

# ***Judlau Contracting, Inc. v. Dep't of Transportation***

OATH Index No. 981/25, mem. dec. (May 21, 2026)

Contractor sought determination that the Department's directive to replace garage floor instead of repairing or replacing selected floor slabs was a material alteration prohibited under Article 25.2 of the Contract. The Board finds that the Department's directive does not constitute a material alteration in the scope of work in the Contract. Contractor's petition is dismissed. All members of the panel concur.

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## **New York City Office of Administrative Trials and Hearings Contract Dispute Resolution Board**

*In the Matter of*  
**Judlau Contracting, Inc.**  
*Petitioner*  
*-against-*  
**Department of Transportation**  
*Respondent*

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### **Memorandum Decision**

**Astrid B. Gloade**, *Administrative Law Judge/Chair*

**Nick Negron, Esq.**, *Mayor's Office of Contract Services*

**James A. Brown, Esq.**, *Pre-qualified Panel Member*

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Pending before the Contract Dispute Resolution Board (“Board” or “CDRB”) is a petition filed by Judlau Contracting, Inc. (“Judlau”) arising from a contract with the Department of Transportation (the “Department”) for the rehabilitation of the West 79th Street Bridge over Amtrak and the West 79th Street Rotunda Complex (“Project”). Judlau seeks a determination that the Department’s directive for Judlau to replace the Rotunda’s garage floor is a material alteration in the “scope of Work in the Contract” and is prohibited under Article 25.2 of the Contract (Amended Petition (“Amend. Pet.”) at ¶¶ 1, 12). The Department seeks dismissal of the petition (Response to Amend. Pet. (“Resp.”) at 2).

Oral argument was held before the Board via videoconference on February 5, 2026, and the record was held open for the submission of additional documents (Tr. 49-50). The Board extended its time to issue its decision to May 22, 2026. *See* 9 RCNY § 4-09(g)(4) (Lexis 2026). For the reasons below, the Board finds that the Department’s directive does not constitute a material alteration in the scope of work in the Contract.

## **Background**

The Rotunda is a three-level multimodal structure (Contract at PDF pg. 657<sup>1</sup>). The top level is a vehicle traffic circle that serves as an interchange for West 79th Street and the southbound side of the Henry Hudson Parkway (Contract at 657, 660). The middle level is a pedestrian plaza, and the bottom level is the garage where the concrete floor at issue is located (Contract at 661-62). The Rotunda has not undergone any major rehabilitation since it was built in 1936 (Contract at 657). In April 2021, Judlau and the Department entered into a \$149,988,555 contract (“Contract”) <sup>2</sup> for rehabilitation of the Rotunda and the 79th Street Bridge (Resp. at 2). With regard to the Rotunda, the “Project Goal” is described as “Comprehensive Rehabilitation of the West 79th Street Rotunda Complex” (Contract at 654).

The Contract’s Special Provisions provide a general overview of the scope of work and expressly state that they do “not reflect all of the work necessary to complete this Contract” (Contract at 1476). The Special Provisions note that work at the traffic circle level includes the

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<sup>1</sup> Citations to pages of the Amended Petition’s Exhibits, the Response’s Exhibits, and the Contract refer to PDF pages numbers of those files as received by the Board from the parties.

<sup>2</sup> Contract No. HBM1189, Comptroller Registration No. 20211418736 (Amend. Pet. at ¶ 9).

removal of the West 79th Street Bridge deck and replacement with a new reinforced concrete deck and steel girder composite structure, installation of new anchored concrete traffic barriers, and replacement of concrete curbs and safety walks (Contract at 1477-78). Work at the plaza level includes partial replacement of the concrete deck, stone/tile floor, and Guastavino ceiling vaults, and upgrading of the level's utility, ventilation, and fire safety systems (Contract at 1478-79).

At the garage level, the Special Provisions provide that the "existing concrete garage floor slab shall be repaired as required and as indicated in the plans" (Contract at 1481). In addition to this repair work, Contract Drawing SR-414 calls for the replacement of a specified portion of the floor in the northwest corner of the garage that was "cracked and depressed" (Amend. Pet. Ex. 2 at 51). The drawing includes a note that the "contractor shall field verify the limits of the damaged slab" (*Id.*). The Special Provisions also call for replacing the garage's underground drainage system, upgrading all utilities, and repairing and/or replacing existing New York City Department of Parks and Recreation ("DOPR") facilities located in the garage (Contract at 1481-82).

Work began on the Project in 2022 (Amend. Pet. Ex. 8 at 194). While at the Project site, Judlau observed that in addition to the portion of the garage floor specifically marked for replacement in Contract Drawing SR-414, "several other" areas of the garage floor were cracked and depressed (Amend. Pet. Ex. 8 at 199).<sup>3</sup> In addition, "when Judlau began to remove the concrete step in front of the existing Garage Level Parks Offices, a void was discovered between the concrete slab and existing subbase. The void appear[ed] to be approximately two feet deep at this location" (*Id.*). On May 27, 2022, Judlau submitted a Request for Information to the Department that described its observations, provided photographs, and asked for direction on how to address the issue (Amend. Pet. Ex. 8 at 199-218). Subsequently, while performing the drainage work outlined in the Special Provisions, which required Judlau to cut through portions of the garage's concrete floor in order to excavate and reach the areas where a new water main would be installed, Judlau discovered that portions of the floor were collapsing from lack of

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<sup>3</sup> The Request for Information, dated May 27, 2022, is marked "draft," but the parties do not dispute its accuracy or completeness.

support (Resp. Ex. C at 123; Resp. Ex. D at 124). On January 13 and 17, 2023, Judlau submitted to the Department additional Requests for Information that detailed the problem and requested direction on how to proceed (*Id.*).

In response to the issues Judlau identified, the Department issued “field change sheets” that called for replacement of the entire garage floor (Amend. Pet. at ¶¶ 11-12). The Department emailed the field change sheets to Judlau on July 12, 2023, and asked Judlau to provide a cost proposal for the work (Amend. Pet. Ex. 4 at 109). In emails exchanged between September 25 and October 18, 2023, Judlau submitted a proposal for the garage floor change order that the Department found insufficiently detailed, so the Department asked Judlau for a revised estimate (Amend. Pet. Ex. 4 at 104-08). In email correspondence on October 18, 2023, Judlau responded with a lump sum estimate of over \$20 million and asserted that the plan to replace the entire garage floor constituted “a material alteration in the scope of Work in the Contract contrary to Article 25.2” (Amend. Pet. Ex. 4 at 104-05). On November 10, 2023, the Department replied, stating:

[I]t is [the Department’s] position that the Garage floor slab replacement does not constitute a material alteration of the scope as outlined in Article 25.2. The replacement of the floor slab is necessary to perform the contract work. Without removal, the unsupported and minimally reinforced slab will be a hazard to workers performing the drainage and utility work . . . . In addition, a goal of the contract is to have a functioning Garage, including the floor slab, and it will not be possible to restore the existing slab after the drainage and utility work is complete. Thus, construction of [the] new slab will be necessary. Although a significant addition to the contract, the floor slab replacement is not a material alteration of the scope.

(Amend. Pet. Ex. 4 at 104). The Department concluded by again asking Judlau for a detailed price estimate (*Id.*).z

On November 16, 2023, Judlau submitted a Notice of Dispute to the Department’s commissioner (Amend. Pet. at ¶ 20). In the Notice, Judlau contended that the plan to replace the garage floor “completely alter[ed] the scope of work” by requiring the floor “to be completely removed . . . and poured back new” (Amend. Pet. Ex. 4 at 102). Judlau also stated that the new plan would require the “cleaning and priming [of] existing exposed structural steel before placing new concrete” (*Id.*). Judlau argued that the plan to replace the garage floor, along with the

associated extra work entailed, “was never considered in this Contract and constitutes a material change” (Amend. Pet. Ex. 4 at 103).

On January 11, 2024, the Department issued its determination on the dispute (the “Agency Determination”), concluding that the plan to replace the Rotunda’s garage floor did not materially alter the scope of work in the Contract (Amend. Pet. at ¶ 21; Amend. Pet. Ex. 4 at 99-100). The Department reasoned that the structural issues Judlau identified created safety concerns for the workers working in the watermain trench and made the existing floor unsuitable for new DOPR facilities to be constructed on top of it (Amend. Pet. Ex. 4 at 99-100). For these reasons, replacement of the floor was “necessary to complete the original scope of work” and the Department was authorized to make such changes to the Contract pursuant to Article 25 (*Id.*).

On February 9, 2024, Judlau filed a Notice of Claim with the Comptroller, seeking review of the Agency Determination (Amend. Pet. at ¶ 23; Amend. Pet. Ex. 4 at 92-97). On April 10, 2024, while Judlau’s Notice of Claim was pending, the Department registered Change Order Number 2024-0025, directing Judlau to replace the garage floor, with the work to be compensated on a time and material basis (Amend. Pet. Ex. 3 at 90). On August 26, 2024, the Comptroller denied Judlau’s claim, finding that “[t]he replacement of the garage floor slab is clearly Extra Work and does not constitute a material change in the scope of the Contract.” The Comptroller reasoned that whether a change is material “must be judged in the context of the Contract in its entirety” (Amend. Pet. Ex. 7 at 185-89). The Comptroller noted that Article 78.2 of the Contract “clearly anticipates and allows for changes based on differing site conditions” (*Id.*).

Judlau filed its original petition with the Board on November 8, 2024.<sup>4</sup> On March 28, 2025, the Department submitted a letter application seeking dismissal of the petition for lack of jurisdiction over the claim. On April 10, 2025, Judlau submitted notice of its intent to amend its petition and submitted an amended petition on April 24, 2025, to which the Department

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<sup>4</sup> From the record, it appears that Judlau’s original petition to the Board may have been untimely. See 9 RCNY § 4-09(e)(4), (g). Timeliness was not raised by the Department and is not addressed here. See *Triton Structural Concrete, Inc. v. Dep’t of Design & Construction*, OATH Index No. 2362/16, mem. dec. at 7 (Jan. 18, 2017) (citing *A.J. Pegno Construction Corp./Tully Construction Co., Inc. for Titan Roofing, Inc. v. Dep’t of Environmental Protection*, OATH Index No. 1436/08, mem. dec. at 4 (May 21, 2008)).

objected (Reply Exs. 17, 19). The Board denied the Department's application to dismiss the petition on May 8, 2025 and accepted Judlau's amended petition (Reply Ex. 18). The Department answered the amended petition on July 22, 2025 (*Id.*; Resp. at 23). Judlau submitted a reply on August 19, 2025.

## **Analysis**

Contract Article 27 and Procurement Policy Board ("PPB") Rule 4-09 provide the Board authority to resolve disputes. The Board's jurisdiction includes "disputes about the scope of Work delineated by the Contract [and] the interpretation of Contract documents" (Contract Art. 27.1.2 at 1196). 9 RCNY § 4-09(a)(2). The Board's decision "must be consistent with the terms of the contract." 9 RCNY § 4-09(g)(4).

Judlau argues that the Department's directive to replace the Rotunda's garage floor violates the Contract's prohibition on changes "for any material alteration in the scope of Work in the Contract" (Amend. Pet. at ¶¶ 42-51; Contract Art. 25.2 at 1192). Judlau also contends that the Contract's differing site conditions provision (Contract Art. 78.2 at 1241) does not authorize material alterations in the scope of Contract Work (Amend. Pet. at ¶¶ 77-81). In response, the Department argues that the Board lacks jurisdiction to grant the relief Judlau seeks and that its directive does not materially alter the scope of Contract Work.

For the reasons below, the Board finds that it has jurisdiction over this dispute and that the Department's directive is not a material alteration in the scope of Contract Work.

### **The Dispute is Within the Board's Jurisdiction**

The Department argues that Judlau is seeking to avoid performing work that is within the original scope of work in the Contract and its request for relief essentially seeks rescission of the Contract (Resp. at 21). On this premise, the Department argues that rescission is an equitable remedy that the Board lacks the authority to provide (Resp. at 21-22). In response, Judlau contends that it is within the Board's jurisdiction to determine whether the Department's directive violated Article 25.2 of the Contract and that it is "asking the Board to enforce the Contract, not to disavow it" (Reply at 13).

The PPB Rules and Contract authorize the Board to resolve "disputes about the scope of Work delineated by the Contract [and] the interpretation of Contract documents" (Contract Art.

27.1.2 at 1196). 9 RCNY § 4-09(a)(2). The dispute here concerns whether the Department's directive contravenes Article 25.2, which provides that "[c]hanges are not permitted for any material alteration in the scope of Work in the Contract." Article 25 further provides that changes may be made to the Contract only if they are "in accordance with the Law and [the] Contract" (Contract Art. 25.1 at 1192). Deciding whether a proposed change is within the scope of work under the Contract is precisely the kind of dispute that the PPB Rules and Contract authorize the Board to consider. *See Travelers, Surety for Modern Continental Construction Co., Inc. v. Dep't of Environmental Protection*, OATH Index No. 1499/13, mem. dec. at 6 (Feb. 5, 2014) (finding that the Board has jurisdiction to consider issues "plainly within the dispute resolution process in the contract and [PPB] rule 4-09").

Additionally, the parameters of the Board's review merits brief discussion in light Judlau's request for a determination annulling and vacating the Comptroller's determination as well as that of the Department (Amend. Pet. at ¶¶ 1, 41, 43, 76, 82). While the Board has jurisdiction to review the Agency Determination, it is not empowered to review the Comptroller's determination, and thus may not consider Judlau's request for a determination annulling and vacating that determination (Contract Art. 27.7 at 1198 ("Contractor . . . may petition the Contract Dispute Resolution Board to review the Commissioner's determination.")). *See* 9 RCNY § 4-09(g) ("[T]he vendor . . . may petition the CDRB to review the Agency Head determination."); *see also Adam Developers Enterprises, Inc. v. Dep't of Design & Construction*, OATH Index No. 527/18, mem. dec. at 4-5 (Oct. 5, 2018) ("[T]he Board's review of this claim was confined to the Commissioner's determination, consistent with the PPB rules and the Contract.").

### **Scope of Contract Work**

The issue here is whether the Department's directive that Judlau replace the Rotunda's garage floor instead of repairing and replacing selected floor slabs materially alters the scope of work in the Contract, which is prohibited under Article 25.2 of the Contract. The Board concludes that it does not.

Contract Article 25.2 provides:

Contract changes will be made only for Work necessary to complete the Work included in the original scope of the Contract and/or for non-material changes to the scope of the Contract. Changes are not

permitted for any material alteration in the scope of Work in the Contract.

Resolution of this dispute turns on whether the Department's directive for Judlau to replace the Rotunda's garage floor is a change necessary to complete work included in the original scope of the Contract, which the Contract permits, and whether the floor replacement work materially alters the scope of work in the Contract, which is prohibited.

### **The Change is Necessary to Complete Work Included in the Original Scope of the Contract**

Because the Contract permits changes that are "necessary to complete the Work included in the original scope of the Contract," the Board must consider whether replacement of the garage floor falls within this provision. We find that it does.

In construing a contract, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). "Whether a contractual term is ambiguous must be determined by the court as a matter of law . . . ." *Duane Reade, Inc. v. Cardtronics, LP*, 54 A.D.3d 137, 141 (1st Dep't 2008) (citing *Kass v. Kass*, 91 N.Y.2d 554, 566 (1998)). "An agreement is unambiguous 'if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'"" *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 244 (2014) (alteration in original) (citing *Greenfield*, 98 N.Y.2d at 569). The parties agree that Article 25.2 of the Contract is not ambiguous (Tr. 32-33, 41-42), yet advance different constructions of its terms.

The Contract provides that changes are permitted where necessary to complete work that is within the original scope of the Contract. "Necessary" is not defined in the Contract, but is commonly defined to mean "required" and "absolutely needed." See Merriam-Webster, Necessary, <https://www.merriam-webster.com/dictionary/necessary> (last updated May 9, 2026). The Board agrees with the Department that replacement of the garage floor slab is necessary to complete work that is included in the original scope of the Contract.

Judlau's assertion that one cannot "genuinely characterize 'the work to be performed' as the 'renovation of the Rotunda Complex'" and that it "did not assume an obligation to perform any and all work relating to the 'Rotunda Complex' as a whole" (Amend. Pet. at ¶¶ 66-67; Tr. 13) ignores the explicit and broad contractual language defining "Work" and "Project."

The Contract defines "Work" as "all services required to complete the Project . . ." (Contract Art. 2.1.35 at 1158). "Project" is defined as "the public improvement to which this Contract relates" (Contract Art. 2.1.26 at 1157). The provision in Article 25.2 that permits changes for "Work necessary to complete the Work included in the original scope of the Contract" must be construed in keeping with those definitions. *See Empire Properties Corp. v. Manufacturers Trust Co.*, 288 N.Y. 242, 248 (1942) ("A written contract 'will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.'" (citation omitted)).

These Contract definitions indicate that work necessary to complete the work in the original scope of the Contract must be viewed broadly in the context of the original scope of services that were required to complete the Project as a whole. The \$149 million Contract is for the "Comprehensive Rehabilitation" of the Rotunda, a historic 90-year-old structure that has never undergone major rehabilitation (Contract at 1, 654, 657). Therefore, the original scope of the Contract encompasses all services required to complete that rehabilitation, including rehabilitation of the garage floor.

Judlau's contention that replacing the floor slab was not necessary to complete work within the original scope of the Contract is not persuasive. It is undisputed that as part of rehabilitation of the Rotunda, the Contract calls for utility and drainage work underneath the parking garage floor and for the repair or replacement of the DOPR facilities on the garage floor. The Department contends that once the structural issues with the existing floor became apparent, it was necessary to replace the floor so that the underlying drainage and utility work could be completed safely (Resp. at 12-13). The Department also determined that the change was necessary to complete the Contract because the existing floor is inadequate to support the DOPR Maintenance and Operations space to be constructed on the garage level according to the original scope of Work, and to perform "significant utility work . . . below the slab" in the DOPR

space (Resp. Ex. G). As another basis for finding the work necessary, the Department asserted in the Agency Determination that the soil under the existing floor slab had settled, thereby creating a safety hazard for workers near the unsupported slab and rendering the condition unsafe (*Id.*; Tr. 11). Thus, the Department reasonably determined that replacing the garage floor slab is necessary to complete Work within the original scope of the Contract.

While Judlau argued at oral argument that it has always maintained that replacing the garage floor is not necessary to complete work (Tr. 10), Judlau contested only the Department's assertion that the changes were not a material alteration in its Notice of Dispute (Amend. Pet. Ex. 4 at 101-03). Similarly, in its amended petition, Judlau contended "that a change might be 'necessary to complete' the contract's base scope of work [does] not gainsay the fact that it is a material alteration to the contract's scope" (Amend. Pet. at ¶ 47). In other words, Judlau did not contest that replacing the garage floor is necessary to complete the Rotunda rehabilitation project. Instead, it argues that even if replacing the garage floor is necessary to complete the work included in the original scope of the Contract, it is a prohibited material alteration to the scope of work in the Contract. As discussed below, Judlau is incorrect.

### **The Change is Not a Material Alteration in the Scope of Work in the Contract**

Although Article 25.2 of the Contract prohibits "any material alteration in the scope of Work in the Contract," it does not define "material alteration." The parties proffer differing constructions of the term. Judlau focused on whether the parties contemplated the change "at the time of contracting," using the terms "material," "significant," and "substantial" interchangeably for the purposes of that analysis (Amend. Pet. ¶¶ 55-57, 60; Reply at 5). The Department maintains that "material" and "cardinal change" are synonymous and, relying on a definition of "cardinal change," argues the Contract only prohibits change that are so drastic that they amount to a cardinal change to the Contract (Resp. at 9-10, 18-19).

The basis for the Department's construction of "material alteration" is unsupported. It asserts that "material changes are those that constitute a change so drastic that it would affect 'the essential identity or main purpose of the contract,' such that it 'constitutes a new undertaking'" (Resp. at 9 (citing *Tutor Perini Corp. v. City of New York Office of Admin. Trials & Hearings Contract Dispute Resolution Bd.*, 193 A.D.3d 665, 666 (1st Dep't 2021))). The

Department contends that replacing the Rotunda's garage floor does not rise to this level (Resp. at 9-10, 12). However, the Department cites no support for its assertion that "material" and "cardinal change" are synonymous and there is authority to the contrary. See *McCarthy Concrete, Inc. v Banton Construction Co.*, 203 A.D.3d 1496, 1501 (3d Dep't 2022) (finding that a change in concrete delivery method from pouring to pumping constituted a material, not cardinal, change to the contractor's scope of work).

In support of its contention that replacing the garage floor constitutes a material alteration to the scope of work, Judlau points to the Department's Resident Engineer's description of the Department's directive as a "significant addition to the contract." Judlau also notes that the Comptroller described the directive as "a significant change order in terms of both work and cost" (Amend. Pet. at ¶ 59; Amend. Pet. Ex. 4 at 98; Amend. Pet. Ex. 7 at 189).

In essence, Judlau contends that replacing the garage floor was not contemplated by the parties at the time they entered into the Contract and is such a significant or substantial change from the original plans for repair and selective replacement of garage floor slab that it constitutes a material alteration in the scope of work under the Contract. Judlau asserts that the change requires structural work to ensure the floor is supported and stable, whereas the initial scope of work did not require any major structural work for the floor (Amend. Pet. at ¶¶ 27-30, 64, 69; Tr. 8, 11-12, 19).

Judlau is mistaken, for several reasons.

First, Judlau ignores that the Pre-Bid Conference documents notified bidders, including Judlau, that because the Project was for rehabilitation work, modification of construction details and Work quantities might be necessary. Specifically, the documents provided that:

The Contractor's attention is directed to the fact that, due to the nature of rehabilitation projects, *the exact extent of rehabilitation Work cannot always be accurately determined prior to the commencement of Work*. These Contract Documents have been prepared, based upon field inspection and other information available at the time. Actual field conditions may require modifications in construction details and Work quantities. The Contractor shall perform the Work to meet field conditions.

(Contract at 1483) (emphasis added). Accordingly, Judlau was on notice prior to bidding that because the Project was one for rehabilitation of the Rotunda, the exact extent of that work may

not have been accurately determined and the actual conditions may require “modification in construction details and Work quantities.” This is what happened here.

Second, the changes here are consistent with the kind of work included in the scope of the Contract, although the changes significantly increased the extent of that work, for which the Department indicated that Judlau would be compensated under a change order on a time and material basis pursuant to its directive.

The Project already called for services similar to the work required to replace the garage floor. For example, Judlau argues that the Department’s directive materially alters the scope of work because it “called for the cleaning and priming of existing exposed structural steel” (Amend. Pet. at ¶ 29). The Contract’s Special Provisions provide for similar work at each level of the Rotunda: at the traffic circle level, “[t]he existing concrete encasement of the structural steel columns supporting the Traffic Circle girders and framing shall be removed as indicated in the plans. *The existing steel shall be cleaned, repaired, and/or replaced as indicated*”; at the plaza level, “[t]he existing concrete encasement on the structural steel framing supporting the Pedestrian Plaza Level shall be removed as indicated in the plans. *The existing steel shall be cleaned, repaired, and/or replaced as indicated*”; and at the garage level, “[t]he existing concrete encasement on the structural steel framing supporting the levels above shall be removed as indicated in the plans. *The existing steel shall be cleaned, repaired, and/or replaced as indicated*” (Contract at 1477, 1479, 1481) (emphasis added).

In addition, the Contract’s Special Provisions further call for the removal and replacement of the West 79th Street Bridge’s existing reinforced concrete deck with a “new reinforced concrete deck and steel girder composite structure” (Contract at 1477). The Contract also includes the Pre-Bid Conference Presentation documents. Those documents note that the scope of work at the garage level includes “[r]emoval of existing concrete encasement to accommodate structural framing repairs and upgrades” (Contract at 662). The “Scope of Work” slide for the West 79th Street Bridge includes new “steel beams” (Contract at 659). Such provisions establish that, from the outset, the Project required significant structural work, including at the garage level.

Third, Judlau appears to rely on a report by Dr. Liling Cao, P.E., Senior Principal of Thornton Tomasetti, Inc. (the “Cao Report”), in which Dr. Cao opined that replacing the garage floor “fundamentally altered the nature of the contacted [*sic*] scope of work” (Amend. Pet. at ¶¶ 27-30, 64-65; Tr. 9, 14). Dr. Cao was retained to assess the extent of changes in connection with the Department’s order to replace the Rotunda garage floor and issued her report on April 12, 2024 (Amend. Pet. Ex. 3 at 60). However, the Cao Report, which the Department disputed, cannot overcome the Contract itself.

As an initial matter, the Board rejects the Department’s assertion that it should not consider the Cao Report because the report was not presented to the Comptroller in accordance with PPB Rule 4-09(e)(1) and is therefore not properly part of the record (Resp. at 20-21). The report was submitted in response to the Comptroller’s Request for Information and there is no evidence in the record that the Comptroller deemed submission of the report improper (Tr. 34-36). Further, the Board has discretion under PPB Rule 4-09(g)(3) to “seek technical or other expert advice as it shall deem appropriate” and has used this discretion to consider written opinions, even when those opinions were not submitted to the Comptroller. *See, e.g., Acme Industrial Inc., LLC v. Dep’t of Environmental Protection*, OATH Index No. 287/25, mem. dec. at 5 n.3 (Jan. 22, 2025) (noting that, pursuant to PPB Rule 4-09(g)(3), the Board exercised its discretion to consider written statements from engineering experts submitted by the petitioner, despite the facts that the statements were not submitted to the Comptroller nor requested by the Board).<sup>5</sup>

The Cao Report notes that Thornton Thomasetti conducted a site visit on March 15, 2024, and opined that the order to replace the garage floor was issued “to minimize the risk from the soil settlement by creating a new load path in the floor system” (Amend. Pet. Ex. 3 at 62). Replacing the floor would require Judlau to use “tie beams to support the new concrete slab instead of relying upon the soil to withstand the slab loads” (*Id.*). Dr. Cao concluded that:

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<sup>5</sup> The Board afforded the Department an opportunity to submit a response to the Cao Report (Tr. 48-50). The Department elected to rely on a report already in the record from the City’s Construction Support Services Consultant, HDR/AECOM JV, dated April 24, 2024 (Amend. Pet. Ex. 12 at 274-78).

The modified scope of work to fully remove and reconstruct the garage slab is not an extension of the original scope, instead it completely alters the structural system at the foundation level and triggers a tremendous change from non-structural construction effort to substantial foundation work.

(Amend. Pet. Ex. 3 at 65-66).

The Department contested the Cao Report in both a letter, dated April 30, 2024, and a report that was prepared by its Construction Support Services Consultant, HDR/AECOM JV (the “Department Report”) (Amend. Pet. Ex. 12 at 274-78). The Department Report disputes the Cao Report’s assertion that the new floor creates a new load path that potentially increases stress to the existing foundation. Instead, the Department Report contends that reduction and elimination of components on the Traffic Circle level would “result in a substantial net decrease in load on the existing foundations. This available foundation capacity made it possible to support the replacement Garage slab on the existing foundation system without overstress” (Amend. Pet. Ex. 12 at 277). The Department Report further states that the Cao Report’s “assessment is incomplete as it does not factor all changes that impact the loads on the existing foundations” (Amend. Pet. Ex. 12 at 276-77). Importantly, the Department’s April 30, 2024 letter accompanying the Department Report notes that the Cao Report “makes no direct statement that the extra work is a material alteration of the contract scope, cites no contract provisions in the report, and provides no new information that would cause the floor slab replacement to be considered a material alteration of the scope” (Amend. Pet. Ex. 12 at 274).

Ultimately, while the Cao Report states that the extra work caused by replacing the entire garage floor modified and fundamentally altered the scope of work, it does not address whether this extra work was a “material alteration” to the scope of work in the Contract under Article 25.2. Indeed, it appears the Cao Report focused on the garage level changes, with no indication that the review was in the context of the scope of the work of the Contract for the rehabilitation project as a whole (Tr. 14-15). Finally, important aspects of the Cao Report are disputed by the Department and resolution of those disputes is not within the Board’s purview. *See Fire Alarm Electrical Corp. v. Dep’t of Environmental Protection*, OATH Index Nos. 1525/22 & 2830/22, mem. dec. at 13 (Dec. 11, 2023) (“The Board functions as the appellate tribunal within this process. Its role is to review the agency head’s determination, not function as a fact-finder or trial court.”);

see also *Personal Touch Home Care, Inc. v. Human Resources Admin.*, OATH Index No. 2338/19, mem. dec. at 4-5 (Oct. 11, 2019), *aff'd*, 201 A.D.3d 532 (1st Dep't 2022) (noting that the Board lacks authority to resolve issues of disputed fact). Accordingly, the Cao Report was afforded little weight.

Fourth, the case law that Judlau relies on in support of its argument is inapt. Judlau cites *Success Construction Corp. v. Superintendent of Insurance*, 220 A.D.2d 339, 340 (1st Dep't 1995) (Amend. Pet. at ¶ 55), for its contention that an alteration is material if it exceeds what the parties contemplated at the time of contracting.<sup>6</sup> However, *Success Construction Corp.* arose in the context of a surety contract and the quoted language limited its application to that context. The court in *Success Construction Corp.* stated that, “[u]nder construction contracts specifically making allowances for alterations during the progress of the work, changes not fairly within the contemplation of the parties at the time the original contract was made, constituting a material departure from the original undertaking, *will therefore release a nonconsenting surety from its obligations under its bond.*” 220 A.D.2d at 340 (emphasis added). Further, there is no evidence that the bond in *Success Construction Corp.* contained the language found in Article 25.2 of the Contract.

Moreover, the court in *Success Construction Corp.* affirmed dismissal of a claim against an insurer's surety bond, finding that the surety was discharged from any obligation under its bond when the claimant issued change orders that “materially altered the terms of its original contract” and substantially expanded the scope of its work to include work specifically excluded under the original contract. Here, the work was changed to include replacement of the garage floor slab, which was included in the scope of Contract work, albeit to a lesser extent, as the

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<sup>6</sup> Judlau refers to this case as *In re Liquidation of Union Indem. Ins. Co. of New York*, 220 A.D.2d 339, 340 (1st Dep't 1995) in its papers; however, the caption in the reported case is used here. In its response to the amended petition, the Department discusses *In re Liquidation of Union Indemnity Insurance Co.*, 234 A.D.2d 120, 122 (1st Dep't 1996), which is a different case than that Judlau relies upon (Amend. Pet. at ¶ 55; Resp. at 19). However, the case the Department discusses contains language identical to that relied upon by Judlau and under either case, the analysis is the same.

Contract drawing called for replacement of floor slab in a section of the garage (Amend. Pet. Ex. 2 at 51; Tr. 11, 18).

Judlau cites two other cases in support of its contention that courts have used “significant,” and “substantial,” “in determining whether changes constitute material alterations in scope” (Amend. Pet. at ¶ 56). However, neither case addresses whether a change is a “material alteration” to scope of work in a contract. *See In re GII Industries v. NYS Dep’t of Transportation*, 464 B.R. 557, 565 (Bankr. E.D. N.Y. 2011) (addressing the issue of whether the modified plans constituted a “Significant Change,” a term defined in the contract as when the “work as altered differs materially in kind or nature from that involved or included in the original proposed construction”); *Peter Kiewit Sons’ Co. v. Summit Construction. Co.*, 422 F.2d 242, 255 (8th Cir. 1969) (finding that changes ordered by contractor went so substantially beyond the scope of the subcontract as to constitute breach of contract).

For the reasons above, the Board finds that, under Judlau’s interpretation of “material alteration,” requiring that Judlau replace the garage floor instead of selectively repairing and replacing floor slab, is not a prohibited material alteration under Article 25.2. Under the Department’s interpretation, the Board would reach the same conclusion. The replacement of the entire floor is not such a drastic change that it affects “the essential identity or main purpose,” of the Contract (*Tutor Perini Corp.*, 193 A.D.3d at 666), which required the “comprehensive rehabilitation” of the Rotunda, including the garage floor (Contract at 654, 657).

### **The Differing Site Condition Provision is Consistent with Article 25.2**

The Department argues that Article 78.2 of the Contract, which allows for modification of the Contract for differing site conditions, supports finding that the change here is permitted under the Contract (Resp. at 9, 13-14). Judlau contends that the Contract’s differing site conditions provision does not authorize changes that materially alter the scope of the Contract (Amend. Pet. at ¶¶ 79-80).

Contract Article 78.2 provides:

Should the Contractor encounter during the progress of the Work site conditions or environmental hazards at the Site materially differing from any shown on the Contract Drawings or indicated in the Specifications or such conditions or environmental hazards as

could not reasonably have been anticipated by the Contractor, which conditions or hazards will materially affect the cost of the Work to be done under the Contract, the attention of the Commissioner must be called immediately to such conditions or hazards before they are disturbed. The Commissioner shall thereupon promptly investigate the conditions or hazards. If the Commissioner finds that they do so materially differ, and that they could not have been reasonably anticipated by the Contractor, the Contract may be modified with the Commissioner's written approval.

The provision, the Department argues, contemplates changes to the Contract in circumstances like those here, by allowing for modification to the Contract for differing site conditions or environmental hazards even when the change will "materially affect the cost of the Work" (Resp. at 13-16).

Article 25.2 prohibits material alterations to the scope of work in the Contract, but permits non-material changes to the scope of the Contract. Article 78.2 permits modification to the Contract for site conditions and environmental hazards that are materially different from those in Contract documents or that the contractor could not have reasonably anticipated, where such conditions and modifications will materially affect cost of the Contract Work.

While any such changes must adhere to Article 25, meaning that they must be consistent with the original scope of work in the Contract, Article 78.2 allows for modification of the Contract based on conditions that differ from any shown on the Contract drawings or that could not reasonably have been anticipated by the Contractor and that might significantly increase the cost of the work. *See Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956) ("The rules of construction of contracts requires us to adopt an interpretation which gives meaning to every provision of a contract . . ."). Thus, the differing site conditions provision is a basis for modification of the Contract. However, it is unnecessary for the Board to reach the issue of whether the change order directing Judlau to replace the garage floor falls under this provision.

In sum, Judlau failed to establish that the order to replace the garage floor slab was a prohibited material alteration in the scope of work in the Contract.

## Conclusion

The Board finds that the Department's directive does not constitute a material alteration in the scope of work in the Contract. Judlau's petition is dismissed. All members of the panel concur.

Astrid B. Gloade  
Administrative Law Judge/Chair

May 21, 2026

Appearances:

**Meltzer, Lippe, Goldstein & Breitstone, LLP**

*Attorneys for Petitioner*

**By: Manny A. Frade, Esq.**

**Adam P. Wald, Esq.**

**Steven Banks**

**New York City Corporation Counsel**

*Attorneys for Respondent*

**By: Blake Ahlberg, Esq.**

**Matthew Rephen, Esq.**