

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>THE UNITED STATES OF AMERICA,</b>	:	<b>CIVIL ACTION</b>
<b>for the Use and Benefit of</b>	:	
<b>PRO-SPEC PAINTING, INC.,</b>	:	
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>BORO DEVELOPERS, INC. and</b>	:	
<b>INSURANCE COMPANY OF</b>	:	
<b>NORTH AMERICA,</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 96-5498</b>

**MEMORANDUM**

**Reed, J.**

**November 18, 1997**

Plaintiff Pro-Spec Painting, Inc. (“Pro-Spec”) filed a motion for summary judgment to confirm an arbitration award (Document No. 21) issued in a contract dispute with defendant Boro Developers, Inc. (“Boro”). Because I find that the arbitration article in the contract between Pro-Spec and Boro unambiguously indicates that the parties intended the arbitration to be binding and because Boro has not argued that the award should be vacated on any of the grounds provided in the Federal Arbitration Act (“FAA”), which governs implementation of the arbitration article, the motion by Pro-Spec for summary judgment will be granted and the arbitration award will be confirmed.

**I. BACKGROUND**

Boro is a general contracting company that works exclusively on construction projects in

the federal, state, and municipal sectors. Pro-Spec is a painting contractor. Pro-Spec and Boro entered into two contracts; under the second contract, which is at issue here, Pro-Spec was to perform painting on a construction project to renovate the Robert C. N. Nix, Sr. Federal Office Building in Philadelphia, Pennsylvania. The negotiations over the contract language described below occurred over the formation of the first contract, but both parties agree that the language of the contract at issue is identical to the first contract and was intended to be the same.

The contract, based on a form contract developed by the American Institute of Architects (AIA), contained provisions for the arbitration of disputes between Pro-Spec and Boro in Article 6. According to deposition testimony submitted to this Court by the parties, the president of Pro-Spec and the CEO of Boro negotiated over the inclusion of a clause in Article 6 regarding the finality and effect of any arbitration -- Pro-Spec's practice was always to include a statement that arbitration was to be final and Boro's practice was never to include such a statement in the contract. (Def.'s Mem. at 3; F. Shapiro dep. at 13).

Article 6.4 of the AIA contract originally provided that:

The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

This provision was crossed out as a matter of course by Boro; however, for the contract with Pro-Spec, the CEO of Boro typed the following clause at the bottom of the page:

Either party, if the award rendered by the arbitrator or arbitrators if [sic] found unacceptable shall have all normal remedies to persue [sic] a reversal of the decision in accordance with applicable laws in any court having jurisdiction thereof.

After the contract for the Nix Federal Office Building was completed, Pro-Spec filed a demand for arbitration on October 12, 1995, claiming that Boro had not paid Pro-Spec the full amount owed under the contract. Boro participated fully in the arbitration process. A hearing was held before an American Arbitration Association (AAA) appointed arbitrator on September 26, 1996. After the parties submitted briefs to the AAA and had an opportunity to present their positions at the arbitration hearing, the arbitrator entered an award on November 1, 1996, in favor of Pro-Spec for \$33,030.24 plus the reimbursement from Boro of \$500.00 in administrative fees that Pro-Spec had advanced for the arbitration.

In August of 1996, after the arbitration hearing but before the arbitrator entered an award, Pro-Spec brought an action in this Court under the Miller Act, 40 U.S.C. § 270a, against Boro and Insurance Company of North America (“INA”). The Miller Act provides that a contractor who is awarded a contract to work on a public building must provide a bond to the United States for the protection of those supplying labor and materials for the project.<sup>1</sup> On May 7, 1997, this Court granted leave to Pro-Spec to amend its complaint to include a claim for confirmation of the arbitration award. At the time Pro-Spec filed this motion for summary judgment to confirm the arbitration award, Boro had not paid the amount awarded to Pro-Spec by the arbitrator, nor had it appealed the award.

The contract between Pro-Spec and Boro is governed by the Federal Arbitration Act, 9

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<sup>1</sup> Pro-Spec alleged that INA as surety is jointly and severally liable with Boro for all damages owed to Pro-Spec under the contract. (Pl.’s Amended Complaint at ¶¶ 7, 19 and 26). Although INA admitted it issued a surety bond to Boro, it generally denied the averments of liability to plaintiff. Boro and INA submitted a joint response to Pro-Spec’s motion for summary judgment. From this record, including the joint response, the Court infers a normal surety agreement between Boro and INA under which INA is liable for all sums Boro is legally liable to pay Pro-Spec.

U.S.C. §1 et seq.<sup>2</sup> Under § 2, the FAA is applicable to any contract to arbitrate disputes that involves commerce. Section 9, covering the method by which a party may confirm an arbitration award, provides that:

[A]t any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

An arbitration award may be vacated only if the award was procured by corruption, fraud, or undue means, if there was evident partiality or corruption in the arbitrators, if the arbitrators were guilty of misconduct, or if the arbitrators exceeded or imperfectly executed their powers. See 9 U.S.C. § 10. Section 12 requires a party seeking to vacate an award to serve the adverse party with the motion within three months of the award.

The typed revision of the arbitration clause in the contract between Pro-Spec and Boro is at the heart of this motion for summary judgment. The parties disagree on what their intent was in including this provision and the interpretation it should now be given. Pro-Spec contends that the parties intended the provision to mean that arbitration would be binding and could only be appealed by channels permitted by applicable law. (Yarbrough dep. at 31). Because Boro has not used those channels to contest the award, Pro-Spec argues it is entitled to summary judgment

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<sup>2</sup> Pro-Spec claims that Pennsylvania law governing arbitration applies as well as federal law. Because the FAA is applicable to this case, the federal statute preempts any provision of the Pennsylvania statute governing arbitration that conflicts with it. See Southland Corp. v. Keating, 465 U.S. 1, 10-16 (1984) (holding that a California law that restricted the enforcement of arbitration clauses directly conflicted with the FAA and thus violated the Supremacy Clause). The Supreme Court in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983) declared that the FAA “is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”

confirming the award.

Boro contends that the parties intended the modified arbitration clause to indicate that any arbitration award would be nonbinding and that “either party had the right to accept or reject any arbitration award rendered in any hearing conducted pursuant to said clause, leaving this Honorable Court free to rule on the controversy on its merits.” (Def.’s Mem. at 2; F. Shapiro dep. at 22). To defend against the motion for summary judgment, Boro argues that there is a genuine question of material fact as to the intent of the parties in the typed provision of Article 6, serving to bar summary judgment.<sup>3</sup>

## II. CONTRACT CONSTRUCTION AND INTERPRETATION UNDER A MOTION FOR SUMMARY JUDGMENT

Pro-Spec seeks confirmation of the award through a motion for summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure provides that a motion for summary judgment may be granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

The resolution of this motion depends in part on whether or not the words of the contract including the typed revision of the arbitration clause are ambiguous and open to more than one

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<sup>3</sup> Boro also argues that Pro-Spec waived its right to enforce the arbitration clause because it filed a claim in this Court under the Miller Act. It is difficult to see how Pro-Spec waived its right to enforce the arbitration clause because Pro-Spec had already filed its demand for arbitration and the parties had already completed the arbitration hearing when Pro-Spec filed its Miller Act claim. Boro cites Goral v. Fox Ridge, 683 A.2d 931 (Pa. Super. Ct. 1996) in support of its waiver argument. In Goral, the court held that the defendant waived its right to enforce the arbitration clause because the defendant waited to demand that the claim go to arbitration until the court ruled against it on the question of whether the plaintiff’s claim was time barred. I find that the facts of Goral are distinguishable from the facts here, and thus, I am not persuaded that Pro-Spec has waived its right to enforce the arbitration clause.

interpretation or if the plain meaning of the contract is clear on its face. Federal law applies in construing and enforcing an arbitration clause under the FAA. See Goodwin v. Elkins & Co., 730 F.2d 99, 108 (3d Cir.), cert. denied, 469 U.S. 831 (1984); John Ashe Associates, Inc. v. Envirogenics Co., 425 F. Supp. 238, 241 (E.D. Pa. 1977). The question of whether a contract provision is ambiguous is a question of law. See American Flint Glass Workers v. Beaumont Glass Co., 62 F.3d 574, 581 (3d Cir. 1995) (applying general federal principles of contract law). If a contract is open to two interpretations, no party is entitled to summary judgment because interpretation of an ambiguous contract is a question of fact. See American Flint, 62 F.3d at 581 (explaining that in reviewing a grant of summary judgment, if the opposing party “presents us with a reasonable reading of the contract which varies from that adopted by the district court, then a question of fact as to the meaning of the contract exists which can only be resolved at trial”) (quoting Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3d Cir. 1987)). However, if the contract is unambiguous, a court may interpret the contract as a matter of law and the moving party may be entitled to summary judgment.

In interpreting a contract, the court should first examine the four corners of the document. See Washington Hospital v. White, 889 F.2d 1294, 1300 (3d Cir. 1989). “In deciding whether a contract is ambiguous, a court does not just ask whether the language is clear; instead it hears the proffer of the parties and determine[s] if there are objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible of different meanings.” American Flint, 62 F.3d at 581 (internal quotes omitted); see also In re New Valley Corp., 89 F.3d 143, 150 (3d Cir. 1996), cert. denied, 117 S. Ct. 947 (1997) (quoting same and applying federal common law of contracts).

While a court is initially limited in interpreting a contract to the document's four corners, a court should consider all language within those parameters as a whole. See, e.g., Fidelity Federal Savings and Loan Association v. Felicetti, 830 F. Supp. 262, 269 (E.D. Pa. 1993) (“It is elementary contract law that when interpreting a specific term of a contract, the entirety of the contract must be taken into consideration.”) As a part of this interpretive process, a court should look to the position of the parties to see what they intended to accomplish in forming the contract. See Rainbow Navigation, Inc. v. United States, 742 F. Supp. 171, 185 (D.N.J. 1990), aff'd, 937 F.2d 105 (3d Cir. 1991) (“It is a general principle of contract law that the purpose of an agreement should be considered in construing its terms.”) Finally, a court should not interpret a contract in a way to make any of its provisions unworkable or void. See First Philadelphia Realty Corp. v. Albany Savings Bank, 609 F. Supp. 207, 210 (E.D. Pa. 1985) (observing that contracts should not be construed as to make any provision of the contract meaningless).

### III. ANALYSIS

Looking to the four corners of the contract between Pro-Spec and Boro, it is clear that the parties entered into a lengthy, detailed, and sophisticated contract for the painting work. As part of the contract, they included an article for the arbitration of any disputes arising between them pertaining to the work under the contract. The comprehensiveness of the contract as a whole and the inclusion of a detailed arbitration article indicates that the parties intended to inject a level of efficiency into their business relationship through the terms of the contract. Agreeing to arbitrate disputes allows the parties to avoid the expense, time, and uncertainty involved in litigating disputes in court. It is a logical and permissible inference that the parties intended as part of this

efficient mechanism that the parties could challenge the arbitration award only under limited circumstances and otherwise they would be bound by the award and able to have it judicially confirmed.

Thus, I find that the language of the arbitration article including the typed revision of the arbitration clause is not ambiguous and lends itself to only one interpretation. Included in the four corners of the contract at Article 6 are three detailed paragraphs outlining the terms and procedures under which disputes arising out of the contract would be arbitrated, including a provision in Article 6.2 that the agreement to arbitrate shall be enforceable in any court having jurisdiction thereof. The words “all normal remedies to pursue [sic] a reversal of the decision in accordance with applicable laws in any court having jurisdiction thereof” in the typed revision of the arbitration clause clearly mean that the arbitration award could be appealed through normal channels allowed under applicable law. Further, it is clear that the “normal channels” open to appeal an arbitration award covered by the FAA are those found in section 10, pertaining to vacating an award.

Clearly Boro intended that disputes would be arbitrated and an unacceptable award could be challenged in court under applicable law, i.e. the FAA. There is no language even suggesting that the arbitration process or the award could be ignored or rejected out of hand by Boro. Boro agreed that an unacceptable award had to be attacked by legal remedies in court. There is no contract law which would allow Boro to take advantage of the efficiency that the arbitration article brings to the deal on the one hand but refuse to abide by some of its terms on the other. There is no other reasonable interpretation of the contract as a whole.

Thus, the award is binding upon Boro unless it can challenge the award under the FAA.

Boro has made no allegations of fraud, corruption, or any other ground for vacating an award listed in § 10. In fact, Boro never made a motion to set aside the award; the only thing pending before this Court is Boro's response to Pro-Spec's motion for summary judgment, and Boro certainly did not challenge the award within the three month period provided in § 12 of the FAA. See Tokura Construction Co. v. Corporacion Raymond, S.A., 533 F. Supp. 1274, 1277-78 (S.D. Texas 1982) (holding that § 12 operates to time bar objections to an arbitration award even if they are raised in defense to a motion to confirm the award if filed beyond the three month period); Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union 135 v. Jefferson Trucking Company, 628 F.2d 1023 (7th Cir. 1980) (same), cert. denied, 449 U.S. 1125 (1981). But see Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union 364 v. Ruan Transport Corp., 473 F. Supp. 298 (N.D. Ind. 1979)(reaching the opposite conclusion).

As a result, because I find that the revised arbitration clause is unambiguous on its face, no genuine issue of material fact exists, and I interpret the clause to mean that the arbitration is binding as a matter of law. Unless this Court could vacate the award on the grounds listed in § 10 of the FAA, this Court is bound under § 9 to confirm the award without further inquiry.<sup>4</sup>

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<sup>4</sup> Courts addressing the question of whether they have jurisdiction to confirm an award under § 9 have held that the parties must expressly provide for confirmation by a court in the contract, unless there are other factors present to indicate the parties' intent to allow confirmation despite the lack of an express provision. See Higgins v. United States Postal Service, 655 F. Supp. 739, 744 (D. Me. 1987). Some of these other factors from which courts have inferred the parties' intent to allow confirmation and thus based their jurisdiction under §9 include language indicating that the arbitration award is binding and final, see Ingvoldstad v. Kings Wharf Island Co., 593 F. Supp. 997, 1002 (D.V.I. 1984), aff'd, 770 F.2d 1071 (3d Cir. 1985) (considering the conduct of the party alleging lack of jurisdiction and the language of the arbitration clause in determining that "permission [to exercise jurisdiction and confirm the award] can be implied from language which makes an award 'binding and final'"), participation of the parties in the arbitration process, see Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386, 388-90 (7th Cir.), cert denied, 454 U.S. 838 (1981); Murray Oil Products Co. v. Mitsui & Co., 146 F.2d 381, 383 (2d Cir. 1944) (finding an implicit agreement for an entry of judgment on an arbitration award where the parties submit their dispute to arbitration and do not object to the procedures), and utilization of AAA rules or arbitrators, see Kallen v. District 1199, National Union of Hospital and Health Care Employees, 574 F.2d 723, 724-26 (2d Cir. 1978); Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1272-73 (7th Cir. 1976).

Thus, the motion for summary judgment will be granted and the arbitration award confirmed.

An appropriate Order follows.

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I have found no express provision in the contract indicating that the parties agree that a judgment of the court shall be entered on the award; in fact, language to that effect was part of the clause that was crossed out in the AIA contract. However, this Court has jurisdiction to confirm the award under § 9 because, in light of the language of Article 6 as a whole, the parties intended to allow confirmation of the award in this Court when they indicated that arbitration would be binding, when they participated in the arbitration process, and when they submitted their dispute to an AAA arbitrator. In addition, the parties agreed in Article 6.2 that the arbitration agreement “shall be specifically enforceable under applicable law in any court having jurisdiction thereof.” The parties also provided that either party could pursue normal remedies to reverse an award; this is indicative of their intent to allow judicial confirmation because if such an attempt to reverse the award was unsuccessful, confirmation of the award would naturally and logically result. For these provisions to be meaningful, the parties must have intended for the judicial confirmation of any award entered pursuant to the arbitration article; otherwise Article 6, to which both parties agreed, would be unenforceable and unworkable.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>THE UNITED STATES OF AMERICA,</b>	:	<b>CIVIL ACTION</b>
<b>for the Use and Benefit of</b>	:	
<b>PRO-SPEC PAINTING, INC.,</b>	:	
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>BORO DEVELOPERS, INC., and</b>	:	
<b>INSURANCE COMPANY OF</b>	:	
<b>NORTH AMERICA,</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 96-5498</b>

**ORDER**

**AND NOW**, this 18th day of November, 1997, upon consideration of the motion of plaintiff Pro-Spec Painting, Inc. for summary judgment to confirm the arbitration award (Document No. 21), as well as the various memoranda of the parties relating thereto, and upon review of the pleadings, depositions, documents, and discovery of record, and for the reasons set forth in the foregoing memorandum, having found that the arbitration article and the typed revision of the arbitration clause in the contract unambiguously indicates that the parties were free to pursue the avenues for appeal available under the applicable Federal Arbitration Act to vacate the arbitration award, and having further found that defendant Boro Developers, Inc. did not attempt to have the award vacated under the Federal Arbitration Act, it is hereby **ORDERED** that the motion by plaintiff for summary judgment is **GRANTED** and the arbitration award of \$33,030.24,<sup>1</sup> plus interest from November 2, 1996 to November 18, 1997, calculated at the

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<sup>1</sup> The arbitrator's award (Exhibit B to Pl.'s Amended Complaint) of \$33, 030.24 was inclusive of interest to the date of the award, November 1, 1996.

annual rate of 6 3/8%, plus \$500 in unreimbursed administration fees is **CONFIRMED**.

**JUDGMENT IS HEREBY ENTERED** in favor of plaintiff Pro-Spec Painting, Inc. and against defendants Boro Developers, Inc. and Insurance Company of North America jointly and severally in the sum of \$35,733.99.<sup>2</sup>

This is a final Order.<sup>3</sup> The clerk is directed to close this file.

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**LOWELL A. REED, JR., J.**

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<sup>2</sup> The sum was calculated as follows: \$33,030.24 at 6 3/8% per year for 382 days (covering November 2, 1996 to November 18, 1997) yields \$2,203.75 in interest. When added to the original award of \$33,030.24 plus \$500 in unreimbursed administration fees, the total is \$35,733.99.

<sup>3</sup> Because plaintiff plead Count II as an alternative basis for relief and plaintiff having successfully sought summary judgment on Count I, the claim set forth in Count II is denied without prejudice as moot.