Summit Mechanical Systems Ltd. v. Dep't of Parks & Recreation

OATH Index No. 665/13, mem. dec. (Apr. 17, 2013)

Contract Dispute Resolution Board grants the City's motion to dismiss the portions of the petition because the contractor failed to timely petition the Board after the Comptroller's determination.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS
CONTRACT DISPUTE RESOLUTION BOARD
In the Matter of
SUMMIT MECHANICAL SYSTEMS LTD.
Petitioner
- against -
DEPARTMENT OF PARK AND RECREATION
Respondent

MEMORANDUM DECISION

FAYE LEWIS, *Administrative Law Judge/Chair*

LAURA RINGELHEIM, *Special Counsel, Mayor's Office of Contract Services*

DONNA MERRIS, ESQ., *Prequalified Panel Member*

Presently pending before the Contract Dispute Resolution Board ("CDRB" or "the Board") is the motion of respondent, the Department of Parks and Recreation ("Parks" or "DPR"), to dismiss petitioner's appeal due to its non-compliance with the timeframes set forth in Article 27 of the contracts and the Procurement Policy Board Rules ("PPB Rules"), as well as the Board's lack of subject matter jurisdiction. In its appeal, petitioner, Summit Mechanical Systems, Ltd. ("Summit"), seeks payments totaling $1,906,614.88 for work done and damages it incurred under four contracts with Parks for the performance of heating, ventilation, and air conditioning ("HVAC") work at various locations. For the reasons set forth below, the Board finds petitioner's claims under three of the contracts and a portion of the fourth contract are time-barred and partially grants respondent's motion to dismiss.

BACKGROUND

Forest Park Contract

Summit's first set of claims relate to Contract Number Q015-307M ("Forest Park Contract"). Parks awarded that contract to Summit on July 8, 2008, for the installation of an HVAC system in the Overlook building located in Forest Park, Queens. The original contract price was $140,774.40. Work on the project was to begin on October 6, 2008, and to be completed by April 3, 2009. Throughout its work on this project, Summit had several disagreements with Parks, primarily involving various delays, disputes over what work was required by the contract and what required change orders, and what paperwork was required for Summit to receive payment.

On August 13, 2009, Parks' counsel, Deborah Howe, sent Summit a notice referencing a number of issues that Parks was having with Summit and directing Summit to appear on August 17, 2009, for an opportunity to be heard on why it should not be held in default (J. Marrero Letter to Howe of Aug. 14, 2009; Chan Letter to J. Marrero of Jan. 30, 2012). Summit informed Ms. Howe that it needed more time to prepare a response to all the issues referenced in the notice and requested an extension (J. Marrero Letter to Howe of Aug. 14, 2009).

By letter dated August 17, 2009, Mary Pazan, Parks' Agency Chief Contracting Officer, informed Summit that Parks had found it in default (DPR Mem. Mar. 26, 2013, Appendix 2). The grounds cited for the default included: Summit's failure to commence work, abandonment of the work, refusal to proceed with work, unreasonable delay of work, failure to staff the project, Summit's failure to submit and get approval for shop drawings despite Parks' directives that it do so, Summit's failure to address an issue with an air blower, and Summit's failure to comply with the contract specifications. Summit was directed to immediately discontinue operations under the contract and quit the site (DPR Mem. Mar. 26, 2013, Appendix 2 at 7).

Summit submitted a Notice of Dispute to the Commissioner on July 22, 2011 (J. Marrero Letter to Comm'r Benepe of July 22, 2011 ("Notice of Dispute")). In it Summit argued that Parks delayed getting plans approved and a work permit issued, allowed construction to go forward despite knowledge of an asbestos issue, and failed to pay for overruns as required by the contract. Summit also asserted that there were design errors and omissions which required change orders and that Parks had breached the contract by not paying for the necessary remedial work. Summit further alleged that Parks wrongly defaulted Summit in an attempt to cover up the

design errors and omissions. According to Summit, the contract should have been terminated in the best interest of the City, rather than defaulted, so that Summit could receive payment for the work it completed.

Deborah Howe issued a determination, on behalf of the Parks' Commissioner, on December 30, 2011 (Howe Letter to J. Marrero of Dec. 30, 2011 ("Comm'r Determination")). In it she stated that Article 27 of the Contract was not the proper forum to protest the default; pursuant to Article 49 of the Contract, that decision is only reviewable in a lawsuit filed in court under Article 78 of the New York Civil Practice Law and Rules. As for the payments Summit sought, Ms. Howe stated that under the contract, if a contractor defaults, the City is entitled to hire another contractor to finish the job and charge the defaulting contractor for that work. That money is deducted out of the monies earned prior to default. Because the contract had not been completed, the City could not determine how much money should be paid to Summit for work completed prior to default. Ms. Howe concluded by advising Summit that it could appeal the determination by submitting a Notice of Claim to the Comptroller's Office within thirty days of its receipt.

Summit submitted a Notice of Claim on January 4, 2012 (M. Marrero Letter to Martinez of Jan. 4, 2012 ("Notice of Claim")). The Comptroller issued its determination on May 11, 2012 (Taylor Letter to M. Marrero of May 11, 2012). It framed the dispute as Summit's "conten[tion] that it was wrongly declared in default of the Contract by the Department of Parks and Recreation," and found that protests of default determinations are covered under Article 49 of the Contract, which limits Summit's recourse to commencing a lawsuit under Article 78 of the Civil Practice Law and Rules. Accordingly, the dispute resolution procedure contained in Article 27 of the Contract did not apply and the claim was denied.

Summit submitted a petition to the CDRB dated August 31, 2012 (Pet.). The petition was received by the Board on September 18, 2012. The petition states that "SMS seeks to determine if the Department of Parks & Recreation [sic] City of New York had a design Flaw, with omissions and errors and wrongfully with malice, deliberately defaulted and terminated all our contracts in question as a cover up to their design flaws [sic]." Under the heading for the Forest Park Contract, Summit references missing shop drawings "that required change orders," design flaws and errors, and concludes that "SMS has problems with the Agency's Designs. To go into

greater detail, however, would create implied Warranties on system performance that could be a source of litigation between DPR and SMS, the HVAC Contractor."

Thereafter the Board requested clarification on what relief Summit was seeking. In response, Summit provided a chart indicating that it seeks: $140,774.00, which it alleges is the amount unpaid under the original contract; $179,200.00, which it alleges was the cost it incurred due to the project delays caused by design flaws, omissions, errors and cost overruns; $290 in unidentified "miscellaneous" costs; $168,200.00 to cover the overhead costs incurred due to the delays; $14,200.00 to cover the additional insurance occasioned by the delay; $17,000.00 to cover its legal fees; an undetermined amount of interest on the late payments; an undetermined amount to cover the interest on Summit's line of credit; and an undetermined amount of punitive damages (Forest Park Recapitulation, Oct. 22, 2012).

Marine Park Contract

Summit's second set of claims relate to Contract No. B057-58A ("Marine Park Contract"). Parks awarded that contract to Summit on December 7, 2007, for HVAC work relating to the demolition of a field house and the construction of a community center in Marine Park in Brooklyn (Order to Work Letter to Scibma of Mar. 25, 2008; DPR Mot. to Dismiss, Ex. B). The original contract price was $489,632.00. The project was initially scheduled to begin on February 28, 2008, and be completed by August 20, 2009.

As with the Forest Park contract, Summit had several disagreements with Parks throughout this project. The disagreements were mainly over who was responsible for coordinating the project, what materials and/or manufacturers were to be used, what information was required to be in Summit's submissions to Parks, and how the work was to be done.

On March 24, 2010, Parks sent Summit a letter advising Summit that the contract was terminated, effective immediately, pursuant to Article 64 of the Contract (Pazan Letter to Scibona of Mar. 24, 2010). The reasons for the termination are clarified by Parks' evaluation of Summit, completed on May 3, 2011 (MOCS Contract Performance Evaluation). On "timeliness" Summit was rated "unsatisfactory." The comments to that section explain that Summit submitted drawings late, primarily because it did not properly correct and resubmit drawings. Due to these delays the other trades were unable to use coordination drawings, which negatively impacted their performance. Further, the evaluation stated that Summit only completed .5% of total contract work. Summit was rated "fair" on "fiscal administration and accountability." The

comments on that section noted that by the time the contract was terminated, no sub-contractors had been submitted for approval, that the agency's position was that Summit could not complete the contract, and that Summit missed two of last three site meetings. Summit was rated "unsatisfactory" on "performance and overall quality of work." The comments explain that the duct work and piping installed was problematic as they were too low for the proposed ceiling heights; Summit should have flagged these and corrected them on shop drawing submittals. The ductwork would have to be corrected by another contractor. Based on the three subcategories, Summit received an overall rating of "unsatisfactory."

Summit submitted a Notice of Dispute to Parks' Commissioner on July 22, 2011 (J. Marrero Letter to Benepe of July 22, 2011 ("Notice of Dispute")). It claimed that Parks and the general contractor had caused constant delays on the project. There were many design errors and omissions and the engineers would not approve Summit's submissions in a timely manner. Parks had asked Summit to submit change orders to address the design flaws. Then, rather than approving Summit's change orders, Parks terminated the contract. Summit argued that this constituted a breach because articles 15 and 26 of the contract require Parks to negotiate new unit prices, and the termination was not in the best interest of the City. Summit further contended that Parks had not made its final payment for the stored materials left on the jobsite and the retainer. The Notice of Dispute also alleged that change order form number 2 stated that the reason for it was a "non-material scope change." Summit felt this was inaccurate and should be changed. Finally, the Notice of Dispute referred to an e-mail Summit received which described a meeting at which engineers were allegedly instructed to "frame" the contractors.

The Notice of Dispute on the Marine Park Contract was addressed in the December 30, 2011, Commissioner's determination (Comm'r Determination). It found that the wrongful termination claim was time-barred as Summit was advised of the termination on March 24, 2010, but did not raise the claim until July 22, 2011, outside the thirty-day period provided by Article 27. It also found that the claims with regard to the change orders were not subject to Article 27 resolution, as the details included on the change order had no bearing on payment. With regard to final payment, the determination noted that final payment for this contract was made August 10, 2011, a payment for a change order was made on August 12, 2011, and all remaining retainage was paid on August 19, 2011. Accordingly, Summit's claims for payment were moot. Finally, the determination noted that when a contract is terminated, all payments are deemed

liquidated damages and are accepted by the Contractor in full satisfaction of all claims against the City. Accordingly, Summit's claims were denied. The Determination concluded by informing Summit that it had 30 days to appeal by submitting a Notice of Claim to the Comptroller pursuant to section 4-09 of the Procurement Policy Board Rules. (Comm'r Determination.)

Summit's claims on the Marine Park Contract were included in its January 4, 2012 Notice of Claim to the Comptroller (Notice of Claim). On February 7, 2012, the Comptroller's Office asked Summit to provide a statement as to why the dispute was wrongly decided by the agency head. The Comptroller issued its determination on June 19, 2012, denying the claims (Cox Letter to M. Marrero of June 19, 2012). It informed Summit that it could seek further review "by complying with the requirements of Article 27 of the contract. If an appeal is to be made, three copies of the Contract Dispute Resolution Board petition should be addressed to . . ." (Cox Letter to M. Marrero of June 19, 2012, at 4).

The petition to the CDRB dated August 31, 2012, which the Board received on September 18, 2012, contained Summit's claims on the Marine Park Contract (Pet.). Under the heading for the Marine Park Contract, Summit states that Parks requested shop drawings "that required change orders prior to submitting shop drawings from a design flaw and errors by DPR," and indicates that it was not the design or consulting engineer on the project (implying that it was not its responsibility to create the shop drawings). Summit further states that it "has problems with the Agency's Designs. To go into greater detail, however, would create implied Warranties on system performance that could be a source of litigation between DPR and SMS, the HVAC Contractor."

Thereafter the Board requested clarification on what relief Summit was seeking. In response, Summit provided a chart indicating that on the Marine Park Contract it seeks: $329,853.08, which it alleges is the amount unpaid under the original contract; $146,825.00, which it alleges was the cost it incurred due to the project delays caused by design flaws, omissions, errors and cost overruns; $290 in unidentified "miscellaneous" costs; $168,200.00 to cover the overhead costs incurred due to the delays; $14,200.00 to cover the additional insurance occasioned by the delay; an undetermined amount of interest on the late payments; an undetermined amount to cover the interest on Summit's line of credit; and an undetermined amount of punitive damages (Marine Park Recapitulation, Oct. 22, 2012).

Poe Park Contract

Summit's third set of claims relate to Contract No. X040-504M ("Poe Park Contract"), which Parks awarded to Summit on October 1, 2007, for HVAC work at a playground in the Bronx, which included the installation of a heating and cooling system. The original contract price was $130,790.40. Summit was ordered to work as of November 10, 2007, and there was a scheduled completion date of May 2, 2009 (Poe Park Recapitulation, Oct. 22, 2012).

On October 8, 2010, Summit learned that a Park's audit had questioned its use of black steel pipe on the project, as opposed to the copper pipe specified in the contract, and that payment might be withheld as a result (J. Marrero E-mail to Newsome of Oct. 9, 2010). Summit asserted that the contract permitted it to use steel pipe (J. Marrero E-mail to Newsome of Oct. 9, 2010; J. Marrero E-mail to Newsome of Jan. 10, 2011; M. Marrero E-mail to Morrison of Jan. 13, 2011; J. Marrero Letter to Mulla of Jan. 17, 2011). It offered to replace the black steel piping with copper piping if there was an approved change order for the cost of replacement prior to any work and if Summit received payment on a payment requisition it had previously submitted (J. Marrero Letter to Mulla of Jan. 17, 2011). On May 16, 2011, Parks informed Summit that no payment would be made until the piping was corrected, referred Summit to the provisions of the contract it believed Summit violated, informed Summit that its payment requisition was being rejected and returned, and advised Summit to follow dispute resolution procedures by filing a Notice of Dispute if it disagreed with Parks' decision (J. Marrero Letter to Eng of May 19, 2011; Chan Letter to J. Marrero of Jan. 30, 2012).

Issues under this contract also arose when Summit was required to address water damage. Sometime before March 25, 2011, the electronic controls located in the boiler room were damaged by water and Summit purchased new controls and installed them (J. Marrero Letter to Eng of May 19, 2011). On July 25, 2011, Parks informed Summit about a leak that had developed on a unit in the mezzanine, which caused damage to ceiling tiles and light fixtures, resulting in the unit shutting down (Newsome E-mail to J. Marrero of July 25, 2011). On December 13, 2011, Summit was called to the site because of other problems with the boiler system. It discovered that the vertical section of the boiler discharge on the roof was subject to clogging during heavy rain and snow (J. Marrero E-mail to Shutte of Dec. 14, 2011). In order to protect the system, Summit needed to shut down and drain the system. Summit submitted a change order request to cover the costs of fixing the various water damage issues and correcting

design flaws so that the problems would not reoccur (Invoice for Change Order No. 1, Dec. 15, 2011). On July 9, 2012, Miles Eng informed Summit that "Change Order #1 Boiler Control Board" for the replacement control board was denied by the Engineering Audit Office ("EAO"). The letter informed SMS of its right to request a Commissioner's Determination under Article 27 and stated that such a request must be made within 30 days (Eng Letter to SMS of July 19, 2012).

On July 22, 2011, Summit filed a Notice of Dispute. It alleged that Summit did its work in accordance with the contract and that the steel pipe was suitable; that it completed a disputed punchlist item by hand delivering the needed equipment manuals to the Resident Engineer; that it was entitled to compensation for electrical work that was not in the contract but that the project manager told Summit that it should do; that it was entitled to payment on the change order for the replacement control board[1]; that it was entitled to final payment under the contract; and that it was entitled to liquidated damages for delays beyond its control (J. Marrero Letter to Benepe of July 22, 2011 ("Notice of Dispute")).

These claims were denied in Ms. Howe's determination dated December 30, 2011 (Comm'r Determination). The determination found that: (1) the change order for the control board was still being processed and "therefore there is no dispute requiring a determination"; (2) insofar as Summit said it was entitled to money for electrical work that was not in its contract, Summit never submitted a change order or a written request for additional funds that was denied. Therefore, SMS was not entitled to additional payment, nor is there a dispute on this issue; and (3) Summit's claims for liquidated damages are not subject to Article 27. The determination further noted that Parks rejected Summit's request for payment on May 16, 2011. Accordingly, Summit's claim for that payment in its July 22, 2011 Notice of Dispute was time barred. Moreover, that payment request was legitimately rejected as Summit's work did not conform to the contract specifications which called for copper pipe. The Determination concluded by informing Summit that it had 30 days to appeal by submitting a Notice of Claim to the Comptroller pursuant to section 4-09 of the Procurement Policy Board Rules. (Comm'r Determination.)

[1]It is not clear if the change order Summit referred to is the change order dated December 15, 2011, which it submitted after filing the Notice of Dispute, or if it had previously submitted another one. The change order dated December 15, 2011, was the only change order Summit submitted as evidence to support its Poe Park claims.

Summit's claims on the Poe Park Contract were included in its January 4, 2012 Notice of Claim to the Comptroller (Notice of Claim). After seeking and receiving additional information from Summit, the Comptroller issued a determination on July 31, 2012, denying Summit's claims (DPR Mot. to Dismiss, Ex. P). The determination included a statement that Summit could "seek further review of the contract balance dispute by complying with the requirements of Article 27 of the contract. If an appeal is to be made, three copies of the Contract Dispute Resolution Board petition should be addressed to . . ." (DPR Mot. to Dismiss, Ex. P).

Summit's claims relating to the Poe Park Contract were included in the petition received by the CDRB on September 18, 2012. The petition did not provide any details on what specifically Summit was disputing under the Poe Park Contract, other than the fact that "SMS has problems with the Agency's Designs." After the Board requested clarification, Summit provided a chart which indicates that it is seeking: an unpaid contract balance of $20,075.00; $4,095.53 for the Boiler Control Board damaged by water; $7,488.78 for the work detailed in Change Order No. 1; $164,500.00 for delays caused by designs, omission, and errors; $16,200.00 for fixed and general overhead costs; $290.00 in miscellaneous costs; $14,200.00 for extra insurance costs; an undetermined amount of interest on the late payments; an undetermined amount to cover the interest on Summit's line of credit; and an undetermined amount of punitive damages (Poe Park Recapitulation, Oct. 22, 2012).

P.S. 100 Contract

Summit's fourth set of claims relate to Contract Number X204-405M ("P.S. 100 Contract"). Summit was awarded that contract on May 16, 2008, for HVAC work at a playground in the Bronx, which included the installation of a heating system. The original contract price was $31,093.69. Summit was ordered to work as of September 10, 2008, and there was a scheduled completion date of September 9, 2009 (DPR Letter to Sammis of Aug. 29, 2008; DPR Mot. to Dismiss, Ex. D).

Initially, the contract called for the installation of a gas-fired furnace. Accordingly, Summit ordered a gas-fired furnace ("the Reznor unit"), which was purchased and delivered by December 7, 2009 (J. Marrero E-mail to Pertuz of Dec. 7, 2009). The Reznor unit was custom made and non-returnable (Gardenier E-mail to J. Marrero of Jan. 12, 2010). However, at some point in 2010, Parks discovered that there was no gas service to the location and, accordingly, changed the design to require an electric furnace instead. On or about September 10, 2010,

Parks instructed Summit to submit change orders for purchase and installation of an electric heater, as well as an electric air handler and thermostat (J. Marrero E-mail to Sdao of Sept. 14, 2010).

Pursuant to those instructions, on October 26, 2010, Summit submitted two change order requests: Change Order No. 2 for $8,098.40, to cover the purchase price and installation costs of an electric heater, airhandler, and thermostat, and Change Order No. 3 for $5,620.00, to cover the cost of the Reznor unit. The Engineering Audit Office approved Change Order No. 2 for $7,852.89 and Change Order No. 3 for $5,620.00 on January 4, 2011. On November 30, 2011, the Change Orders were approved by Parks' Deputy Chief. (DPR Mem. Mar. 11, 2013, Appendices 3 and 4.)

Summit submitted a Notice of Dispute to the Commissioner on July 22, 2011. In it, Summit complained that it had not been paid for the change order work and that the change orders had not been registered by the Comptroller's office. Summit also asserted that Change Order No. 2 incorrectly indicated that it was for "non-material scope change" as opposed to "design error or design omission". Summit further stated that it was entitled to liquidated damages for delays beyond its control. (Notice of Dispute.)

Ms. Howe denied these claims in her December 30, 2011, determination (Comm'r Determination). With respect to the delay claims, the determination stated that they were not subject to the alternative dispute resolution provisions in Article 27, but rather needed to be submitted under Articles 11 and 30 of the contract. As for the change orders, the determination noted that they were still being processed and thus found that "there is no dispute necessitating a determination at this time." It also noted that the underlying reason for the change order – whether due to design change or some other basis – had no bearing on payment and was not a matter that could be disputed under Article 27 of the contract. The Determination concluded by informing Summit that it had 30 days to appeal by submitting a Notice of Claim to the Comptroller pursuant to section 4-09 of the Procurement Policy Board Rules. (Comm'r Determination.)

Summit's claims under the P.S. 100 Contract were included in its Notice of Claim to the Comptroller dated January 4, 2012 (Notice of Claim). In response to the Comptroller's request for a statement as to why the agency head's decision was wrongly decided, Summit replied that the "change orders have been in DPR's possession since last year and [we] do not understand

what is taking so long to get paid" (M. Marrero Letter to Taylor of Mar. 6, 2012). On August 1, 2012, the Comptroller's Office requested more time to respond to Summit's claims (DPR. Mot. to Dismiss, Ex. R). Summit agreed to give the Comptroller's until September 15, 2012, to issue a determination (DPR Mot. to Dismiss, Ex. R). The Comptroller failed to issue a determination by that date.

Summit's claims under the P.S. 100 Contract were included in the petition the Board received on September 18, 2012. The petition did not provide any details on what specifically Summit was disputing under the P.S. 100 Contract, other than the fact that "SMS has problems with the Agency's Designs." After the Board requested clarification, Summit provided a chart which indicates that it is seeking: an unpaid balance of $21,319.18; $144,725.00 for "Delays Due to Designs, Omissions and Errors"; $168,200.00 for "Fixed and General Overhead" over two years; $14,200.00 for "Insurance Requirements" over two years; and $290 for "Miscellaneous". In total, they argued that they were owed $348,733.49, plus interest and punitive damages in amounts "to be decided" (P.S. 100 Recapitulation, Oct. 22, 2012).

Motion to Dismiss

Parks responded to the petition on December 5, 2012, by filing the instant motion to dismiss the claims under each contract. In it Parks asserts that Summit failed to comply with the timelines in Article 27 of the contracts and the PPB rules, and that the Board lacks subject matter jurisdiction over some of the claims. Summit submitted an answer on January 14, 2013, which was non-responsive to Parks' arguments. On March 6, 2013, the Board heard oral argument on the motion, after which it requested additional submissions. Pursuant to that request, Parks submitted a supplemental memorandum on March 11, 2013, Summit submitted a supplemental memorandum on March 20, 2013, and Parks responded to Summit's submission on March 26, 2013.

ANALYSIS

Under section 4-09 of the PPB Rules and Article 27 of the contracts, certain disputes arising out of a contract between a vendor and the City are subject to an alternative dispute resolution ("ADR") process, which includes three levels of review: an initial review by the Agency Head, an intermediary review by the Comptroller, and final review by the Board. The PPB Rules and Article 27 provide timeframes for contractors to make submissions at each stage:

a Notice of Dispute must be submitted to the Agency Head "within thirty (30) Days of receiving written notice of the determination or action that is the subject of the dispute," (Contract Art. 27.4), *see also* 9 RCNY § 4-09(d)(1); a Notice of Claim must be submitted to the Comptroller "within thirty (30) days of receipt of a decision by the Commissioner," (Contract Art. 27.5), *see also* 9 RCNY § 4-09(e)(1); and a petition to the Board may be made thirty days after the Comptroller has issued its determination, (Contract Art. 27.7), *see also* 9 RCNY § 4-09(g). Under the rules, the Agency Head's and/or the Comptroller's "[f]ailure to make such determination within the time required by this section shall be deemed a non-determination without prejudice that will allow application to the next level." 9 RCNY § 4-09(b).

The submissions to the Commissioner and to the Board relating to the Forest Park, Marine Park, and Poe Park Contracts did not comply with the timeframes. Parks contends that this requires dismissal of the related claims. Summit alleges that the Commissioner failed to issue its determinations within the thirty days provided by Article 27.4 of the Contracts and PPB Rule 4-09(d)(3) and that this failure nullifies its lateness. Summit argues that its position is supported by the language in Article 27.2 of the Contract ("[f]ailure to make such determination within the time required by this section . . . will allow application to the next level"), *see also* 9 RCNY § 4-09(b), and *Lapeer Contracting Co. v. Department of Parks and Recreation*, OATH Index No. 817/03, mem. dec. (July 14, 2003).

Summit's reliance on *Lapeer Contracting*, OATH 817/03, is misplaced. In *Lapeer*, the petitioner submitted its Notice of Claim on August 29, 2002. Though PPB Rule 4-09(e)(4) and the Contract provide that the Comptroller has 45 days to investigate and compromise the claim, the Comptroller issued a denial on September 13, 2002, prior to the expiration of the 45-day period. The petitioner submitted its appeal to the Board on November 8, 2002, more than 30 days after the Comptroller's decision. In reviewing a challenge to the timeliness of that submission, the Board noted that the contract provided that "in the event the claim has not been settled or adjusted by the Comptroller within the period provided in this section [45 days], the supplier, within thirty (30) days thereafter, may petition the CDRB," and that a contractor "may not present its petition to the CDRB until the period for investigation and compromise delineated in this paragraph has expired." OATH 817/03 at 5-6; *see also* 9 RCNY § 4-09(e)(4), (g). Where the Comptroller issues a decision before its 45 days are up, this language conflicts the Board's normal interpretation that a contractor has 30 days from the issuance of the decision to appeal.

The Board also noted that the Comptroller's denial had not informed petitioner that it had 30 days from its issuance to appeal the denial. Accordingly, neither the contract, the PPB Rules, nor the Comptroller's decision had put petitioner on clear notice that its 30 days for seeking review would start to run on the date the decision was issued, as opposed to the end of the 45-day period the Comptroller had to investigate and review the claim. The Board also noted that the Commissioner had delayed issuing its decision for almost a year, thus, it characterized the petitioner's three-week delay as inconsequential. The Board found that "[u]nder these circumstances . . . petitioner's claim is timely and should be reviewed on the merits." OATH 817/03 at 6.

The instant case is distinguishable as Summit had adequate notice of its timeframe for submitting its appeal to the Board. Unlike *Lapeer*, none of the Comptroller's decisions were issued prior to the expiration of its 45-day time period for investigation and compromise. In these circumstances, no ambiguity is created by the reference to the 45-day period in the contract and PPB Rules 4-09(e)(4) and 4-09(g). Accordingly, Article 27 of the Contract and PPB Rule 4-09(g) provided adequate notice to Summit of its 30-day timeframe. *See Level Export Corp. v. Wolz, Aiken & Co.*, 305 N.Y. 82, 87 (1953) ("He who signs or accepts a written contract . . . is conclusively presumed to know its contents"); *Progressive Casualty Insurance Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993) ("a party who signs a written contract is conclusively presumed to know its contents"). Moreover, though not required by the PPB Rules,[2] the Comptroller's determinations on the Marine Park and Poe Park claims each included additional notice of the timeframe by instructing Summit to follow the provisions in Article 27 of the contract if it wanted to seek further review. *See Silverite Construction Co. v. Dep't of Environmental Protection*, OATH Index No. 1723/12, mem. dec. at 4 (July 20, 2012) (instructions to follow Article 27 of the contract sufficient; enumeration of the steps in the appeals process not required).

The fact that the Commissioner's decisions were late is not, by itself, sufficient to excuse Summit's late submissions. Though the CDRB has not directly addressed this issue, it has issued

[2] Summit's memorandum, dated March 20, 2013, suggests that the Comptroller's failure to include notice of how to appeal in its determination on the Forest Park claims, is an additional grounds for excusing the lateness (Pet. Mem. at 16: "The fact that the comptroller deemed that the Petitioner's recourse was an Article 78 does not excuse the comptroller of notifying the Petitioner of the CDRB"). However, Summit made no showing that the Comptroller was required to include such a notice in its decision. Indeed, unlike the provisions in section 4-09(d)(3) of the PPB

several opinions since *Lapeer* demonstrating that fact. *See, e.g.*, *Silverite Construction Co.*, OATH 1723/12 (petition dismissed where both the Notice of Dispute and Notice of Claim were submitted outside the timeframes delineated in the PPB Rules, despite the fact that the Commissioner's decision was also issued outside the timeframes); *Melcara Corp. v. Dep't of Housing Preservation & Development*, OATH Index No. 1557/12, mem. dec. (Aug. 3, 2012) (petition dismissed due to petitioner's failure to timely file its Notice of Dispute, even though Commissioner issued its determination late); *Skyline Credit Ride, Inc. v. Bd. of Elections*, OATH Index No. 878/12, mem. dec. (Feb. 28, 2012) (petition dismiss where Notice of Claim was untimely, despite Agency Head's failure to follow PPB Rules in issuing its determination); *Start Elevator, Inc. v. Dep't of Correction*, OATH Index No. 1160/11, mem. dec. (Feb. 28, 2011), *aff'd*, Index No. 104620/11 (Sup. Ct. N.Y. Co. Jan. 9, 2012), *aff'd*, 2013 N.Y. App. Div. LEXIS 1556 (1st Dep't 2013) (petition dismissed because it was submitted late to the CDRB, despite Commissioner's failure to issue a determination within its required time period); *Samson Construction Co. v. Dep't of Parks & Recreation*, OATH Index No. 1327/06, mem. dec. (Aug. 7, 2006) (although Commissioner's determination had been issued over 8 months after receipt of first notice of dispute, CDRB dismissed claims because Notices of Dispute were untimely).

Indeed, Summit's assertion that Parks' "unclean hands when it comes to timeliness" excuses its own lateness is akin to an estoppel argument, which is generally not accepted in this forum. *See Arkay Construction, Inc. v. Dep't of Design & Construction,* OATH Index No. 1961/12, mem. dec. at 4-5 (Oct. 2, 2012) (prior erroneous representations by respondent's employees about ADR timeframes did not estop respondent from asserting that petitioner's claims were time barred); *Alta Indelman, Architect/Builders Group, LLC v. Dep't of Sanitation*, OATH Index No. 1092/05, mem. dec. at 7 (June 16, 2005) (rejecting argument that respondent's on-going negotiations and failure to previously argue timeliness estopped respondent from arguing petitioner's claims were untimely at the CDRB); *Ajet Construction Corp. v. Department of Parks & Recreation*, OATH Index No. 1418/01 at 9 (June 28, 2001) (engineer's erroneous instruction that contractor should file claim with the Comptroller, did not excuse contractor's failure to timely file a notice of dispute with the Commissioner).

Rules requiring an agency head to include notice of how to appeal in its determination, section 4-09(e) of the PPB Rules relating to the Comptroller's determination contains no such requirement.

Likewise, Summit's reliance on Article 27.2 and PPB Rule 4-09(b) is unavailing. That rule provides that an agency head's failure to make a "determination within the time required by this article shall be deemed a non-determination without prejudice that will allow application to the next level" (Contract Art. 27.2). *See also* 9 RCNY § 4-09(b). Summit interprets this to mean that if an agency head fails to issue a decision within the requisite timeframe, then the contractor is free to make all other submissions at any time. Such a construction is erroneous and has previously been rejected by this Board. *See Skyline Credit Ride, Inc.*, OATH 878/12 at 6 ("[W]e do not agree that [the contractor] had an unlimited amount of time in which to submit a Notice of Claim. . . ."); *Premier Home Health Care Services, Inc. v. Human Resources Admin.*, OATH Index No. 2514/11, mem. dec. at 7 (Oct. 17, 2011) ("Clearly an interpretation of the PPB Rules which would provide an indefinite timeframe for the petitioner to file would be contrary to the regulatory intent, and we decline to adopt such an interpretation."); *Barele, Inc. v. Human Resources Admin.*, OATH Index No. 1470/11, mem. dec. at 4 (May 16, 2011) ("petitioner is not free to interpret the agency head's failure to issue a decision as an indefinite toll of petitioner's time to submit its Notice of Claim to the Comptroller.").

Instead, the Board has consistently interpreted PPB Rule 4-09(b) to mean that where an agency head fails to make a determination within the required timeframe, the "non-determination" starts the 30-day period for the contractor to make its submission to the Comptroller. *See, e.g., Maracap Construction Industries, Inc. v. Dep't of Transportation*, OATH Index No. 711/08, mem. dec. at 5 (May 9, 2008); *Prime Construction Force v. Dep't of Parks & Recreation*, OATH Index No. 942/06, mem. dec. at 5 (Apr. 4, 2006); *Demo-Tech Corp. v. Dep't of Housing Preservation & Development*, OATH Index No. 659/03, mem. dec. at 5-6 (Nov. 25, 2002). Accordingly, in this case, the only impact of deeming the Commissioner's late decisions "non-determinations" would have been to permit Summit to submit its Notices of Claims to the Comptroller on earlier dates. It would not have excused Summit's subsequent late submissions.

Summit also contends that the timeframes for the ADR process cannot be applied to the Forest Park Contract because Parks failed to properly issue the default. It alleges that the default notice was not signed by the Commissioner as required by the contract and that Summit was not given a reasonable opportunity to be heard before the default was issued. This argument is a red herring. Assuming that Summit's allegations are true, the argument they support is that Parks' issuance of the document labeled notice of default was not a valid means of defaulting Summit.

Clearly, that document is "the determination with which the vendor disagrees" (Contract Art. 27.1.2). *See* 9 RCNY § 4-09(a)(2). Thus, assuming *arguendo* that the ADR provisions apply to disputes over a default,[3] Summit needed to submit a Notice of Dispute to the Commissioner within 30 days of that determination, and follow the other timeframes described in the PPB Rules as well. Summit's arguments go to the merits of its claim,[4] not Parks' motion to dismiss due to a time bar.

The timeframes established by the contracts and the PPB Rules may not be disregarded without good cause. *Start Elevator, Inc.*, OATH 1160/11 at 3; *Delcor Assoc. v. Dep't of Housing Preservation & Development*, OATH Index No. 1872/10, mem. dec. at 2 (Apr. 13, 2010); *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). Here, the petition was submitted on September 18, 2012, approximately three months after the deadline for the Forest Park claims, two months after the deadline for the Marine Park claims, and two weeks after the deadline for the Poe Park claims. The parties agree that the Notices of Dispute were also untimely. Summit has not established a good reason to disregard the timeframes in the contracts and the PPB Rules. Accordingly, Parks' motion to dismiss the claims relating to the Forest Park, Marine Park, and Poe Park Contracts is granted.

In contrast to the claims under the Forest Park, Marine Park, and Poe Park Contracts, Parks asserts that Summit's claims under the P.S. 100 Contract should be dismissed because they were submitted too early. According to Parks, "the nature of the dispute is that C[hange] O[rder]s 2 and 3 . . . have been in DPR's possession for more than a year and that Petitioner does not understand why it is taking so long to get paid" (DPR Mem. Mar. 11, 2013, at 3). Parks alleges that registration and payment of these change orders has been delayed due to Summit's failure to submit an acceptable request for a partial time extension ("PTE"); the PTE Summit submitted did not contain an original signature and was not notarized. Because it has not denied Change Orders 2 and 3, and has agreed to authorize the cost of Change Orders 2 and 3, Parks

[3] The Board is not convinced that it has jurisdiction to review default determinations. *See* Contract Art. 49.2 ("The Commissioner's determination that the Contractor is in default shall be conclusive, final and binding on the parties … If the Contractor protests the determination of the Commissioner, the Contractor may commence a lawsuit in a court of competent jurisdiction of the State of New York under Article 78 of the New York Civil Practice Law and Rules"); *Lapeer Contracting Co., Inc. v. Dep't of Parks & Recreation*, OATH Index No. 817/03, mem. dec. at 9 n.2 (July 14, 2003) ("the Board lacks jurisdiction to reverse an agency finding of default.").

[4] Notably, Summit itself asserts that "the merits of petitioner's claim are identical to whether it was legitimately defaulted under the contract" (SMS Mem. Mar. 20, 2013, at 18).

maintains that there has been no adverse determination which would invoke the ADR provisions in Article 27 of the Contract. Accordingly, Parks argues that the claims under the P.S. 100 Contract should be dismissed as premature.

Summit disagrees. It responds that Parks should not be able to avoid payment by merely agreeing that payment is owed. Summit argues that a dispute over non-payment falls under the type of disputes delineated in Article 27 of the contract and PPB Rule 4-09(a)(2), as it relates to "the interpretation of contract documents," "the amount to be paid for . . . disputed work," and "the conformity of the Contractor's Work to the Contract and the acceptability and quality of the Contractor's Work." Moreover, Parks' contention that the PTE Summit submitted was deficient because it was not signed or notarized is mertiless because the contract does not require PTEs to contain original signatures and be notarized. In any event, after Parks submitted its memo pointing out that deficiency, Summit submitted original signed, notarized PTEs.

Based on the facts of this case, there is no judiciable dispute before this Board regarding Change Orders 2 and 3. Article 27 and the PPB Rules state that a dispute arises under Article 27 and the PPB Rules "when the Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Commissioner makes a determination with which the Contractor disagrees" (Contract Art. 27.1.2). *See also* 9 RCNY § 4-09(a)(2). A contractor can appeal that determination to the Commissioner within 30 days (Contract Art. 27.4). *See also* 9 RCNY § 4-09(d). The Board's role is to review the decisions that the Agency Head makes upon such an appeal (Contract Art. 27.7). *See also* 9 RCNY § 4-09(g). Here, there has not yet been a determination with which the petitioner disagrees, that would trigger the ADR process in Article 27; there is no evidence that a Parks representative has ever denied Summit's change order requests or disagreed with the amount to be paid. Consequently, there is no dispute as that term is defined in the PPB rules; thus there is nothing for us to review. While we acknowledge that there may be some disagreement over what constitutes an acceptable PTE, that was not the dispute which was presented to the Commissioner. In any event, Summit's arguments that the PTEs do not need to notarized and contain original signatures are now moot as Summit has submitted notarized PTEs with original signatures which it appears DPR has approved (Schnittman e-mail to CDRB of Apr. 16, 2013). Accordingly, Summit's claims under the P.S. 100 Contract relating to Change Orders 2 and 3 are dismissed. *See Promotech, Inc. v. Dep't of Design & Construction*, OATH Index No. 460/04, mem. dec. at 3 (Feb. 9. 2004) (dismissing

petition where Commissioner's representative had not yet made a determination with which the contractor disagreed).

However, not all of Summit's claims under the P.S. 100 Contract relate to those change orders. In its submissions, Summit indicated it was seeking an unpaid contract balance of $21,319.18. In addition, under the heading "breach of contract for liquidated damages for delays due to design flaws, omissions, errors and cost overruns," Summit indicated that it was seeking: $144,725.00 for "Designs, Omissions and Errors"; $168,200.00 for "Fixed and General Overhead" over two years; $14,200.00 for "Insurance Requirements" over two years; and $290 for "Miscellaneous" (P.S. 100 Recapitulation, Oct. 22, 2012). The change orders at issue amount to $13,472.89, only a small portion of the P.S. 100 claims. Likely this was part of the unpaid contract balance that Summit referenced. Parks motion to dismiss did not address the other portion of this balance or the other claims enumerated. Thus, these claims remain.

CONCLUSION

Accordingly, Summit's claims relating to the Forest Park, Marine Park and Poe Park Contracts and the claims relating to Change Orders 2 and 3 under the P.S. 100 Contract are dismissed. Parks is directed to submit an answer addressing the outstanding claims within thirty days of this decision, May 16, 2013. All concur.

Faye Lewis
Administrative Law Judge/Chair

April 17, 2013

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