DC 37, L. 375, 6 OCB2d 12 (BCB 2013)

(IP) (Docket No. BCB-3042-12)

Summary of Decision: The Union alleged that DDC violated NYCCBL § 12-306(a)(1) and (4) by hiring outside consultants to perform work that had been performed exclusively by bargaining unit members without first bargaining over the assignment. Respondents argued that DDC has a statutory right to control its staffing needs and that it had no duty to bargain because the work at issue is not exclusive to Union members. They further argued that this matter should be deferred to arbitration because the Union's claims concern an alleged violation of the parties' collective bargaining agreement. The Board determined that the Union's claims should be deferred to arbitration, pursuant to the provisions of the parties' collective bargaining agreement. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, LOCAL 375,
AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF DESIGN & CONSTRUCTION,

Respondents.

DECISION AND ORDER

On August 30, 2012, District Council 37, Local 375, AFSCME, AFL-CIO ("Local 375" or "Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Design and Construction ("DDC"). The Union alleges that DDC breached its duty to bargain in good faith, in violation of § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)

("NYCCBL"), by hiring outside consultants to perform work that had previously been performed exclusively by bargaining unit members without first bargaining over the assignment. The Union also contends that DDC failed to notify the Union of its intentions prior to contracting out the work. Respondents argue that DDC has a statutory right to control its staffing needs and that it had no duty to bargain because the work at issue is not exclusive to Local 375 members. They further argue that this matter should be deferred to arbitration because the Union's claims concern an alleged violation of the parties' collective bargaining agreement. This Board finds that the Union's claims should be deferred to arbitration, pursuant to the provisions of the parties' collective bargaining agreement.

BACKGROUND

DDC serves as the City's primary capital construction project manager for road, sewer, and water main construction projects. DDC's Engineering Audit Office ("EAO") is responsible for auditing and certifying all payment requests and change orders received under construction-related service contracts with private contractors and consultants. EAO is also responsible for making site inspections to determine whether a contractor is performing work according to DDC's specifications.

Local 375 represents individuals employed in technical trades at DDC and other City agencies.[1] As of October 2012, EAO employed sixteen individuals in the in-house title of Auditor and two individuals in the in-house title of Audit Engineer, all of whom were performing auditing services on DDC's construction projects. Of these eighteen employees, the majority

[1] These individuals are engineers, architects, and auditors and hold the civil service titles of Associate Project Manager, Construction Project Manager, Senior Estimator, Civil Engineer, and Mechanical Engineer, among others.

hold titles that are represented by Local 375. However, one of these employees, Sai-Wing Chow, holds the in-house title of Auditor but is represented by DC 37, Local 1407.[2] The City asserts, and the Union denies, that Chow performs the same work as that of the Local 375 members at EAO.

The City and the Union are parties to the 2008-2010 District Council 37 Memorandum of Economic Agreement ("Agreement"), which remains in *status quo* pursuant to NYCCBL § 12-311(d). Section 11 of the Agreement, titled "Privatization/Contracting-Out/Contracting-In," provides, in pertinent part:

> a. It is the Employer's policy to have advance discussions with the Union to review its plans for letting a particular contract which may adversely affect employees covered by this [Agreement]. The Union shall be advised as early as possible, but in no case later than 90 days in advance of the contract being let, of the nature, scope, and approximate dates of the contract and the reasons therefor.
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> b. The Employer will provide the Union as soon as practicable with information, in sufficient detail, so that the Union may prepare such a proposal designed to demonstrate the cost effectiveness of keeping the work in-house. Such information . . . shall include but not be limited to, applicable solicitations to vendors, winning bids, descriptions of services to be provided by vendors, cost comparison analyses, and the agency's estimated direct operating and administrative costs of contracting out the work.
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> c. Not less than 45 days prior to submission to the Comptroller of a recommendation for the award of the contract, the union shall have an opportunity to make a formal proposal to the employer demonstrating that it is cost effective or that it is in the best interest of the employer to continue to perform such work in house. The Employer agrees to consider such proposal before making a final determination. Such final determination shall be made in writing and submitted to the Union as soon as practicable.

[2] Chow's civil service title is "Accountant II." (*See* Ans., Ex. 2)

(Ans., Ex. 14) Section 12 of the Agreement provides, in pertinent part:

> . . . any dispute, controversy, or claim concerning or arising out of the execution, application, interpretation or performance of any of the terms of conditions of this [Agreement] shall be submitted to arbitration upon written notice therefore by any of the parties to this [Agreement] to the party with whom such dispute or controversy exists. The matter submitted for arbitration shall be submitted to an arbitration panel consisting of the three impartial members of the Board of Collective Bargaining . . . .

(*Id.*)

On or about December 16, 2011, DDC Deputy Commissioner for Infrastructure Eric Macfarlane sent a request for proposal to seven private firms seeking bids to perform "resident engineering inspection services" for a major water main installation project. (Ans., Ex. 11) By letter dated March 9, 2012, Macfarlane informed KC Engineering and Land Surveying, P.C. ("KC Engineering") that its bid had been accepted.[3] In May 2012, three engineers from KC Engineering began performing engineering audit work for EAO.[4]

On August 30, 2012, the same date on which it filed the instant petition, the Union filed a request for arbitration. In the request, the Union framed the dispute as:

> Whether [DDC] violated the terms of Section 11 of the [Agreement] regarding the letting of a contract to [KC Engineering] for engineering review work within [EAO]:
>
> 1) DDC has failed to give the Union advance notice of the employer's intentions to let the above-described contract, thereby denying the Union the ability to review the plans for letting said contract; and

[3] This instance is not the first occasion on which DDC hired an outside firm to perform EAO work. Shortly after the September 11, 2001 terrorist attacks, DDC hired the accounting firm KPMG to supplement EAO's auditing work at the World Trade Center site. KPMG served in this capacity through September 2003.

[4] At least two of the three engineers are former City employees and Local 375 members.

> 2) DDC has failed to provide the Union with information to enable the Union to prepare a proposal designed to demonstrate the cost-effectiveness of keeping the work in-house.

(Ans., Ex. 13) As a remedy for the grievance, the Union seeks rescission of DDC's contract with KC Engineering, compliance with the Agreement's terms, and "any other remedy necessary and proper to make the Union whole." (*Id.*)

As a remedy for the alleged NYCCBL violations in the instant matter, the Union requests that the Board issue an order requiring Respondents to cease and desist from assigning bargaining unit work to non-bargaining unit employees, engage in good faith bargaining over the decision to assign engineering audit duties to non-Local 375 members, and post appropriate notices, including electronic notices.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that DDC unilaterally assigned bargaining unit work to private contractors, in violation of NYCCBL § 12-306(a)(1) and (4).[5] It argues that prior to DDC's decision to subcontract work to KC Engineering, EAO's engineering audit work had "always been performed exclusively by engineers represented by Local 375." (Pet. Memo of Law, at p. 4)

[5] NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> ***
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees[.]

The Union argues that the work being performed by KC Engineering is identical to that of EAO's Local 375 engineers. Relying on a test that was developed by the New York Public Employment Relations Board and which it asserts this Board has adopted, the Union argues that, because the subcontracted work is exclusive to Local 375 and is identical to the work performed by its members, Respondents had a duty to bargain over DDC's decision to subcontract the work.

In response to Respondents' claims that the work at issue is not exclusive to Local 375 and, specifically, that Chow performs the same work as bargaining unit members, the Union argues that the work Chow performs is substantively different from that performed by EAO's Local 375 members because he is an accountant and performs accounting work.[6] In contrast, the Local 375 members perform engineering audit work. It contends that engineering audit work requires an engineering background. As such, an accountant does not have the knowledge base to review complex engineering documents and other tasks performed by Local 375 engineers. The Union asserts that, because there is a factual dispute over what type of work Chow performs, the Board should hold a hearing to resolve the issue.

The Union further argues that Respondents' failure to bargain prior to contracting out bargaining unit work is "inherently destructive" of its members' NYCCBL § 12-305 rights and, accordingly, violates NYCCBL § 12-306(a)(1). (Rep. ¶ 34) It argues that subcontracting without bargaining with the Union is a "direct repudiation of the duty to bargain" and an attempt to avoid dealing with the Union, frustrate employee rights, and undermine the Agreement. (Rep. ¶ 34) Moreover, the Union asserts that such an action can lead to the loss of bargaining unit jobs, which clearly affects its members' terms and conditions of employment.

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[6] As to Respondents' similar contention that KPMG also performed work identical to that of EAO's Local 375 engineers, the Union asserts that it is unclear how much of KPMG's work was similar to its members' work, but that "[m]inor, temporary incursions into bargaining unit work may not always defeat claims of exclusivity." (Rep. ¶ 29) (citations omitted)

The Union contends that NYCCBL § 12-307(b) does not obviate the City's bargaining obligation. It also argues that deferral is not appropriate because the issues submitted and the relief sought here are wholly different from what it asserts in its request for arbitration. In the instant petition, the issue is whether Respondents must negotiate over DDC's assignment of bargaining unit work and the relief sought is an order directing Respondents to bargain. In contrast, the issue for arbitration is whether Respondents violated the Agreement by failing to give the Union advance notice of its intention to subcontract with an outside firm, thus precluding the Union's opportunity to submit a competitive proposal for the work. As a remedy in the arbitral matter, the Union seeks rescission of the contract and compliance with the Agreement.

City's Position

Respondents argue that the Board should dismiss the petition because DDC's hiring of KC Engineering falls within its express managerial rights under NYCCBL § 12-307(b) to "direct its employees and determine the methods, means and personnel by which government operations are to be conducted." *Id.* Among the rights encompassed by this provision, Respondents contend, is the ability of management to control its staffing needs. Here, Respondents sought the assistance of a private contractor because DDC needed to finish a multimillion dollar project within a condensed time frame.

Moreover, Respondents contend that the Union cannot demonstrate that the duties performed by EAO engineers are exclusive to Local 375 members and, thus, a mandatory subject of bargaining. By way of example, Respondents argue that Chow has been performing the duties that Local 375 contends are exclusive to its bargaining unit for over 10 years. In addition, they argue that DDC contracted out the work performed by EAO's Local 375 members to KPMG in 2001. Because the work at issue is not exclusive to Local 375, Respondents had no duty to

bargain with the Union and hence did not violate NYCCBL § 12-306(a)(4). Respondents also argue that the Union failed to establish an independent violation of NYCCBL § 12-306(a)(1) because it has not alleged any facts to demonstrate that the alleged assignment of bargaining unit work to KC Engineering prevents Local 375 members from exercising their protected employee rights, nor has it demonstrated anti-union animus.[7]

Finally, Respondents contend that the instant petition should be deferred to arbitration because the factual dispute over the assignment of auditing work to KC Engineering is governed by § 11 of the Agreement. They assert that, for matters that require contract interpretation but may also involve application of the NYCCBL, it has long been the policy of the Board to defer disputes to arbitration and then resolve any outstanding improper practice allegations that are not addressed in the arbitration. Moreover, they assert that under the Board's test for deferral to arbitration, the claims alleged in the petition should be deferred.

DISCUSSION

The Union claims that Respondents violated NYCCBL § 12-306(a)(1) and (4) when DDC contracted out exclusive bargaining unit work to KC Engineering without first bargaining or notifying the Union. The Union filed a related grievance alleging that DDC violated the parties' Agreement by, among other things, failing to notify it prior to letting the contract to KC Engineering. For the following reasons, we defer the Union's improper practice claims to the parties' contractual grievance process.

[7] Respondents further argue that DDC did not violate the Agreement by subcontracting with KC Engineering. They assert that § 11 of the Agreement mandates that the employer hold advance discussions with the Union to review its plans for "letting a contract which may *adversely* affect employees covered by that agreement." (Ans. ¶ 48) (emphasis in Ans.) The City argues that there is no evidence that DDC's hiring of KC Engineering employees had any adverse impact on City employees.

Pursuant to Civil Service Law § 205(5)(d), this Board lacks the authority "to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice." *Id.*; *see DC 37*, 79 OCB2d 21, at 20-22 (BCB 2007) (same); *see also DC 37, L. 1508*, 79 OCB 11, at 12 (BCB 2007) (alleged contract violations that do not otherwise constitute improper practices are expressly beyond the Board's jurisdiction). The instant matter involves a claim that arises under both the NYCCBL and the parties' Agreement. When such is the case, we will defer disputes to arbitration "where the circumstances are such that the contractual arbitration procedure provides an appropriate means of resolving the matter, consistent with the declared policy of the NYCCBL to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations." *DC 37*, 79 OCB 21, at 21.

Here, we find that the Union's improper practice claims arise out of the same transaction as its contractual claims. That transaction is the letting of a contract to KC Engineering to perform work for DDC's EAO. As a result, the facts concerning Respondents' alleged refusal to bargain over claimed exclusive unit work or to notify the Union that it planned to subcontract such work are inextricably intertwined with the questions raised in the Union's August 31, 2012 request for arbitration. Accordingly, we defer this matter to the arbitration process, which is currently proceeding, so that it may be resolved in whole or in part by the arbitration of the pending grievance. *See DC 37, L. 1508*, 79 OCB 11, at 15 (noting that the Board generally has not exercised its jurisdiction over improper practice claims when the same claim and issues are pending in another forum in order to avoid unnecessary duplication of effort and the risk of an inconsistent determination).

In deferring this matter to arbitration, however, we recognize that not all the issues raised by the Union in the petition are identical to those asserted in the grievance. The facts asserted in both the grievance and the petition, however, are sufficiently interrelated so as to be appropriate to defer this matter to the pending arbitration proceeding. Under the circumstances, the Board shall retain jurisdiction over the instant improper practice petition but hold any further proceedings in the matter in abeyance until such time as an arbitrator has issued an opinion and award. At that time, if either party seeks to proceed with the improper practice in this forum, we shall determine whether any of the material issues raised in the pleadings remain unresolved following the arbitration, and proceed accordingly. *See DC 37, L. 1508*, 79 OCB 11, at 15.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the claims contained in the verified improper practice petition filed by District Council 37, Local 375, AFSCME, AFL-CIO, docketed as BCB-3042-12, are hereby deferred to the parties' contractual arbitration procedure; and it is further

ORDERED, that the Board shall retain jurisdiction over the improper practice petition but hold any further proceedings in abeyance until such time as an arbitrator has issued an opinion and award in the arbitration docketed as A-14277-12, at which time, if either party seeks to proceed with the instant matter, the Board shall determine whether there are material issues raised in the pleadings which remain unresolved following the arbitration and proceed accordingly; and it is further

ORDERED, that the Board shall also retain jurisdiction over the improper practice petition should a determination on the merits of the contractual claims be foreclosed or should any award issued by the arbitrator be repugnant to rights under the New York City Collective Bargaining Law.

Dated: May 29, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PETER B. PEPPER
MEMBER