

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

CITY OF READING,	:	CIVIL ACTION
	:	NO. 97-7799
Plaintiff,	:	
	:	
v.	:	
	:	
WHEELABRATOR WATER	:	
TECHNOLOGY, INC.,	:	
	:	
Defendants.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

MARCH 31, 1998

Presently before the Court is a motion by Wheelabrator Water Technology, Inc. ("Wheelabrator") to dismiss a petition by the City of Reading ("the City") to vacate an arbitration award. In addition to dismissal of the City's petition, Wheelabrator requests that the Court confirm the arbitrators' award. For the following reasons, the Court will grant Wheelabrator's motion to dismiss and will confirm the arbitrators' award.

I. BACKGROUND

On June 26, 1996, the City and Wheelabrator entered into a contract for the removal and/or disposal of biosolids generated by the City's Fritz Island Wastewater Treatment Plant ("the Contract"). Shortly after the Contract took effect, a dispute arose as to whether Wheelabrator was entitled to a

"change order"¹ to compensate Wheelabrator for an unforeseen increase in the cost of performing the Contract.

Prior to entering into the Contract, the City had provided potential bidders, including Wheelabrator, with historical data and estimates indicating that a large proportion of the biosolids to be disposed pursuant to the Contract qualified under environmental regulations as beneficially reusable biosolids. Reusable biosolids can be disposed at a cost to Wheelabrator of \$21.20 per ton. The remaining biosolids had to be landfilled at a cost to Wheelabrator of \$34.58 per ton. Based on the estimated relative quantities of reusable to non-reusable biosolids, Wheelabrator provided a single bid of \$29.17 per ton, and was awarded the Contract.

After the Contract was executed, it became evident that none of the biosolids collected from the City's Wastewater Treatment Plant could be beneficially reused due to a problem with excess levels of molybdenum. Because all of the biosolids had to be landfilled, the cost of performing the Contract increased significantly. As a result, Wheelabrator requested a modification or change order to the underlying Contract that would recognize Wheelabrator's increased costs. The City refused to consider Wheelabrator's request on two separate occasions

¹A change order is defined by the Contract as "[a] written order to Contractor signed by Owner authorizing an addition, deletion or revision in the Work, or an adjustment in the Contract Price or the Contract Time issued after the effective date of this Contract."

based on an assertion that, under the terms of the Contract, it had sole and unlimited discretion to either award or not award a change order.² Wheelabrator then requested arbitration pursuant to §8:21 of the Contract, which provides, in relevant part, that "[a]ll disputes under this Contract shall be submitted for arbitration if agreement cannot be reached."

The arbitrators awarded Wheelabrator compensation from the City in the amount of \$39.36 per ton for all biosolids removed until beneficially reusable solids are again produced, at which point, the compensation payable to Wheelabrator would revert to \$29.17 per ton. (Arb. Dec. at 9). The basis for the arbitrators' decision was two-fold. First, it found that the parties were faced with a "fundamental change in circumstances that could not have been within the contemplation of either of the parties," and therefore, "[u]nder the circumstances, it was entirely reasonable for Wheelabrator to request a change order." (Arbit. Dec. at 5). Second, the arbitrators noted that reusable biosolids were not being produced because the City failed to repair a defective condition which existed in the Wastewater Treatment Plant. (Arbit. Dec. at 5-6). Citing the Pennsylvania

²The City specifically pointed to §8:17 of the Contract which provides, in part, that:

Without invalidating the Agreement, Owner may, at any time or from time to time, order additions, deletions or revisions in the Work; these will be authorized by Change Orders.

rule that exculpatory provisions in a contract cannot be raised as a defense where there is affirmative interference with the contractor's work or failure to act in some essential matter necessary to the prosecution of the work, the arbitrators rejected arguments by the City that various clauses of the Contract demonstrated that Wheelabrator assumed the risk of variations in the amount of reusable biosolids produced. (Arbit. Dec. at 5-7).

The City then petitioned this Court requesting that the Court reverse the decision of the arbitrators, and vacate the arbitrators' award of damages pursuant to § 10(a)(4) of the Federal Arbitration Act.³ 9 U.S.C. § 10(a)(4).⁴ Specifically, the

³In its original petition, the City argued that the standard provided by the Pennsylvania Uniform Arbitration Act for vacating an arbitrators decision applied to this case. Wheelabrator, however, argued that the appropriate standard was the one supplied by the Federal Arbitration Act. Upon direction from the Court, the City amended its petition by adding a count for relief under the Federal Arbitration Act. Finally, on March 19, 1998, during a hearing and after the testimony of an employee from Wheelabrator regarding Wheelabrator's contacts with interstate commerce, the City conceded that the standard provided by the Federal Arbitration Act applies to this case. Therefore, by agreement of the parties, the Court will analyze the City's petition and Wheelabrator's motion to dismiss under the standard supplied by the Federal Arbitration Act.

⁴9 U.S.C § 10 provides:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) Where the award was procured by corruption fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

City argues that the arbitrators exceeded their powers by: (1) effectively issuing a change order with regard to price despite the fact that, under the Contract, only the City has the right to grant a change order; and (2) totally re-fashioning the Contract in their award despite the fact that they were completely without power to do so under the Contract.⁵ In response to the City's petition, Wheelabrator filed a motion to dismiss the petition for failure to state a claim upon which relief may be granted, and requested that the arbitrators' award be confirmed.

II. LEGAL STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a motion to dismiss for failure to state a claim upon

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10.

⁵The City's petition also stated that the arbitrators exceeded their power when they considered parol evidence. However, that argument was withdrawn by counsel for the City during the hearing before this Court.

which relief may be granted if the facts plead, and reasonable inferences therefrom, are legally insufficient to support the relief requested. Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept as true the facts alleged and reasonable inferences drawn from them. Id. Dismissal is limited to those instances where it is certain that no relief could be granted under "any set of facts that could be proved." Graves v. Lowery, 117 F.3d 723, 726 (3d Cir. 1997).

III. DISCUSSION

A. The Federal Arbitration Act

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, "establishes a federal policy favoring arbitration" by requiring the courts to "rigorously enforce agreements to arbitrate." Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 225 (1987). To that end, the scope of review is "narrow in the extreme" under the Act. Amalgamated Meat Cutters v. Cross Brothers Meat Packers, Inc., 518 F.2d 1113, 1121 (3d Cir. 1975). The district court may not reweigh the evidence to decide whether to vacate the award. Mutual Fire, Marine & Inland Insurance Co. v. Norad Reinsurance Co., 868 F.2d 52, 56 (3d Cir. 1989)("It is not this court's role, however, to sit as the [arbitration] panel did and reexamine evidence under the guise of determining whether the arbitrators exceeded their powers."). In other words, the court must focus on the "arbiter and the contract and not on the

facts underlying the dispute." Local Unions 1160 v. Busy Beaver Bldg. Ctrs., Inc., 616 F. Supp. 812, 813 (W.D.Pa. 1985).

Additionally, "a federal court may set aside an arbitration award only where certain statutory or judicially created grounds are present." Merril Lynch, Pierce, Fenner & Smith v. Jaros, 70 F.3d 418, 420 (6th Cir. 1995)(interpreting the Federal Arbitration Act); see 9 U.S.C. § 10 (enumerating the grounds for vacating an arbitration award). One of those grounds is that "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

The Third Circuit has set forth the analysis that a district court must undertake when deciding a challenge to an arbitrators' award on the grounds that the arbitrators exceeded their powers. Meadows Indemnity Co. v. Arkwright Mutual Insurance Co., 1996 WL 557513 *3 (E.D.Pa. 1996)(citing Mutual Fire, Marine & Island Ins. Co., 868 F.2d at 52)). First, "[t]he court must examine the form of the relief awarded to determine if it is rationally derived either from the agreement between the parties or from the parties' submissions to the arbitrators." Id. Second, "[t]he Court must determine whether the terms of the relief are rational, and may vacate the award if it finds that the relief awarded and the terms of the award are "completely irrational." Id. (citing Swift Indus., Inc, v. Botany Indus., Inc., 466 F.2d 1125 (3d Cir. 1972)).

B. Is the Form of Relief Rationally Derived from the

Agreement Between the Parties?

In order to determine whether the relief granted is rationally derived from the agreement, the Court must determine whether the "authority of the arbitrator springs from the agreement to arbitrate." See Swift, 466 F.2d at 1131. Parties are generally free to structure arbitration agreements as they see fit. Id.; see also Matteson v. Ryder System Inc., 99 F.3d 108, 112 (3d Cir. 1996)(the authority of the arbitrator is defined by the agreement and the submissions of the party); Volt Information Services, Inc. v. Board of Trustees of Stanford University, 489 U.S. 468, 478-479 (1989). They may either grant the arbitrator plenary authority or they may limit by contract the issues which may be arbitrated, Volt, 489 U.S. at 478-479 (1989), and/or the remedies which may be awarded, Swift, 466 F.2d at 1131; and the Federal Arbitration Act requires that the arbitration agreement be enforced according to those terms. In other words, an arbitrator may not venture beyond the bounds of his or her authority as defined by the arbitration agreement no matter how broad or narrow the scope of the arbitrator's authority. United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597-98 (1960).

In this case, there are at least two reasons why the arbitrators' authority "springs from the agreement."

First, the plain language of the Contract indicates that the scope of authority delegated by the parties to the arbitrators was plenary, without any limitations being placed on

the types of disputes which could be submitted to the arbitrator. Section 8:21 of the Contract provides, in relevant part, that: "All disputes under this Contract shall be submitted for arbitration if agreement cannot be reached." (emphasis added). Nor does the Contract contain language limiting the type of relief which the arbitrators may award to remedy a violation. In the absence of explicit provision addressing remedies, as is the case here, "arbitrators are given wide latitude in fashioning an appropriate remedy." Chameleon Dental Products, Inc. v. Jackson, 925 F.2d 223, 225-26 (7th Cir. 1990); see also Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 710 (7th Cir. 1994) ("It is commonplace to leave the arbitrators pretty much at large in the formulation of remedies . . ."). Therefore, the plain language of the Contract indicates that the arbitrators were acting within the scope of their authority when: (1) they resolved the dispute submitted to them by Wheelabrator regarding a change order; and (2) they granted Wheelabrator relief in the form of a change in unit price.

Second, the arbitrators' interpretation is rationally inferable from the contract. See Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215 (5th Cir. 1990). Here, the City views the terms of the Contract as providing it with unfettered discretion to decide whether to issue or withhold change orders. The arbitrators disagreed and interpreted the change order provisions as preventing the City from unreasonably withholding a change order in cases of changed circumstances not

contemplated by the parties or in situations where the City affirmatively interferes with the contractor's work. What the City views as an unauthorized exercise of authority is in fact a disagreement by the City as to how the arbitration panel construed the language of the Contract. Viewed in this light, it is perfectly rational to infer from the language of the Contract that the City was not free to withhold the issuance of a change order arbitrarily.

C. Is the Relief Granted Completely Irrational?

The Court also finds that the terms of the relief granted were not "completely irrational." See Swift Indus., Inc., 466 F.2d at 1125. The arbitrators calculated their award by adding a reasonable profit to Wheelabrator's actual cost of disposing of nonreusable biosolids. Furthermore, the award was limited in duration so as not to be overreaching. Once reusable biosolids are produced in any quantity, the compensation per ton will revert back to the amount provided for by the Contract. In the absence of any objection from the defendant as to rationality of the award, and given the rational approach used to calculate the award and the reasonable duration of the award, the Court cannot conclude that the award was completely irrational.

D. Confirmation of the Award

If the parties to a Contract agree that a judgment of the court will be entered after arbitration, then unless the award has been vacated, modified or corrected, the Federal Arbitration Act requires the district courts to enter an order

confirming the arbitration award.⁶ 9 U.S.C. § 9. Section 8:21(E) of the Contract between Wheelabrator and the City provides that the "arbitration proceeding and decision shall be a condition precedent to any right of legal action, and wherever permitted by law it may be filed in Court to carry it into effect." The parties having agreed to entry of an order confirming the arbitrators' award and the City having failed to state a claim for vacating the arbitrators' decision, the arbitration award is confirmed.

III. CONCLUSION

Accepting as true all facts alleged by the City in its petition and all reasonable inferences therefrom, the Court cannot conclude that the arbitrators exceeded their powers. Thus, the facts alleged are not legally sufficient to support the City's request that the arbitrators' award be vacated. The City's petition will be dismissed pursuant to Federal Rule of Civil

⁶Section 9 of the Federal Arbitration Act provides, in relevant part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to arbitration, and shall specify the court, then at 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.

9 U.S.C. §9.

Procedure 12(b)(6), and the arbitration award will be confirmed.

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

CITY OF READING	:	CIVIL ACTION
	:	NO. 97-7799
Plaintiff,	:	
	:	
v.	:	
	:	
WHEELABRATOR WATER	:	
TECHNOLOGY, INC.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this **31st** day of **March, 1998**, upon consideration of motion by defendant Wheelabrator Water Technology, Inc. ("Wheelabrator") to dismiss petition by plaintiff City of Reading ("the City") for appeal of arbitration award and for entry of judgment (doc. no. 2), response thereto by the City (doc. no. 6), motion by Wheelabrator to file a reply brief in support of its motion to dismiss (doc. no. 7), Wheelabrator's reply brief in support of its motion to dismiss (doc. no. 8), and the City's amended petition for appeal from award of arbitrators (doc. no. 10), it is **ORDERED** that:

1. Motion by Wheelabrator to file a reply brief in support of its motion to dismiss (doc. no. 7) is **GRANTED**;

2. Motion by Wheelabrator to dismiss plaintiff's petition for appeal of arbitration award and for entry of judgment (doc. no. 2) is **GRANTED**;

3. The City's amended petition for appeal from award of arbitrators (doc. no. 10) is **DISMISSED**; and

4. The arbitrators' decision and award is **CONFIRMED** and is entered as the **JUDGMENT** of this Court in accordance with 9 U.S.C. § 9.

AND IT IS SO ORDERED

EDUARDO C. ROBRENO, J.