Gandhi Engineering, Inc. v. Dep't of Transportation

OATH Index No. 1602/21, mem. dec. (Apr. 27, 2022)

Contract Dispute Resolution Board finds that contractor's Notice of Dispute seeking reversal of deductions made by DOT from numerous salary payments to workers on five City bridge projects was untimely and claim had been waived in contractor's time extension requests. Board grants DOT's motion to dismiss.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

CONTRACT DISPUTE RESOLUTION BOARD

In the Matter of
GANDHI ENGINEERING, INC.
Petitioner
- against -
DEPARTMENT OF TRANSPORTATION
Respondent

MEMORANDUM DECISION

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

DAVID A. GARFINKEL, ESQ., *Mayor's Office of Contract Services*

JAMES F. MCKEEVER, ESQ., *Prequalified Panel Member*

Pending before the Contract Dispute Resolution Board ("CDRB" or the "Board") is a Petition filed by Gandhi Engineering, Inc. ("Gandhi" or "Petitioner"). The Petition arises from a contract between Gandhi and the Department of Transportation ("DOT," "Respondent," or the "City") for the reconstruction of five bridges in Manhattan and the Bronx. Gandhi seeks review of 120 DOT-issued "Reduction Memos" by which DOT ultimately deducted a total of $685,371.56, invoice by invoice, over two decades, from worker salaries paid by Gandhi, as stated in the numerous monthly payment requisitions Gandhi submitted since 1998. Gandhi claims an award of $685,371.56.

For the reasons set forth below, the Board concludes that the Petition must be dismissed because Gandhi's claim is time-barred and Gandhi waived its claim in return for numerous extensions of time.

BACKGROUND

On June 9, 1997, Gandhi and DOT entered into a $4,889,962 contract for "Total Design and Construction Support Services" on five City bridges: 1) Pelham Parkway Bridge over the Hutchinson River; 2) East 188th Street Bridge over Metro-North; 3) Riverside Drive Bridge over the 158th Street ramp; 4) City Island Road Bridge over Eastchester Bay; and 5) East 78th Street Pedestrian Bridge over the FDR Drive (the "Contract") (Petition ["Pet."] Ex. 4 at 1, SR-28). The Contract was registered by the Comptroller on July 22, 1997, and initially had a duration of four years. Gandhi was ordered to proceed with the Contract work on or about November 12, 1997 (Pet. at 2; Pet. Ex. 1 at 1-2). As the scope of the projects expanded, nine extensions of time were issued, through March 2020, and the contract price increased to $16,451,073.93 (Pet. at 2; Reply at 1-2 and Exs. 1-3 thereto). DOT granted Gandhi's Partial Time Extension ("PTE") Request No. 3, dated March 12, 2009, and PTE Request No. 4, dated October 27, 2011, on the basis that Gandhi agreed "to waive all claims they may have arising from the subject contract in consideration of being granted this extension of time" (Respondent's Motion to Dismiss ["Resp."] Ex. A). In PTE Request No. 5, dated April 17, 2013, PTE Request No. 8, dated September 29, 2017, and PTE Request No. 9, dated December 13, 2019, Gandhi agreed to "waive and release any and all claims . . . which we may have against the City of New York in connection with the aforesaid Contract except for: 1. Overhead Adjustments and related additional fixed fee; 2. Salary Adjustments and related billing; and 3. Pending and future Change Orders for additional and out of scope work" (Reply Exs. 1-3; Resp. Ex. B).

Over the course of the project, Gandhi submitted at least 147 invoices (Pet. Ex. 2 & Attachment 1 thereto). DOT made deductions to most of these payment requisitions through the issuance of approximately 120 Reduction Memos, which reduced the billing by a total of $685,371.56 over two decades (Pet. at 2; Resp. at 2). Gandhi was notified every time a Reduction Memo was issued (Resp. at 2). The deductions span Invoice No. 1, dated April 29, 1998, through invoice No. 147, dated December 6, 2018 (Pet. Ex. 2 at Attachment 1). Gandhi asserts that DOT made these deductions by reducing the base rates charged for its employees despite it being "undisputed that the amounts charged were paid to the workers and that the amounts paid to the workers were, in each instance, less than the maximum amount allowable for the line item" (Pet. at 2) (emphasis in original).

The projects are now "virtually complete" but have not yet been closed out. The final accounting of the project prompted the instant claim (Pet. at 2; Reply at 2).

On October 4, 2019, Gandhi filed by letter a Notice of Dispute ("NOD") with DOT's Commissioner seeking the release of $685,371.56 "withheld by the DOT as a part of Project Manager and Fiscal Reductions" (Pet. Ex. 2). The DOT Commissioner never issued a determination in response to the NOD. Having received no response, Gandhi filed a Notice of Claim ("NOC") with the Comptroller's Office on January 23, 2020 (Pet. Ex. 2). Gandhi supplemented its NOC via letter dated March 12, 2020, which included a summary of 43 Reduction Memos (Pet. Ex. 2).

The Comptroller denied Gandhi's claim in its determination dated January 7, 2021 (Pet. Ex. 1). The Comptroller determined that Gandhi's NOD was untimely, as section D.2 of the Contract required Gandhi to file its NOD with the DOT Commissioner "within ten days of receipt of the determination or action which is the subject of the dispute" (Pet. Ex. 1). The Comptroller determined that Gandhi was notified of the deductions taken by DOT more than one year prior to filing its NOD on October 4, 2019, citing Gandhi's September 25, 2018 tabulation of the deductions in Attachment 1 to its NOD (Pet. Ex. 1 at 3; Pet. Ex. 2 Attachment 1; Pet. Ex. 3). The Comptroller further determined that in PTE No. 3, dated March 12, 2009, Gandhi "failed to delineate and reserve the particulars of this claim" and, therefore, "waived any claim regarding a Contract deduction up to and [preceding] this date" (Pet. Ex. 1 at 3).

On February 4, 2021, Gandhi filed the instant Petition with the CDRB. In lieu of responding to the Petition on the merits, the City filed a motion to dismiss on November 29, 2021. Gandhi submitted a reply in opposition to the City's motion to dismiss on February 17, 2022.

Upon full consideration of the parties' submissions, the Board now grants the City's motion to dismiss the Petition, for the reasons set forth below.

ANALYSIS

The Board's authority to resolve contract disputes between the City and a contractor is set forth in both the Contract and the Procurement Policy Board Rules ("PPB Rules"). The PPB Rules authorize the Board to hear claims "about the scope of work delineated by the contract, the interpretation of contract documents, the amount to be paid for extra work or disputed work

performed in connection with the contract, the conformity of the vendor's work to the contract, and the acceptability and quality of the vendor's work . . . ." 9 RCNY § 4-09(a)(2) (Lexis 2022); *see also* Pet. Ex. 4, Contract, Appendix A, Article 9(A) at 37, "PPB Rules/Resolution of Disputes." The Board's "decision must be consistent with the terms of the contract." 9 RCNY § 4-09(g)(4).

Gandhi's Notice of Dispute Was Untimely

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." *Ferreira Construction Co., Inc. v. Dep't of Transportation*, OATH Index No. 1619/12, mem. dec. at 7 (Nov. 16, 2012) (citations omitted). When a dispute arises, the PPB Rules provide that an NOD must be submitted to the agency head "within the time specified by the Contract." 9 RCNY § 4-09(d)(1). The "Resolution of Disputes" section of the contract, at section D, entitled "Presentation of Disputes to Agency Head," provides at subsection 2, entitled "Time, Form and Content of a Contractor's Notice of Dispute and the Commissioner's Response," that "[t]he notice shall be submitted by the Contractor to the Commissioner within (10) days of receiving notice of the determination or action which is the subject of the dispute" (Pet. Ex. 4, Contract, Appendix A at 37).

"The Board has held that a letter from a person with agency authority who unambiguously denies a contractor's request is a determination that triggers the [contractually provided] period to file a Notice of Dispute." *Triton Structural Concrete, Inc. v. Dep't of Design & Construction*, OATH Index No. 1184/15, mem. dec. at 5 (June 17, 2015); *see also Maracap Construction Industries, Inc. v. Dep't of Transportation*, OATH Index No. 711/08, mem. dec. at 5 (May 9, 2008) ("statutory period for challenging a determination commences when unambiguous notification is issued"); *Ajet Construction Corp. v. Dep't of Parks & Recreation*, OATH Index No. 1418/01, mem. dec. at 10-11 (June 28, 2001) (claim time-barred where letter from the project engineer unambiguously denied change order). Here, the Petition includes 43 of the 120 Reduction Memos in which DOT reduced payments to workers on this Contract via email to Gandhi over approximately 20 years, as shown in Gandhi's Attachment 1 to its Petition, from Invoice No. 1 to Invoice No. 147 (Pet. Ex. 2 & Attachment 1 thereto; Pet. Ex. 3). There is

no contention here that the DOT personnel who reduced the payments lacked agency authority to do so.

DOT issued Reduction Memos in response to most of Gandhi's payment requisitions, beginning as early as April 29, 1998, and continuing through disputed Invoice No. 147, dated December 6, 2018 (Reply at 2; Pet. Ex. 2 & Attachment 1 thereto; Resp. at 2). The terms of the Contract required Gandhi to submit an NOD within 10 days of its receipt of each Reduction Memo, however, Gandhi failed to file its NOD with the DOT Commissioner until October 4, 2019, nearly a year after the last disputed reduction and more than 20 years after the first reduction of pay by DOT. As shown by its Petition, Gandhi was on notice of the reductions at issue as early as September 25, 2018 (and, in fact, for many years before that). *See* Oct. 4, 2019 NOD letter to the DOT Commissioner (Pet. Ex. 2 & Attachment 1 thereto).

Gandhi argues that given the scope of the projects, it would have been "nearly impossible" to "review the amount deducted from the requisitions for each bridge and then file separate claims with back-up support for each deduction on each bridge," and that instead of doing so, it "properly waited until its work was completed and the entire scope of the deductions could be calculated to file its claim" (Pet. at 4-5). Gandhi also argued that "good cause and reasonableness warranted a delay in the filing of repetitive, individual claims until the Project was finally completed, which is precisely what [Gandhi] did," and that to "file separate claims for each and every deduction for each of the bridge projects within ten days of receipt of each of the 120 Reduction Memos" would be "preposterous, and would serve neither DOT, the Comptroller, this Board, nor" Gandhi (Reply at 3).

Gandhi's argument, however, disregards the terms of the agreement into which it entered. The Contract required prompt submission of its disputes to the agency head. Gandhi's contentions that the projects had numerous pay items requiring detailed record-keeping, and that the notice terms to which it agreed were, therefore, onerous, do not constitute good cause for failure to abide by the contractual and regulatory timelines provided for dispute resolution. *See Dell-Tech Enterprises, Inc. v. Dep't of Parks & Recreation*, OATH Index No. 2363/16, mem. dec. at 5 (Oct. 13, 2016) (petitioner "should have filed a NOD within 30 days after each separate DPR determination with which it disagreed, and not waited for all determinations to be issued. The Contract and PPB Rules do not provide for an exception where only a certain percentage of the contract has been performed or where there [is] a high amount of overruns").

Additionally, even if the Board were to consider Gandhi's argument that it was appropriate to file a single NOD with regard to all the deductions taken by DOT once the work was complete, Gandhi was certainly aware of the totality of its dispute by September 25, 2018, the date of a spreadsheet it prepared detailing the various deductions by DOT and amounts Gandhi claimed it was owed (Pet. Ex. 2, Attachment 1). Despite knowing the particulars of its dispute, Gandhi failed to file its NOD until more than a year later, on October 4, 2019.

Gandhi also argues in its Petition that the 10-day NOD provision in the contract did not apply to this claim. It notes that the Contract's Resolution of Disputes Provision applies "solely" to disputes "concerning the scope of the work delineated by the contract, the interpretation of contract documents, the amount to be paid for extra work or disputed work performed in connection with the contract, the conformity of the Contractor's work with the contract and the acceptability and quality of the Contractor's work" (Pet. at 3) (quoting Contract, Appendix A at 37). Gandhi reasons that its claim "does not concern the scope or quality of the contract work, change order work or interpretation of contract language, but rather the claim concerns a series of unilateral deductions from payment requisitions for work admittedly properly performed in accordance with the contract" (Pet. at 3).

Petitioner's argument is without merit. The Board finds that Gandhi's claim involves "the amount to be paid for . . . disputed work performed in connection with the contract." Moreover, Petitioner's argument proves too much. Were the Board to accept Gandhi's argument that the Resolution of Disputes provision of the Contract did not apply to this claim, then the CDRB would be without jurisdiction to hear it. Gandhi voluntarily submitted its Petition to the CDRB, thereby implicitly acknowledging that the Board has jurisdiction to rule on this claim. Gandhi cannot simultaneously deny the Board's jurisdiction over this dispute, assert that certain of the time bars in the Contract do not apply to its claim, and yet pursue a monetary award under other terms of the Contract. Such self-contradictory arguments in the alternative are illogical and unpersuasive on this record.

Gandhi further argues, in its reply letter in opposition to the city's motion to dismiss, that the "10-day notice requirement upon which DOT relies was specifically meant to deal with things such as change orders or allegedly poorly performed or out-of-scope work," and that the short timeframe for submitting disputes was to allow DOT the opportunity to examine such issues at the time each arose, but that in this instance, "DOT was not prejudiced in the least by

the submission of [Gandhi's] disagreement with the deductions as a single claim" (Reply at 3-4).

The Contract provides no support for Gandhi's argument. Gandhi's claim falls squarely within the types of disputes delineated in the Resolution of Disputes section of the Contract. Gandhi agreed to the Contract terms, which required submission of its NOD within 10 days of receiving notice from the agency of an action with which it disagreed. Despite being notified through the issuance of 120 memoranda from 1998 through 2018, of deductions DOT intended to take from its payment requisitions, no NOD was filed within 10 days of any of the memoranda. Instead, Gandhi waited until October 4, 2019, before submitting an NOD regarding the deductions. Gandhi's claim is time-barred.

We have noted that "[t]he New York Court of Appeals has recognized that [a dispute resolution article of a City] contract was designed to protect the public interest in avoiding costly and disruptive delays during public works projects. . . . The policy considerations behind [the dispute resolution article] support the Board's finding that this contract provision requires a contractor to promptly file a notice of dispute soon after learning of an adverse interpretation of the contract." *Dell Tech Enterprises, Inc. v. Dep't of Environmental Protection*, OATH Index No. 427/07, mem. dec. at 6 (Nov. 22, 2006) (citing *Kalisch-Jarcho, Inc. v. City of New York*, 72 N.Y.2d 727, 732 (1988)). *See generally Matter of CCA Civil, Inc. v. Contract Dispute Resolution Bd. of the City of N.Y.*, 2018 N.Y. Misc. LEXIS 744, *2 (Sup. Ct. N.Y. Co. Feb. 14, 2018) ("In order to avail themselves of this dispute resolution procedure, the contractor and the agency must act promptly, within the time frames set forth in the Contract, and the Procurement Policy Board Rules"), *aff'g, CCA Civil, Inc. v. Dep't of Transportation*, OATH Index No. 1528/16, mem. dec. (July 19, 2016).

Moreover, "[f]ailure to comply with the time limits set forth in the Contract and PPB Rules for seeking additional payment is grounds for dismissal of the petition." *Dell-Tech*, OATH 2363/16 at 4; *SPMP Joint Venture v. Dep't of Environmental Protection*, OATH Index No. 808/06, mem. dec. at 2-3 (Jan. 31, 2006); *D & D Mason Contractors, Inc. v. Dep't of Parks and Recreation*, OATH Index No. 158/01, mem. dec. at 3-4 (Aug. 21, 2000).

In sum, Gandhi's NOD was untimely pursuant to the Contract and the PPB Rules.[1] Therefore, the Petition must be dismissed. *See Prismatic Development Corp. v. Dep't of*

[1] Rule 4-09(d)(1) currently provides 30 days for a vendor to submit its NOD to an agency head, while the applicable predecessor of that rule provided 10 days. *See* 9 RCNY § 4-09, note 1 (Lexis 2022), Statement of Basis and Purpose, *City Record*, Aug. 3, 1998.

Sanitation, OATH Index No. 1239/16, mem. dec. at 9 (June 30, 2016) ("Having found the NOD untimely, it is appropriate to grant respondent's motion to dismiss the petition").

Gandhi Waived its Claim in Multiple Time Extension Requests

The Contract requires that when the contractor applies for an extension of time, it must "set forth in detail . . . (c) a statement that the Contractor waives all claims except for those delineated in the application, and the particulars of any claim which the Contractor does not agree to waive" (Pet. Ex. 4, Contract Appendix A, Article 9(E)(1)(c) at 42). New York courts have consistently enforced waivers of claims in extensions of time granted under municipal contracts. More precisely, the "[c]ourts have repeatedly found that claims are waived if they are not included in requests for extension of time and contractors cannot avoid waiver by including vague or broadly worded exceptions in their time extension requests." *Matter of Mace Contracting. Corp. v. New York City Dept. of Environmental Protection*, 2020 N.Y. Slip Op. 33834(U) at **4-5, 2020 N.Y. Misc. LEXIS 9683 at *6-7 (Sup. Ct. N.Y. Co. Nov. 18, 2020) (enforcing waiver against contractor's reservation in time extension of claims for "differential cost, labor rate increase" and "overhead related cost") (citing *Mars Assocs., Inc. v City of New York*, 53 N.Y.2d 627 (1981), *aff'g*, 70 A.D.2d 839 (1st Dept 1979)) (sophisticated contractor must specify its claim and could not rely on blanket exception to waiver; request for time extension including an exception for various "change orders and work under protest" found insufficient to preserve claim for delay damages), *aff'g, Mace Contracting Corp. v. Dep't of Environmental Protection,* OATH Index No. 1434/19, mem. dec. (Jan. 2, 2020).

The Court of Appeals in *Mars* held that the contractor must "state its intentions with clarity" when reserving claims in an extension of time. *Mars*, 53 N.Y.2d at 629. *Accord LAWS Construction Corp. v. Contract Dispute Resolution Bd.*, 145 A.D.3d 523 (1st Dept 2016), *aff'g*, Index No. 159473/2014, 2015 N.Y. Misc. LEXIS 11876 (Sup. Ct. N. Y. Co. July 6, 2015), *aff'g*, *LAWS Construction Corp. v. Dep't of Parks & Recreation*, OATH Index No. 1445/14, mem. dec. at 4, 8-10 (May 28, 2014) (generally worded reservation of claims for monies due to "interferences with and construction changes in the work" and for "all contract monies . . . due . . . for extra and additional work" was insufficient to preserve specific claim that golf course design changes resulted in extra work); *Prismatic Development Corp. v. Contract Dispute Resolution Bd.,* Index No. 100295/2015 (Sup. Ct. N.Y. Co. Nov. 24, 2015) (finding claim for

additional costs resulting from "hidden underwater, man-made obstruction" waived, despite contractor's attempt to reserve "all claims for ... extra ... work" and "additional costs due to test pile program" in extension request), *aff'g*, *Prismatic Development Corp. v. Dep't of Sanitation*, OATH Index No. 2405/14, mem. dec. (Oct. 22, 2014); *Summit Construction Services Group, Inc. v. City of New York*, Index No. 155253/2015, 2015 N.Y. Misc. LEXIS 3108 (Sup. Ct. N.Y. Co. Aug. 20, 2015), *aff'g*, *Summit Construction Services Group, Inc. v. Dep't of Design & Construction*, OATH Index No. 456/16, mem. dec. (Jan. 26, 2015).

Similarly, here, the plain language of the Contract required Gandhi to set forth the claims it was not agreeing to waive and reserve them in detail and with specificity, but Gandhi failed to do so. *See NorthE Group, Inc. v. Dep't of Design & Construction*, OATH Index No. 158/15, mem. dec at 4-6 (Dec. 23, 2014) ("the Board has consistently found that broad categorical reservations, such as those used by NorthE, are insufficient to preserve claims" under the contractual extension of time article of a municipal contract; general categorical reservation of claims, opening possibility of all conceivable claims in a category, held insufficiently particularized and against public policy where contractor knew it wanted payment for specific painting work).

As noted by Petitioner, as a result of DOT's expansion and extension of the projects, nine extensions of time were issued, moving the completion date out by approximately 20 years. In both PTE No. 3, dated March 12, 2009, and PTE No. 4, dated October 27, 2011, Gandhi agreed "to waive and release any and all claims including . . . any . . . cause whatsoever which we may against the City of New York, in connection with the aforesaid contract," "[i]n consideration of the granting, for the purpose of expediting payments," of the extension of time (Resp. Ex. A). That extension was granted on November 4, 2011 (Resp. Ex. A). Thus, any claims to monies deducted by DOT up to November 4, 2011, were clearly waived.

In Gandhi's PTE Request No. 5, dated April 17, 2013; PTE Request No. 8, dated September 29, 2017; and PTE Request No. 9, dated December 13, 2019, Gandhi agreed to "waive and release any and all claims . . . which we may have against the City of New York in connection with the aforesaid contract except for: 1. Overhead Adjustments and related additional fixed fee; 2. Salary Adjustments and related billing, and 3. Pending and future Change Orders for additional and out of scope work" (Resp. Ex. B). Petitioner alleges that it reserved its

claim for payment of monies deducted by reserving "Salary Adjustments and related billing"[2] (Reply at 5). However, this generic language was insufficient to reserve its claim, where Gandhi knew the particulars of each deduction it was contesting but failed to reserve or identify the salary deductions it wanted excepted specifically. *See NorthE Group, Inc.*, OATH 158/15 at 5 (petitioner's "reservation of 'claims asserted by us to the City, but not yet paid by the City' and claims for the 'extra costs of labor and material' and 'overhead and profit' were inadequately detailed and insufficiently particular to . . . preserve its claim for painting and protection work"); *Pavarini McGovern, LLC v. Dep't of Parks & Recreation*, OATH Index No. 1565/14, mem. dec. at 5 (June 20, 2014) (petitioner's "generally worded exemption language lacks the clarity necessary to preserve [petitioner's] claim from waiver").

Allowing a contractor to hold all claims -- here for more than a 20-year period -- to the end of the project, would violate public policy. *LAWS Construction Corp. v. Dep't of Parks & Recreation*, OATH Index No. 1445/14, mem. dec. at 10 (May 28, 2014), *aff'd sub nom.*, *LAWS Construction Corp. v. Contract Dispute Resolution Bd.*, Index No. 159473/2014, 2015 N.Y. Misc. LEXIS 11876 (Sup. Ct. N. Y. Co. July 6, 2015), *aff'd*, 145 A.D.3d 523 (1st Dept 2016); *Almar Plumbing & Heating Corp. v. Dormitory Auth. of the State of New York*, 21 Misc.3d 1119(A), 2008 N.Y. Misc. LEXIS 6135 at ***22-23 (Sup. Ct. Kings Co. 2008) (for public policy reasons the "requirement that contractors must specifically reserve claims or release them . . . is

[2] Gandhi acknowledges in its Reply that in granting this time extension, DOT wrote a notation under the exceptions Gandhi included in PTE No. 5: "Salary Adjustments, billing and Change Orders will be processed in accordance with NYCDOT Guidelines and PPB Rules. No change orders will be process[sic] for out of scope work" (Reply at 5-6 and Resp. Ex. B). DOT approved Extension Nos. 8 and 9 with similar notations, except that the first sentence of DOT's notation on those were in the past tense: "Salary Adjustments, billing and Change Orders were processed in accordance with NYCDOT Guidelines and PPB Rules" (Resp. Ex. B). Extension No. 8 said "was processed" while No. 9 read "were processed" (Resp. Ex. B). Gandhi argues that it distinguished in its 2013 time extensions "pending and future change orders" from "Salary adjustments and related billing," and thus reserved a claim for *all past salary adjustments* (Reply at 5-6). Gandhi contends that its exception for salary adjustments was sufficiently specific and all-encompassing, but this is not so as to the Extensions in which it did attempt to reserve claims, Nos. 5, 8, and 9 (2013-19). And, Gandhi had waived *all* claims in its earlier time extensions. Gandhi then concedes, "in the alternative," that it reserved its claim at least from July 18, 2012, measured by Gandhi from the earliest time: the start of the extension period of PTE No. 5 (Reply at 5-6). We have fully considered the notion that the exception for salary adjustments was sufficiently specific and find this contention to be unsupported by the record, the Contract, and the pertinent PPB rules and case law, as noted above. That DOT invoked the PPB Rules in specific reference to salary adjustments, in granting these extensions starting April 19, 2013 (for the period July 18, 2012 to July 5, 2013), further undercuts Ghandhi's argument that it had successfully reserved what would later, over a 20-year look-back by Gandhi, amount to its current, very specific claim exceeding $685,000 based on 120 Reduction Memos over time. In 2013, DOT was left to divine from Gandhi's generally worded, categorical reservation, what these claims might have encompassed as of 2013 and following. Such guesswork contravenes the Contract terms, the PPB rules, which require specificity in reserving claims, and the public policy in favor of responsible and timely municipal planning and budgeting for infrastructure projects, and achieving finality in government contracts.

imperative for" a public body "for purposes of financial planning, budgeting for future projects, [and] reporting accurately to . . . institutions for which it constructs projects . . . ., and bringing about finality to contracts"). Indeed, had Gandhi timely presented its claims, DOT could have addressed them years ago and the parties might have resolved the dispute before it ballooned to nearly $700,000.

Petitioner was well aware of the particulars of its claim for payment deductions taken over a 20-year period. If Petitioner wished to reserve these claims, it was required to specify the salary reductions it was reserving. The general language of "salary adjustments and related billing" failed to set forth in detail the "particulars" of the claims it intended to reserve. Therefore, Petitioner has waived its claim. Petitioner's waivers constitute an independent reason to dismiss the Petition. *See Pavarini McGovern, LLC*, OATH 1565/14 at 7 (where Board found petitioner's claim to have been waived, it was "unnecessary for the Board to consider the merits of [petitioner's] appeal"). Even if the "Salary Adjustments and related billing" were deemed sufficiently specific as to the post July 2013 claims, Gandhi's NOD was nonetheless time-barred in its entirety.

Unjust Enrichment

Finally, Petitioner argues that DOT's rejection of its claim is unjust. However, it is well settled that the Board cannot provide equitable relief. *See, e.g., Admiral Construction LLC v. Dep't of Design & Construction*, OATH Index No. 2041/21, mem. dec. at 5-6 (Mar. 17, 2022); *J.H. Electric of New York, Inc. v. Dep't of Sanitation*, OATH Index No. 2637/09, mem. dec. at 9 (Aug. 27, 2009) ("the Board is constrained to render its decision solely based on the terms of the contract and the PPB rules, and has no authority to provide equitable remedies"); *Weeks Marine, Inc. v. Dep't of Sanitation*, OATH Index No. 1296/00, mem. dec. at 9-10 (June 23, 2000), *aff'd*, 291 A.D.2d 277 (1st Dep't 2002) ("the Board has no authority to provide equitable remedies"). Rather, the Board's "decision must be consistent with the terms of the contract." 9 RCNY § 4-09(g)(4). Thus, the Board lacks jurisdiction to entertain such equitable arguments.

CONCLUSION

Petitioner's Notice of Dispute was untimely, and Petitioner waived its claim in multiple time extension requests. Therefore, the Petition is dismissed in its entirety. This constitutes the

final decision of the Board. All concur.

Joan R. Salzman
Administrative Law Judge/Chair

April 27, 2022

APPEARANCES:

ROSSI, CROWLEY, SANCIMINO & KILGANNON, LLP
Attorneys for Petitioner
BY: THOMAS J. ROSSI, ESQ.

HON. SYLVIA O. HINDS-RADIX (J.S.C., Ret.)
CORPORATION COUNSEL
Attorney for Respondent
BY: SARA Y. GIRGIS, ESQ.