

**Torres Rojas, Genara**

FOI # 13276

**From:** lbs4@columbia.edu  
**Sent:** Friday, June 22, 2012 9:22 AM  
**To:** Duffy, Daniel  
**Cc:** Torres Rojas, Genara; Van Duyne, Sheree  
**Subject:** Freedom of Information Online Request Form

Information:

First Name: Lynne  
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Required copies of the records: Yes

List of specific record(s):

Arbitration Decision between Port Authority and Silverstein Properties regarding WTC Sites 2 and 4, mid-December 2008.

**THE PORT AUTHORITY** OF NY & NJ

Daniel D. Duffy  
*FOI Administrator*

July 13, 2012

Ms. Lynne Sagalyn  
Columbia Business School  
3022 Broadway, 816 Uris  
New York, NY 10027

Re: Freedom of Information Reference No. 13276

Dear Ms. Sagalyn:

This is a response to your June 22, 2012 request, which has been processed under the Port Authority's Freedom of Information Code (the "Code") for copies of records related to the arbitration decision between the Port Authority and Silverstein Properties regarding the WTC sites 2 and 4, mid-December 2008.

Material responsive to your request and available under the Code can be found on the Port Authority's website at <http://www.panynj.gov/corporate-information/foi/13276-O.pdf>. Paper copies of the available records are available upon request.

Please refer to the above FOI reference number in any future correspondence relating to your request.

Very truly yours,



Daniel D. Duffy  
FOI Administrator

In the Matter of the Arbitration between

2 WORLD TRADE CENTER LLC  
and 4 WORLD TRADE CENTER LLC

and

THE PORT AUTHORITY OF NEW  
YORK AND NEW JERSEY.

WTC ARBITRATION NO. 1

BEFORE: John A. Cavanagh  
Harry P. Sacks, Esq.  
Hon. George C. Pratt,  
Arbitrators

### **DECISION**

This arbitration is brought under the Master Development Agreement for Towers 2/3/4 of the World Trade Center made as of November 16, 2006 by and among the Port Authority of New York and New Jersey, 1 World Trade Center LLC, WTC Retail, LLC, 2 World Trade Center LLC, 3 World Trade Center LLC, 4 World Trade Center LLC, and the Port Authority Trans-Hudson Corporation. Two issues are to be determined:

1. Did the Port Authority's October 5, 2008 Certification of Final Site Completion for Site 4 of the World Trade Center effectively constitute a final turnover of Site 4?

2. Did the Port Authority's October 5, 2008 Certification of Partial Site Completion for Site 2 of the World Trade Center effectively constitute a partial turnover of Site 2?

## I BACKGROUND

### A. **The Parties**

The arbitration was commenced by two Arbitration Notices dated November 12, 2008 and served on the Port Authority of New York and New Jersey by 2 World Trade Center LLC and 4 World Trade Center LLC, respectively. For convenience, the Port Authority will be referred to in this Decision as “the PA”; 2 World Trade Center LLC will be referred to as “2 WTC LLC”; and 4 World Trade Center LLC will be referred to as “4 WTC LLC”. 2 WTC LLC and 4 WTC LLC are owned or controlled by Silverstein Properties, Inc. (“SPI”). Unless the context indicates otherwise, SPI will be used to designate one or more of the Silverstein interests, including, at times, 2 WTC LCC and 4 WTC LCC.

### B. **The Project**

In general terms, the project of which this dispute is a small part, aims at the redevelopment and rebuilding of the World Trade Center, whose Twin Towers were destroyed by terrorist attack on September 11, 2001. In the years following the destruction, there was a wide-ranging public debate as to how the WTC site should be redeveloped. Concerns included how to memorialize the lives lost, the need to enliven the area as a mixed-use district, the amount of office and retail space that should be rebuilt, and the roles and responsibilities of the PA, SPI, and others. Everyone involved

recognized that this project was of critical importance not only to the PA and SPI, but to the City and State of New York, the region, and the entire country.

In late 2004 the PA, the Lower Manhattan Development Corp., the State and City of New York, and SPI agreed on a Master Plan that would allow for rebuilding the WTC site into a dynamic mixed-use district, while commemorating the lives lost with an appropriate memorial. Included in the overall project are a number of massive and complicated building projects, including the Freedom Tower, a Visitor's Center, a WTC Memorial, three office towers to be constructed by SPI, a Transportation Hub to service a number of existing subway routes and PATH trains, and a Performing Arts Center. Running through the redevelopment area are a subway line for PATH trains and a separate subway line for the 1 and 9 trains, as well as designs for the re-establishment of portions of Greenwich and Fulton Streets. These projects are to be built under an overall development plan by a number of different contractors.

### **C. The Master Development Agreement (“MDA”).**

In April 2006, the PA and SPI reached a basic agreement, dividing responsibility for redevelopment of the site. The MDA covers a variety of subjects, including the guidelines for this arbitration. For conceptual purposes it divides the WTC site into two major sections: the East Bathtub and the West Bathtub. The East Bathtub space is the area bounded on the north by Vesey Street, on the east by Church Street, on the south by Liberty Street, and on the west by the 1/9 subway line, the approximate location of Greenwich street, which will be restored as a through street as part of the project. The West Bathtub is the space bounded on the north by Vesey Street, on the

east by the 1/9 subway line, on the south by Liberty Street, and on the west by West Street / NYS Route 9A (See: WTC Site Diagram, MDA Ex. I). The 1/9 subway line, with Greenwich street to be constructed above it, divides the East and West Bathtubs.

The West Bathtub space, which is not part of this dispute, will hold the WTC Memorial, the Visitor Center, the Freedom Tower, and the new Performing Arts Center. The East Bathtub space will hold the new Transportation Hub, to be developed and constructed by the PA, and, to be developed and constructed by SPI, three office towers, which will include retail components and mechanical support space for the Transportation Hub.

Our concern in this arbitration is with the sites for Towers 2 and 4. Under the MDA, the PA was required to prepare the East Bathtub so as to make it ready for SPI to begin construction on Sites 2, 3, and 4. Because the PA would also be working along the west border of the East Bathtub while the towers were being constructed, the schedule for turnovers of each of Sites 2, 3, and 4 was divided into two parts – partial turnover and final turnover.

The difference between partial and final completion/turnover is a territorial difference. Along the west side of these three sites, adjacent to the 1/9 subway line, a strip of property, mostly 50 feet in width, was designated as “Retained Area”. Partial completion and partial turnover of a site mean that the PA has completed its work for all of the particular site except for the “Retained Area”. Final completion and final turnover mean that the PA’s work on the entire site, including the Retained Area, is completed.

Dates were established for each turnover, for each of the three sites.

Those dates, discussed below, are critical in the schedule for construction of the three towers.

Recognizing that a project as complex as the overall redevelopment and rebuilding of the World Trade Center would inevitably generate disputes over the parties' respective rights and obligations, the parties included in the MDA, as Article 9, detailed provisions for "Dispute Resolution", providing governing regulations for an arbitration proceeding such as the instant one in the event that mandated negotiations failed to resolve a dispute.

Because the parties desired to complete the project as quickly as possible, consistent with safety, economy, and minimizing the inevitable disruption to the area and to the many people who pass by the area on a daily basis, the parties provided for an unusual form of arbitration. Before any disputes had arisen, the PA and SPI jointly selected a panel to be available to hear, on short notice, any dispute under the MDA, with a tight timetable for resolving the disputes.

A central feature of the MDA is the parties' recognition of the need for cooperation as the project moves along. Indeed, it is specifically provided in §12.14(c) that

. . . the parties agree to cooperate with each other fairly and reasonably in all respects in connection with the redevelopment and rebuilding of the new World Trade Center . . . and coordinate their efforts and interfere as little as possible with each other's development and construction activities. It is the parties' intent that the redevelopment of the World Trade Center will result in a world class environment of the highest quality.

The need to cooperate fairly, reasonably, and in good faith is underscored in several other sections, e.g. §1.1(c) (revisions to East Bathtub Space Allocation Concept Design), §1.1(e) (best efforts to cooperate and meet, and cause all representatives to cooperate and meet, their respective obligations), §1.3(f)(i) (cooperate in all respects in connection with redevelopment and rebuilding of WTC), §1.3(f)(v) (agree on detailed construction and coordination plan and development schedule), §3.2(d) (essential to cooperate with each other in good faith in connection with redevelopment of the WTC property), and §12.14(b) (PA to cooperate with SPI in connection with Tower Financing).

Delays arose as the PA began executing its construction responsibilities for preparing the infrastructure. By letter of June 30, 2008, as requested by Governor Paterson, Chris Ward, the new Executive Director of the PA, reported on his assessment of the overall rebuilding effort at the WTC. In the context of four central questions he identified 15 issues that required resolution. On October 2, 2008, Mr. Ward reported again that the 15 issues had been resolved, that the essential elements were in place, and that the effort can finally be managed like a construction project.

#### **D. The Disputes**

Four days after the Executive Director's second report to the Governor, by letter of October 6, 2008, forwarding two certificates of completion, the PA reported that it "has completed the work necessary to meet the turnover requirements... for [final turnover of] Site 4 and [partial turnover of] Site 2 . . . effective as of October 5, 2008." SPI responded on October 10, 2008, with a Dispute Notice with respect to each site,

asserting that “the Port Authority has not satisfied the procedural and substantive requirements of the MDA” for site completion. (emphasis by SPI) In each notice, and in virtually identical language, SPI asserted, “Among other things, the Port Authority has failed to (1) ‘complete the PA East Bathtub Preparatory Work . . . in accordance with the provisions of [the MDA],’ and (2) ‘deliver [the site to SPI] in Construction Ready Condition,’ as required by Section 1.3(d) of the MDA”.

As indicated above, this arbitration presents two disputes to be resolved – one with respect to the certificate for final turnover of Site 4, and the other with respect to the certificate for partial turnover of Site 2. Both disputes involve technical construction issues as well as interpretations of the MDA. The panel has to determine for each certificate whether the PA, as of October 5, 2008, met the turnover requirements of the MDA that are applicable to that site.

For the PA to effectuate a turnover of a site (partial or final) under the terms of the MDA, it must (1) complete for the Delivered Area the “PA East Bathtub Preparatory Work”, and (2) deliver the area in “Construction-Ready Condition”. (§1.3(d)(i) (Completion of Partial Sites) and §1.3(d)(ii) (Completion of Retained Areas).

Completion of the PA East Bathtub Preparatory Work requires for the Delivered Area:

- Complete construction of the Slurry Wall and installation of all tie-backs;
- “full excavation of the East Bathtub area” to elevation 240’;
- “completion of the temporary underpinnings and associated excavation of the 1/9 subway lines in or around or adjacent to

Delivered Area in accordance with the East Bathtub Space Allocation Concept Design”; and

- Completion of any other work assigned to the PA. (MDA, Definition 86.)

To be in Construction-Ready Condition requires for the Delivered Area

- Completion of East Bathtub Preparatory Work;
- The PA’s contractors and personnel “shall have been completely demobilized from such Delivered Area (including removal of all equipment and personnel)”;
- SPI “shall have uninterrupted access to Delivered Area for the performance of its construction logistics for the entire period” until construction is completed; and
- “[P]ossession and use of such Delivered Area shall have been delivered to [SPI] in a condition which enables [SPI] to immediately commence and proceed with construction thereon free of material interference.” (MDA, Definition 39.)

The principal issues thus presented by this proceeding are whether the PA properly certified the Final Site Completion for Site 4 and properly certified the Partial Site Completion for Site 2 as of October 5, 2008, pursuant to these MDA requirements.

Significant delays afflicted the turnover schedules. For Site 4, the partial turnover scheduled for December 31, 2007, did not occur until February 17, 2008. Partial turnover of Site 2, which is the subject of part of this arbitration, was originally scheduled for June 30, 2008.

Behind the technical requirements for meeting the turnover conditions lie other considerations likely to be impacted by this panel's decision as to each site. Approximately six weeks before the 9/11 attack, SPI had entered into a 99-year net lease with the PA for the Twin Towers. Ever since the destruction that occurred on 9/11/01, SPI has been paying rent under that lease, totaling approximately \$700 million to date. The MDA was entered into along with multiple other agreements to revise and restate the underlying lease, essentially, for present purposes, to transfer the leasing arrangement from the original WTC site to Sites 2, 3, and 4. SPI, through separate entities, agreed to construct a large office tower on each of Sites 2, 3, and 4. The combined gross space of the three towers will exceed six million square feet.

The PA agreed to make the sites ready for SPI's construction work to begin. This involved clearing the debris from the destroyed Twin Towers and constructing the East Bathtub, in which the foundations of each of the towers would sit. The PA was required to excavate the bottom of the East Bathtub to elevation 240', with ground level being at approximately 285'.

For each of the three sites the parties established specific dates by which the PA was to complete its work, first, for partial site completion and then, for final site completion. The expected dates for partial site completion were:

Site 2 - 6/30/08

Site 3 - 12/31/07

Site 4 - 12/31/07

The expected dates for final site completion were:

Site 2 - 12/31/08

Site 3 - 12/31/08

Site 4 - 6/30/08

Because the PA has defaulted on some of the completion dates, the PA has been required to pay SPI liquidated damages at the rate of \$300,000 per day. MDA §1.3(e)(ii) provides that if the PA is late in meeting any partial or final Site Completion Date, the PA must pay to SPI liquidated damages of \$300,000 per day “for each day” that the completion date on any site is later than its scheduled date “until such time as the applicable [completion date] shall have been achieved.”

The time obligations of both parties are “subject in all cases to Unavoidable Delay. . . [A]pplicable time periods . . . shall be automatically extended in all cases by periods of Unavoidable Delay.” (MDA §1.3(e)(iv)). In this arbitration, no claim of Unavoidable Delay has been contended or proven as a justification for any extension of the time periods in question.

While liquidated damages are being paid, the PA in effect pays to SPI the difference between the \$300,000 per day and the basic rent that SPI must pay to the PA. The panel was told at the hearing that SPI is paying rent at the rate of approximately \$8 million per month. Consequently, during much of 2008, the PA has been paying to SPI a net amount of approximately \$1 million per month.

The two certificates of completion provided by the PA as of October 5, 2008, represent an attempt by the PA to cut off the liquidated damages payments. If the partial site completion certificate for Site 2 were valid, then the PA would no longer be in default on that site, but would become so again if it does not reach final completion by December 31<sup>st</sup> of this year, a matter days from this Decision.

The certificate of final completion for Site 4, if valid, would terminate the PA's obligations as to Site 4. Even if valid, however, the Site 4 certificate would cut off the liquidated damages only for a short time, unless the PA achieves final completion for both Sites 2 and 3 by December 31, 2008. This is because the MDA requires payment of liquidated damages as long as the PA is in default on any completion of any of the three sites (MDA §1.3(c)(ii)).

The completion turnover dates have another layer of significance. SPI is required to complete construction of its three towers by specified dates. The MDA was amended as of June 11, 2008 by extending the dates for completion, including the discretionary extra one year granted to SPT for each tower, to require that Towers 2 and 3 be completed by June 30, 2013 and that Tower 4 be completed by April 30, 2012. In addition to time extensions for Unavoidable Delay (MDA§1.3(e)(iv)), the MDA as amended provides that the expected completion date for each of the three towers is to be extended by whatever days the PA was late in both the partial and final turnovers of that site (MDA Amendment as of June 11, 2008). Therefore, the construction clock does not begin ticking for SPI on each site until issuance of a valid certificate of final completion for that site. Since the partial turnover of Site 4, and as required by MDA §1.3(e)(iii), SPI had been proceeding with foundation construction on the site even though the construction clock had not commenced to run for Site 4.

No one disputes that the time requirements for construction will be difficult for SPI to meet. These requirements would indeed be tight even if only a single office tower were being constructed and if the work were being done in an area remote from the congestion that surrounds the WTC site. With these three towers being constructed

in parallel with construction of the Transportation Hub, the Freedom Tower, and the other work required on the WTC redevelopment project, SPI credibly argues that every day is precious in its attempt to meet the completion deadlines. SPI urges that only full and strict compliance by the PA with the turnover requirements will protect its rights and preserve for it the full construction period contemplated by the MDA. Particularly significant here is a draconian provision that, according to SPI, would permit the PA to cancel the lease for a tower not substantially completed on time. (See: MDA Art. 8). SPI also asserts that under a cross-default guarantee provision in the MDA and related documents a default in the completion of one tower could result in foreclosure on all three towers.

#### **E. The Panel**

Well before this arbitration was noticed, the panel had been selected by agreement of the parties, as called for by MDA §9.2(a). Under MDA §9.2(b) each arbitration is to be conducted under the Commercial Rules of the American Arbitration Association as modified by the MDA. The panel is expected to be available to hear any dispute properly raised under the MDA. As required by MDA § 9.2(b)(i), before commencing the hearing on this arbitration, each of the arbitrators submitted his written oath to hear and decide this dispute and any other disputes faithfully and fairly.

#### **F. The Procedure**

The parties and the panel have attempted to follow closely the procedures set forth in MDA §9.2. On November 12, 2008, SPI provided two Arbitration Notices,

one for Site 2, and the other for Site 4. For Site 2 the notice recites that SPI had on October 10, 2008, provided a written notice of dispute challenging the PA's "purported Certificate of Partial Site Completion", and that the parties had met in good faith in an unsuccessful attempt to negotiate a resolution to the dispute. The wording for the Site 4 notice was virtually identical, except that the Site 4 certificate was for "Final Site Completion", rather than "Partial Site Completion". For the arbitration schedule, the notices provided that the parties "shall deliver their respective Determinations" on November 19, 2008, and that the hearing would commence on November 24 and conclude on November 26, 2008. The parties' respective "Determinations" consisted of documents and written memoranda outlining the parties' respective positions.

As scheduled, the hearing commenced on November 24, 2008. Oral testimony was taken on that date and on November 25, 2008. On November 26, 2008, the hearing was continued by way of summarized presentations from each side and an extended question-and-answer session conducted by the panel.

At the close of the hearing, the panel noted the requirement of MDA §9.2(b)(v) that the decision be rendered within five business days after concluding the hearing. Because this is the first arbitration conducted under the MDA, because it involves two different sites, and because of the number and difficulty of the issues presented, the panel requested an additional five business days to complete its decision. Both parties readily agreed.

## **G. The Claims**

As stated in its letter of October 6, 2008, forwarding the two completion certificates, the PA contends that it “has completed the work necessary to meet the turnover requirements... for Site 4 and Site 2 . . . effective as of October 5, 2008.” SPI disputes the attempted turnovers, arguing that with respect to each site, the PA has met neither of the two requirements for turnover: (1) completion of the East Bathtub Preparatory Work, and (2) delivery in Construction-Ready Condition. Because those requirements are set forth in the conjunctive, SPI argues that the PA was not entitled to a turnover unless both are satisfied, i.e., the bathtub work was completed and the site was in Construction-Ready Condition.

One of the central concepts in the PA’s opposing position is its contention that none of the conditions identified by SPI would prevent a turnover unless it caused a “material interference” with SPI’s construction. Drawing on cases involving after-the-fact claims for delay damages in construction disputes, the PA argues that to be a “material interference” the condition complained of must be shown to cause a delay in SPI’s critical path for construction. Since no critical-path evidence has been presented here, the PA contends that SPI has failed to establish “material interference” and therefore has no valid reason to contest the turnover certificates.

SPI counters this argument by correctly pointing out that being free of material interference is only one of four components in the definition of “Construction-Ready Condition”. Moreover, one of those components – completion of the East Bathtub Preparatory Work – is not only a separate condition from “Construction Ready”, but itself is defined as consisting of four components.

The PA also contends that even if the conditions for the turnovers were not met, the most that SPI would be entitled to would be an extension of time in which to complete construction of the applicable tower. The panel finds no valid basis for that contention. (See: Amendment to MDA, as of June 11, 2008, ¶ 3 (time extensions for late turnovers are "in addition to the right to liquidated damages"))

The panel concludes that to support the turnover of either Site 2 (partial) or Site 4 (final), satisfaction of all components of the bathtub work and construction-ready requirements is required. Accordingly, it is necessary to examine the details of each of SPI's contentions to evaluate its claims that neither Site 2 nor Site 4 was ready for its respective turnover on October 5, 2008. These claims and the problems related to them were the subjects of the parties' submitted Determinations and of the hearing. They are discussed and decided below.

## **II DISCUSSION**

### **A. Site 4**

Two issues are tendered with respect to final turnover of Site 4, both arising from the PA's having changed its development and construction plan beneath the 1/9 subway box without consulting SPI. One issue is the problems caused by the PA's having erected a soldier pile wall along the easterly line of the subway box for the 1/9 subway lines. The other is the PA's failure to complete excavation to elevation 240' beneath the subway box.

(a) The Problem. On the west side of Sites 2, 3, and 4, as well as of the Transportation Hub area, and just below ground level, the 1/9 subway runs through a

tube-like concrete box. When the MDA was executed, the subway box rested on unexcavated dirt and rock. One of the requirements for completing the East Bathtub Preparatory Work was “completion of the temporary underpinnings and associated excavation of the 1/9 subway lines in or around or adjacent to such Delivered Area in accordance with the East Bathtub Space Allocation Concept Design”. That Concept Design contemplated that the space beneath the existing 1/9 subway line would be excavated and used by the PA for program space such as parking and retail. It is to have a finished elevation of 240’, the same as the bottom of the East Bathtub. (Street elevation is approximately 285’.)

To carry out that concept the PA adopted a plan to temporarily underpin the 1/9 subway lines to permit the excavation and for the subsequent installation of permanent underpinning, all while the 1/9 subway lines remained in operation. The Master Development Schedule provided with respect to “Subway line 1 Underpinning” that the PA would complete the subway underpinning adjacent to Tower 4 by June 30, 2008, and would complete the subway underpinning adjacent to [Towers 2 and 3] by Dec. 31, 2008. (MDA, Ex. J)

The PA fell behind on its work schedule. In or about February of 2008, the PA and its contractor, Phoenix, adopted an alternate plan for supporting the subway box, one that employs a “top down” concept. The new plan excavates one level at a time, installing permanent supports as the digging proceeds, and moves down four levels to elevation 240’. To carry out the PA’s full revised plan, however, and also to immediately complete the excavation in the East Bathtub down to elevation 240’ on the

adjacent Sites 2, 3, and 4, requires temporary lateral support for the earth under the subway box.

For that support, Phoenix installed the soldier pile wall along the entire west boundary of Sites 2, 3, and 4. SPI objected immediately when Phoenix began construction of the soldier pile wall, but without effect. As of the time of the hearing, the soldier pile wall had been constructed, and the excavation under the revised plan had proceeded approximately 1/4<sup>th</sup> of the way toward elevation 240'.

The soldier pile wall was installed in a strip described in Note 3 on MDA Exhibit AA (East Bathtub Site Turnover by PA) as

“3. Final turnover of the hatched areas [retained areas] is 10 feet off the east face of the existing 1-line concrete structure [of the 1/9 subway].”

There is no dispute that the soldier pile wall is situated within that 10 foot strip. Similarly, there is no dispute that the earth on the west side of that wall has not yet been fully excavated. The soldier pile wall is intended to be temporary and will be removed once the PA completes its revised plan for excavation to 240' under, and for permanent support of, the subway box. “The soldier pile wall must remain in place until the excavation under the 1/9 box is completed, which the Port Authority expects to take approximately a year.” (PA Determination, p 19). An alternative scheme is apparently now being discussed, but as of the present time, the existence of the soldier pile wall continues to present a substantial problem.

(b) SPI's position. SPI contends that because the PA has failed to complete the originally planned excavation to elevation 240' and has erected the soldier pile wall in the 10' strip, the PA has not yet complied with the requirement for completing

the bathtub improvements adjacent to Site 4 and has resulted in Site 4 not being in Construction-Ready Condition. Apart from being denied, for construction purposes, access to the 10' strip now occupied by the wall, access that under the original plan would have been afforded by complete excavation of the area under the subway box to elevation 240', SPI points out that until the wall is removed, its location and construction directly interfere with two of the proposed footings, the shear wall, and the columns for Tower 4, whose location and plan had initially been approved by the PA and are an integral part of the design for Tower 4. Indeed, SPI had re-designed one of the footings, at the request of and in cooperation with the PA, in order to locate on top of the footing some of the PA's originally planned supports for the subway box.

The soldier pile wall is also close to another of the proposed footings for Tower 4. At that point, the base of the wall has been installed at a depth several feet above where the footing is to go. SPI contends that the excavation required to construct the footing would undermine the rock support for the soldier pile wall and thereby pose a danger to the wall structure, to the related ground materials, to Site 4, and perhaps to the subway box itself. Moreover, according to SPI, the wall interferes with construction of its own shear wall and columns for Tower 4. According to SPI, these conditions, which materially interfere with construction of the footings, shear wall, and columns for Tower 4, establish that Site 4 is not "Construction Ready".

Thus, SPI contends that the PA has not yet complied with either of the two requirements for final turnover of Site 4 – (1) "complete the PA East Bathtub Preparatory Work on the Retained Area", because it has not completed the temporary underpinnings and associated excavation of the 1/9 subway lines adjacent to the

Retained Area; and (2) delivery of the Retained Area in “Construction-Ready Condition”, because the East Bathtub Preparatory work has not been completed, and because the footing, shear-wall, and column problems caused by the soldier pile wall constitute a “material interference” with its ability to “immediately commence and proceed with construction thereon”

(c) PA's position. The PA contends that it was entitled to change its piling and excavation plan; that the soldier pile wall is entirely on a 10' strip of land that will not ever be turned over to SPI, even though Tower 4's footings, shear wall, and columns will be in part of that area; and that the excavation and construction necessary to transfer the load of the subway box to the permanent piling have already been completed, along with completion of the associated excavation work for the first level. No more is required, according to the PA.

At the hearing, the PA presented two exhibits, RX8 and RX9, with proposals to “work around” and “accommodat[e]” the problems highlighted by SPI. It acknowledged, however, that both of these proposals are preliminary and have neither been thoroughly discussed with SPI nor approved by the necessary engineers, or by the MTA.

(d) Decision. The panel agrees with SPI that Site 4 is not ready for turnover because of the problems indicated above. Clearly, the PA did not complete “the temporary underpinnings and associated excavation of the 1/9 subway lines in or around or adjacent to [the Retained Area on Site 4]” and thus did not complete the East Bathtub Preparatory Work, a condition for final site completion and turnover. Indeed, the PA simply abandoned its original plan to use temporary underpinning and to provide

the associated excavation. Indeed, without consulting SPI, the PA unilaterally changed the construction plan for support of the subway box. We reject the PA's contention that completing a single level of the permanent underpinning and associated excavation and transferring to it the load of the subway box constitutes compliance with this requirement for completion of the East Bathtub Preparatory Work. The change materially interferes with SPI's construction of Tower 4 and thereby prevents Site 4 from being "Construction Ready".

A key point in the PA's argument that SPI has no legitimate complaint about the soldier pile wall is that the wall is located entirely in the 10' strip along the west edge of the Retained Area, and that under Note 3 of MDA Ex. AA, (East Bathtub Site Turnover by PA), the 10' strip will never be turned over to SPI. Therefore, according to the PA, since it is entitled to exclusive possession of the 10' strip, it is free to do whatever it likes there, including constructing and maintaining the soldier pile wall. This argument, however, runs counter to the access provisions in MDA §1.3(f), as well as to the PA's recent, commendable, preliminary efforts to seek a solution for the wall problem that its soldier pile wall has created.

Both parties must recognize that they are working in the real world. The PA decided that the system for supporting the subway box had to be changed. Ideally, they would have consulted SPI about the change, or at the very least, would have examined SPI's approved plans for Tower 4 to determine whether the proposed soldier pile wall would interfere with its foundation construction, shear wall, and columns. Regrettably, the PA apparently failed to do either. Nevertheless, the wall has been constructed, and the originally contemplated excavation under the subway box has not

yet been done and apparently will not be completed for a year. We also recognize that in finding a solution to the problem SPI has a duty to cooperate with the PA and to act reasonably to mitigate any damages flowing from the change in method for excavating under and supporting the 1/9 subway box.

In these circumstances, the panel suggests, indeed directs, the parties to cooperate and as rapidly as is reasonably possible to work out solutions to the problems presented by the change in plans for the underpinning of the subway box and the associated excavation. We do not require that the excavation to elevation 240' beneath the subway box be complete before final turnover. However, we are optimistic that with cooperation, the problems associated with the footings, shear wall, and columns for Tower 4 can be resolved so that final completion and turnover of Site 4 can occur with reasonable expedition. This dispute calls for the best efforts of both parties to act quickly and in good faith to arrive at a practical and reasonable solution.

## **B. Site 2**

SPI raises several issues in support of its claim that Site 2 does not qualify for partial site completion. We will discuss them separately.

### **1. Caissons**

(a) The problem. A wing-like portion of the proposed Tower 2 structure, rising some six stories in the air and called the "podium", will extend easterly from Tower 2 toward Church Street. Beneath the easterly-most portion of the podium is a subway station operated by the Metropolitan Transportation Authority (MTA) under an easement granted by the PA. The approved plans for construction of the podium call

for six caissons to be constructed in holes drilled through and near the subway platform. The caissons will provide the base supports for parts of the podium's superstructure and will remain as permanent installations rising from the bedrock below, through and near the subway platform, to support the podium above. Installation of the caissons requires the approval of the MTA, an approval that has not yet been granted.

(b) SPI's position. SPI contends that it cannot construct Tower 2 without first installing the caissons and that it cannot install the caissons until the PA reaches an agreement with the MTA, consenting to their construction. SPI contends that since the PA has not yet obtained such an agreement, Site 2 is not "Construction Ready".

(c) PA's position. The PA contends that under the MDA, it has no obligation to obtain the agreement of the MTA, and that its obligation is only to "take the lead" in working with the MTA to seek its required consent. The PA insists that it has taken the lead and has been engaged in lengthy, difficult, and on-going discussions with the MTA concerning SPI's ability to commence the installation of the caisson foundations for Tower 2.

(d) Decision. It is true that the MDA requires the PA to "take the lead in working with the MTA to coordinate all work in the MTA easements or rights-of-way on Site 2" (MDA § 1.3(i)). The PA's assertion may be correct that it has engaged in "lengthy, difficult, and on-going discussions" with the MTA, but the PA's obligation to "take the lead" in working with the MTA does not remove from MDA Section 1.3(d)(i) the requirement that for partial completion the partial site must be in Construction-Ready Condition. In addition, the PA has neither contended nor satisfactorily proven that its

inability to obtain MTA's approval has been an Unavoidable Delay. Without the MTA's agreement for installation of the caissons, as shown on the approved plan for the podium as part of Tower 2, Site 2 is not Construction Ready. Also, we note that In taking the lead on negotiations with the MTA over its easement rights and obtaining permission to install the caissons, so far the PA has insisted on its negotiating alone with the MTA and has excluded SPI from the discussions.

## **2. Access**

(a) The Problem. Construction-Ready Condition – one of the two requirements for partial site turnover – has several components, one of which is that SPI “shall have uninterrupted access to [Site 2] in accordance with the Site Access Exhibit . . . for the performance of its construction logistics for the entire period until such time as construction of [Tower 2] shall have been completed”. (MDA, Definition 39). For a construction project to proceed reasonably, it is essential that trucks and equipment needed to service contractors on the site have sufficient access to make their deliveries. The entire perimeter of the Redevelopment Site is fenced in. In its access plan, the MDA provided several gates to permit access for construction vehicles, equipment, and people. Currently, from the temporary PATH terminal established by the PA, thousands of people pass by the north boundary of Site 2 on Vesey Street during the morning rush hour, and return by the same route during the evening rush hour. For the safety of those pedestrians, the PA has closed Gate 4A at the northwest corner of Site 2 for a period of time during each rush period. We also note that Gate 4A will be required to service construction of the Freedom Tower in the near future.

Moreover, access by large trucks is particularly difficult in this area for several reasons:

- a system of narrow, one-way streets;
- heavy traffic, both construction and non-construction; and
- thousands of people who each day pass by the site on its north and east boundaries in connection with their use of the PATH trains, whose temporary station is just to the west of Site 2, and of several local subway stations, all of which serve the many office buildings and commercial establishments in lower Manhattan.

(b) SPI's position. SPI reads the description of access in definition 39 of the MBA in a literal fashion. The words call for "uninterrupted access" "for the entire period until [construction is completed]". According to SPI, closing one of the access gates during rush hours "interrupts" its "access".

In response to the PA's contention that the practice of closing Gate 4A is only temporary and is intended to be followed only during the early construction on Site 2, for which both sides agree that there is currently sufficient access to do the foundation work that is needed, SPI insists that later in the construction process, access will be needed for far more trucks and that the "uninterrupted access" now promised for later by the MDA must nevertheless be "for the entire period." In other words, SPI is contending that it must at all times have the maximum amount of access it may need at any time during the course of construction, even though the existing access is reasonably adequate for the work now being done and will remain so for several

months. Therefore, according to SPI, since there is not “uninterrupted” access “for the entire period”, the site is not Construction Ready and consequently does not qualify for partial site delivery.

(c) PA's position. The PA has provided not only the access gates originally indicated on the site access exhibit but has added additional gates. Specifically with respect to Gate 4A, the PA has a plan to re-route pedestrian traffic around the block to the north of Vesey Street, a plan that it will implement when additional use of Gate 4A is required as construction advances beyond the foundation stage. Moreover, once the pedestrian traffic is re-routed to the north, additional access space will be available for Site 2 along Vesey Street.

(d) Decision. SPI is entitled to be able to perform its work in a continuous and reasonable manner. It has not shown, however, that the access problem so far either has prevented it from performing properly or has negated construction readiness for Site 2.

For all parties, access was a problem that was obvious when the MDA was entered into. Given lower Manhattan’s congested traffic on narrow streets, plus the planned simultaneous construction of three office towers, the Freedom Tower, and the Transportation Hub, access certainly was destined to be a major headache for everyone. Plainly, solution would lie only in the cooperation of all parties in dealing with conditions as they arise and change at the site, and Exhibit M to the MDA, the Site Access Exhibit, expressly addresses the problem. It provides, e.g, that

- “The parties shall cooperate . . . in the use of the Site Access Facilities”;

- The PA was given responsibility to manage and modify the access Rules and Regulations;
- “Access in and around the World Trade Center Site shall be subject to periodic modification as construction work progresses . . . .”; and
- “the parties shall cooperate in the daily management and coordination of all construction activities that may affect access . . . .”

The panel rejects SPI’s contention with respect to access, as being too verbalistic and unrealistic in light of the conditions and circumstances not only now prevailing but also as initially contemplated by the parties. SPI’s argument that partial site turnover is conditioned upon its having the degree of access it would need at any time during the course of construction ignores the express provisions in the MDA about cooperating with the PA as conditions change. Indeed, there is no way of telling today what access will be needed at any particular time in the future, yet SPI insists not only that it have now all the access it will ever need, but also that the access must be “uninterrupted”.

Of course, there will be problems here with access, but the panel is not capable of anticipating exactly what they may be. The panel is convinced that such problems can be dealt with only as they arise. For present purposes, we interpret the MDA’s requirement of access to be that Site 2 is entitled to sufficient access for its present foundation-construction purposes and that the access shall not be unreasonably interrupted. The access existing today for Site 2 meets that qualification, so that from an access point of view, the site is ready for construction of the foundations of Tower 2.

### 3. The Void

(a) The Problem. In connection with preparing the East Bathtub, the PA constructed a Slurry Wall along with the east boundary of the bathtub. Along the east side of the Slurry Wall the PA has left an empty area – the “void”. In parts of the void, the PA has left construction remnants, including steel beams. At the request of SPI the PA cleaned and filled the void along the boundary of Site 4. It has refused to do so, however, at Site 2.

(b) SPI’s Position. Removing the steel bracing and other structural remnants that will interfere with caisson installations as well as backfilling the void area are necessary for the PA to complete construction of the East Bathtub, and until they are completed, the “bathtub” condition for a partial site turnover has not been met.

(c) PA’s Position. The PA contends that the void was an existing condition which it has no obligation to cure. It argues additionally, that a portion of the void is in an underground area that will serve the Transportation Hub immediately south of Site 2 and that it would make no sense to first fill this area and then excavate it for purposes of constructing the Hub.

(d) Decision. The panel agrees with SPI that under the MDA it is the obligation of the PA to clean and backfill the void, at least that portion of the void adjacent to Site 2. The PA created the condition in connection with its construction of the Slurry Wall and is obligated to cure the problem by completing the construction, including removing the debris and unnecessary bracing materials that will interfere with

installation of the required caissons, and backfilling the void. Its failure to do so means it has not completed the PA East Bathtub Preparatory Work on Site 2, a requirement for partial completion of Site 2.

4. **Rock-Bolts**

(a) The Problem. Along the north Slurry Wall of the East Bathtub the PA has installed several rock-bolts, which are injected horizontally into the rock face of the bathtub. Small portions of these bolts – approximately one foot in length – have been left projecting into the bathtub area in Site 2. As long as they remain, they interfere with SPI's footing construction for the foundation for Tower 2.

(b) SPI's Position. With the rock-bolt projections in place, SPI argues that the East Bathtub work has not been completed, and the site is not Construction-Ready; therefore, according to SPI it does not qualify for partial site completion.

(c) PA's Position. At the hearing, the PA stated that the projections of the rock-bolts from the face of the bathtub wall can easily be "burned off" without creating any construction or engineering problem.

(d) Decision. The panel holds that it is the obligation of the PA to "burn off" the rock-bolt projections or otherwise eliminate them. Until that is done, Site 2 will not be "Construction Ready".

5. **Tie Backs**

(a) The Problem. As of October 5, 2008, the PA acknowledges that it had not completed work on the tie backs needed for stabilization of the Slurry Wall at the east side of the East Bathtub. By definition, failure to complete the East Bathtub

work in Site 2 means that Site 2 was not completed for partial turnover, but the PA informed the panel at the hearing that work on the tie backs has since been completed.

(b) SPI's position. SPI does not raise the issue in its pre-hearing memorandum. Nevertheless, strictly speaking, Site 2 did not qualify for partial turnover on October 5, 2008 for this reason alone, without regard to SPI's other contentions.

(c) PA's position. The PA rests on the fact that the tie-back work on Site 2 has now been completed.

(d) Decision. Technically, the certificate of partial completion of Site 2 was not valid when it was issued because of the tie-back situation alone. But in the overall scheme the issue is apparently moot in view of what appears to be agreement between the parties about the recent completion of that work and further in light of the other conditions that must also be satisfied before partial turnover of Site 2 can occur.

**6. Rock ledge.** In its Determination, SPI also made reference to a rock ledge projecting from the bathtub wall of Site 2, but insufficient evidence was presented for the panel to rule on that issue. If it is a problem, it does not appear to be major, and we assume the parties will, in the spirit of good-faith cooperation, work it out.

**7. Demobilization.** One of the conditions for being Construction Ready is that all of the PA's contractors' equipment be removed from the Delivered Area. On October 5, 2008, the effective date of the certificates of completion, this had not been fully accomplished. However, the demobilization of the PA's contractors' materials on the east access road was completed by the week of November 17, 2008 and no longer seems to be an issue.

## C. Costs

MDA §9.2(vii) provides:

Each party shall pay its own fees and expenses relating to the arbitration . . . . The unsuccessful party shall pay the fees and expenses of . . . the Arbitrators . . .

In this arbitration, the PA is the unsuccessful party, and is consequently charged with paying the fees and expenses of the arbitrators.

## III SUMMARY AND CONCLUSION

With respect to Site 4, by changing its plan for excavation under and support of the subway box, and by erecting the soldier pile wall, the PA has neither completed the East Bathtub Preparatory Work nor delivered Site 4 in Construction-Ready Condition.

With respect to Site 2:

- Caissons. Lack of MTA approval for installation of the caissons prevents Site 2 from being in Construction-Ready Condition.
- Access. SPI's claim of being denied uninterrupted access is rejected under the conditions now prevailing at the site.
- Void. SPI's claim with respect to the void is sustained; the PA is obligated to remove the bracing materials and other construction remnants and to backfill the void.
- Rock bolts. The PA is required to "burn off" the rock-bolt projections in the North Slurry Wall of the East Bathtub.
- Tie backs. The work having been completed, this problem is moot.

- Rock Ledge. For lack of sufficient evidence, the panel does not rule, but instead assumes that if there is a problem the parties will work it out without further assistance from the panel.
- Demobilization. Since that process has now been completed, the issue is moot at this time.

The panel finds and concludes that due to the conditions on the sites as discussed above,

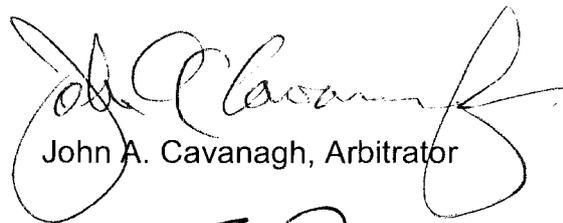
- 1 The PA's October 5, 2008 Certification of Final Site Completion for Site 4 did not effectively constitute a final turnover of Site 4.
- 2 The PA's October 5, 2008 Certification of Partial Site Completion for Site 2 did not effectively constitute a partial turnover of Site 2.
- 3 A certificate of partial completion of Site 2 or of final completion of Site 4 may not properly be issued until the conditions identified in this decision have been cured or otherwise agreed to by the parties.
- 4 Liquidated damages owed by the PA to SPI have continued to run since October 5, 2008, and must be paid promptly by the PA, with applicable interest to the date of payment.
- 5 As noted above, the PA is charged with paying the fees and expenses of the arbitrators.

**Final note.** The panel notes that in developing the design for the redevelopment of the World Trade Center, and in preparing the MDA and its related agreements, the parties have admirably cooperated in facing and resolving many of the conflicts and problems that arose. We commend them in this effort. Now that they are into actual

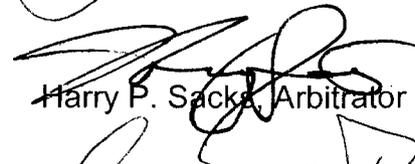
construction, that level of cooperation must not only continue but increase, particularly in communicating with respect to problems as soon as they arise, so that efficient and practical adjustments and solutions can be developed with minimal difficulty. Through a continued and applied spirit of cooperation throughout the construction process, the PA and SPI should be able to complete as quickly as reasonably possible the entire redevelopment project, not only as a revitalized commercial center for New York City, but also as a symbol for the entire nation of the indomitable American spirit and its determination to rise above and overcome the tragedy of 9/11.

[Signatures on next page]

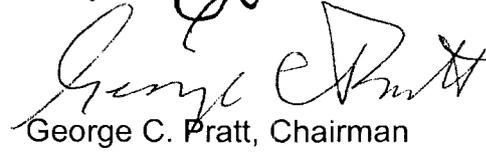
December 11, 2008



John A. Cavanagh, Arbitrator



Harry P. Sacks, Arbitrator



George C. Pratt, Chairman

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