 1996) (in contract to construct federal courthouse in St. Louis, GSA Board of Contract Appeals ruled that contractor was entitled to share in cost savings for its VECP proposal to treat contaminated soil on site rather than loading it on trucks for transport to nearest available landfill in Peoria, Illinois).

Under the CIVEC provision in effect here, when the CIVEC proposal is accepted by the Department, the proposed changes are incorporated into the contract and the contractor will be reimbursed for the work "via changes in the quantity of the unit bid items … and new agreed priced items, as appropriate." Notice to Bidders, § 8(D)(1) (Resp. Ex. S at N-11). Here, it is undisputed that this means Ferreira was due $856,188.50, representing the cost of the work done under the CIVEC proposal, using the mini caissons.

In addition to payment for the work completed under the CIVEC plan, Ferreira was entitled to 50% of the savings that resulted from its innovation. The relevant contract clause provides:

> The cost of the revised work as determined from the aforementioned changes in quantities, or new items will be paid directly. In addition to such payment, the Department will pay to the Contractor, via a separate item, 50 percent of the savings to the Department**, as reflected by the difference between the above payment [i.e., actual cost under CIVEC] and the cost of the related construction required by the original Contract plans and specifications computed at Contract bid prices.**

Notice to Bidders, § 8(D)(2) (Resp. Ex. S at N-11) (emphasis supplied).

This clause plainly means the estimated cost (E) minus the actual cost (A) equals the difference or the amount of cost savings (S). Expressed as an equation, the terms would be a simple subtraction:

E (Estimated cost)	Minuend
- A (Actual cost)	- Subtrahend
= S (Savings)	= Savings or Difference

In the above equation, E is the minuend, A is the subtrahend, and S is the difference. It is the parties' calculation of the minuend that is in issue. Using the above subtraction model, the parties made the following calculations using different concepts for the minuend:

DOT:

E (262 x $3,100) (Est. Quantity of 18" Shafts from Bid x Unit Price of 18" Shafts from Bid)
-A (313.39 x $2,150) (Actual Quantity of 12" Shafts x Actual Price of 12" Shafts Used)
=Savings

Ferreira:

E (313.39 x $3,100) (Actual Quantity of 12" Shafts x Unit Price of 18" Shafts from Bid)
-A (313.39 x $2,150) (Actual Quantity of 12" Shafts x Actual Price of 12" Shafts Used)
=Savings

Below are the parties' more detailed calculations with the disputed numbers for the minuend and disputed cost savings highlighted:

Respondent (Agency) Claim	Final Actual Cost to DOT	Total Original Bid
Diameter of shafts	12”	18”
Number of shafts	313.39	262
Price per shaft	$2,150	$3,100
Subtotal	$673,788.50	$812,200.00
Other amounts – not at issue	$182,400	$137,000.00
Total	$856,188.50	$949,200.00
		($856,188.50)
Savings (Bid less Actual)		$93,011.50
Contractor’s Share 50%		$46,505.75

Petitioner (Contractor) Claim	Final Actual Cost to DOT	Projected Cost As If 12” Shafts Were Required by Contract
Diameter of shafts	12”	18”
Number of shafts	313.39	313.39
Original bid unit cost	$2,150	$3,100
Subtotal	$673,788.50	$971,509
Other amounts – not at issue	$182,400.00	$137,000
Total	856,188.50	$1,108,509
		($856,188.50)
Savings (Projected Cost Using Actual Quantity of 12” Shafts at Bid Price of 18” Shafts Not Used Less Final Actual Cost)		$252,320.50
Contractor’s Share 50%		$126,160.25

(Notice of Claim Ex. 5; Resp. Exs. D, T.)

Petitioner’s CIVEC proposal was to replace the contract specified 18” drilled shafts, which had an estimated unit price of $3,100 with 12” drilled shafts, which had a unit price of $2,150. There is no dispute that petitioner’s CIVEC proposal resulted in savings. The dispute is over the calculation of the savings. Under the contract, Ferreira is entitled to 50% of the cost savings that resulted from its proposal. Ferreira claims that its proposal saved DOT $252,320.50, of which it is entitled to $126,160.25. DOT contends that Ferreira’s proposal saved only $93,011.50, of which Ferreira is entitled to $46,505.75.

As the contract states, “savings to the Department” is the difference between the cost under original contract method (if 18” drilled shafts had been used) minus the actual cost under

CIVEC proposal (using the 12" drilled shafts). The parties agree on the subtrahend, i.e., that the actual cost of the work as revised by CIVEC was $856,188.50. The disagreement is over the calculation of the minuend, what the cost would have been if the work had proceeded as originally planned under the contract. In particular, the parties differ on the ***quantity*** to be used for the drilled shafts. DOT argues that the quantity should be the ***estimated quantity of the contract specified 18" diameter drilled shafts*** contained in the ***original bid (262)***, multiplied by the ***original unit price in the bid ($3,100)***. Ferreira argues that the quantity should be ***the "as-built" quantity of 12" diameter mini caissons actually used (313.39)*** multiplied by ***the original unit price ($3,100) of the 18" shafts in the bid estimate, even though the 12" shafts were a different, smaller product with a different unit price that was not part of the estimated cost of this part of the project***.

The Board finds Ferreira's calculation to be erroneous. It made no sense to use the higher quantity of smaller shafts as part of the estimated cost in the minuend because the bid did not contemplate those shafts at all, and the 18" shafts are different from the 12" shafts. The bid price was for units of larger shafts, and there is no reason to mix the estimated bid price with the actual quantity of a completely different product that was not even contemplated in the bid.[3]

A basic rule of contract interpretation is that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records, Inc*., 98 N.Y.2d 562, 569 (2002). Here, had the work been performed as originally provided in the contract, the out-of-pocket cost to the City would have been $949,200. That is the amount the City was prepared to pay. That this was an "estimate," as Ferreira argues (Tr. 7-10),[4] only serves to underscore that estimated cost minus actual cost is the only common sensical reading of section 8(D). By using a greater number of smaller shafts, the

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[3] Contrary to Ferreira's argument that DOT attempted to convert these unit price items, the shafts, into lump sum amounts (Notice of Claim), that was never the case. The only issue is how one properly calculates a simple subtraction using unit prices and quantities as estimated and subtracting from that estimate unit prices and quantities for material actually used.

[4] Ferreira attempts to dismiss the bid quantity of 18" shafts on the theory that the bid quantity is only an estimate, and that the quantities in the Information for Bidders, the argument goes, are not part of the Contract. Article 34B of the Contract, cited by Ferreira simply notes that the quantities in the bid are "only an approximation." That bid quantity is only an estimate is a given, and Article 34B merely says that the City is not bound to exceed the estimated quantity by more than 25%. It is clear that the bid documents are indeed part of the Contract. *See* Contract Art. 1 §1.1.5, Art. 2 § 2.1.8 (Resp.)

actual cost came to only $856,188.50. The difference between the actual total cost and the total bid cost was $93,011.50 ($949,200 - $856,188.50). Thus, the City's use of its expected out-of-pocket cost in the minuend is consistent with the plain meaning of section 8(D)(2), as the "cost of the related construction required by the original Contract plans and specifications computed at Contract bid prices" and is not irrational. *WDF, Inc. v. Dep't of Environmental Protection*, OATH Index No. 1078/06, mem. dec. at 8-9 (Apr. 26, 2006) (CDRB finds plain meaning of contract language controlling; "absolute obligation" on the contractor to secure its work site meant that petitioner's obligation to repair or replace was not limited); *Trocom Construction Corp. v. Dep't of Design & Construction,* OATH Index No. 492/04, mem. dec. at 8-9 (May 10, 2004) (argument that contractor must drill through boulders was contrary to the plain meaning of a contract clause providing that a "false start" would be allowed if the contractor encountered "underground obstructions" where clause included boulders among the enumerated obstructions to be avoided).

Moreover, Ferreira's use of the actual rather than estimated number of shafts in the minuend to calculate the savings is not reasonable because it does not compare like products. Ferreira never explained why it is reasonable to assume that a greater number of the larger and more expensive 18" shafts would have been used if the work had proceeded as originally planned, instead of the estimated quantity of 18" shafts. Although counsel for Ferreira argued that the City's use of estimated quantities in its calculation of savings was not an "apples-to-apples" comparison and that the City was "mixing apples to oranges here" (Tr. 7-10), it is in fact petitioner that is mixing apples and oranges. The main point of the savings was to use a larger number of smaller, cheaper shafts. The savings cannot be calculated by changing the estimated quantity of the larger shafts and positing that DOT would have drilled more 18" shafts under water.

Counsel for petitioner asserted at oral argument that section 8(D) does not include a formula for calculating the savings that result from the adoption of a CIVEC proposal, nor does it contain any reference to quantities (Tr. 44). We find the clause unambiguous; it compares the payment for the actual construction under the CIVEC proposal as accepted to the "cost" of construction required by the original contract "computed at Contract bid prices." "Cost" is defined in the *Oxford English Dictionary* (1971 ed.) as: "That which must be given or surrendered in order to acquire, produce, accomplish or maintain something; the price paid for a

thing." The plain, common sense meaning of cost in this clause for the shafts, which were unit price items, is the quantity estimated in the bid multiplied by the bid price as reflected in the bid documents (Resp. Ex. T). At oral argument, Ferreira's counsel, when asked, "Doesn't *cost* usually mean quantity times price?," answered, "Right," and acknowledged that the Board would have to interpret the "cost" language in section 8(D) (Tr. 26) (emphasis supplied).

Nonetheless, to the extent that petitioner found section 8(D)(2) ambiguous with regard to calculation of savings, it was incumbent upon petitioner to seek clarification during the bid process. *See James J. McCullagh Co., Inc. v. Dep't of Environmental Protection,* OATH Index No. 1065/00, mem. dec. at 7-8 (May 23, 2000). The ambiguities clause in the contract's Invitation for Bidders provides:

> 7. EXAMINATION OF PROPOSED CONTRACT
>
> A. Request for Interpretation of Contract
>
> Prospective Bidders must examine the Contract documents carefully and before bidding must request of the Agency Chief Contracting Officer (the "ACCO") in writing for an interpretation or correction of every apparent ambiguity, inconsistency or error therein which should have been discovered by a reasonably prudent bidder. Such interpretation or correction as well as any additional Contract provisions the ACCO may decide to include, will be issued in writing by the ACCO as an addendum to the Contract, which will be sent by fax or may be obtained by each person recorded as having received a copy of the Contract documents from the Contract Clerk, and which also will be posted at the place where the Contract documents are available for the inspection of prospective Bidders. Upon such mailing or delivery and posting, such addendum shall become a part of the Contract documents, and binding on all Bidders, whether or not actual notice of such addendum is shown.

(*See* Information for Bidders submitted with October 24, 2012 email of Evan Schnittman, Esq., counsel for respondent, and made part of the record.)[5] Ferreira had an obligation to review the

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[5] The parties submitted excerpts of the contract with their pleadings. In its Response to the Petition, dated June 4, 2012, the City noted that "[t]he entire Contract shall be made available to the Board at its request." On October 24, 2012, the Board requested a copy of the ambiguities clause, and the City supplied it via email the same day. In an email dated October 26, 2012, petitioner objected that the ambiguities clause applies only in the pre-bid phase of the contract: "Any issues regarding the application of the CIVEC proposal could only have arisen post bid," such that petitioner would not have to raise any ambiguities in the CIVEC clauses of the bid documents until after it won the contract and a dispute arose about the interpretation of section 8D of the Invitation for Bids concerning CIVEC. The

CIVEC provisions of section 8(D) of the bid documents and request in writing an interpretation or correction before bidding. Having failed to do so, Ferreira is bound by DOT's interpretation of the CIVEC clause. *Thalle Construction Co., Inc. v. City of New York*, 256 A.D.2d 157, 158 (1st Dep't 1998); *Parking Systems Plus, Inc. v. Dep't of Transportation*, OATH Index No. 2350/11, mem. dec. at 8 (Oct. 28, 2011), *aff'd*, 2012 NY. Misc. LEXIS 3357 (Sup. Ct. N.Y. Co. July 10, 2012); *L & L Painting Co., Inc. v. Dep't of Transportation*, OATH Index No. 1152/06, mem. dec. at 4 (July 27, 2006), *aff'd*, 68 A.D.3d 594 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 827 (2010) ("It has long been held in government contracting that a contractor's failure to discover and raise ambiguities prior to submission of its bid, when required under the contract, is bound by the government agency's interpretation of the contract.")

The petition must be denied on the merits because Ferreira's cost savings calculation does not comport with the language of the contract. If there was an ambiguity in the CIVEC clause, it was incumbent upon Ferreira to raise it at the bidding stage. It did not do so. We have considered petitioner's remaining arguments and found them to be without merit. We find that the proper calculation of savings due to Ferreira for its ingenuity was $46,505.75.

CONCLUSION

For all of the foregoing reasons, petitioner's claim should be dismissed and extra compensation denied. The undisputed sum of $46,505.75 due to Ferreira as its share of the cost savings under this contract should be paid to Ferreira without delay if this has not already been done.

Joan R. Salzman
Administrative Law Judge/Chair

Dated: November 16, 2012

Board does not find this argument persuasive. If Ferreira saw an ambiguity in section 8D, it was obliged to raise it at the bidding stage, to avoid precisely the type of dispute that has arisen here. Ferreira also submitted with its email a New York State Department of Transportation clause for the calculation of savings by a contractor. That state contract does not govern here. Nor does it support petitioner's argument. Moreover, the state clause provides that: "The Department is the sole judge in deciding the construction savings due to the implementation of the VECP." If, as Ferreira argues, the state clause should be used for guidance, that provision would defeat its claim. Ferreira has cited no case law interpreting the New York State DOT VECP clause or other such clauses in support of its position.

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