

**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

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DELTA/B.J.D.S.	:	November Term, 2005
	:	
Plaintiff,	:	No. 3242
	:	
v.	:	Commerce Program
	:	
WILLIARD, A DIVISION OF LIMBACH	:	
COMPANY LLC, PARKER, INC./WILLARD,	:	
INC. and USF&G	:	Control No. 022055
Defendants.	:	
	:	

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**ORDER and OPINION**

**AND NOW**, this 3<sup>rd</sup> day of April 2006, upon consideration of Defendants' Preliminary Objections, the responses in opposition, the respective memoranda, all matters of record and in accordance with the Memorandum Opinion being contemporaneously filed with this Order, it hereby is **ORDERED** that said Preliminary Objections pursuant to Pa.R.C.P. 1028 (a)(6) are **SUSTAINED** and Plaintiff's Complaint is **dismissed without prejudice**, as this matter is subject to alternative dispute resolution pursuant to the contract between the parties.

**BY THE COURT:**

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**HOWLAND W. ABRAMSON, J.**

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	:	

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**OPINION**

***HOWLAND W. ABRAMSON, J.***

Before the Court are Defendants' Preliminary Objections to Plaintiff's Complaint. For the reasons fully set forth below, Defendants' Preliminary Objections are **sustained**.

**DISCUSSION**

Defendants have filed Preliminary Objections to Plaintiff's Complaint pursuant to

**Pa.R.C.P. 1028 (a)(6) – Existence of Agreement for Alternative Dispute Resolution.** 42

Pa.C.S.A. § 7303, which governs such matters, states:

A written agreement to subject any existing controversy to arbitration or a provision in a written agreement to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity relating to the validity, enforceability or revocation of any contract.

42 Pa.C.S.A. § 7303. Judicial inquiry in determining whether a suit must proceed to arbitration requires a determination as to whether: (1) a valid agreement to arbitrate exists between the parties and, if so, (2) whether the dispute involved is within the scope of the arbitration

provision. Smith v. Cumberland Group Ltd., 455 Pa. Super. 276, 284, 687 A.2d 1167, 1171 (1997); Messa v. State Farm Insurance Company, 433 Pa. Super. 594, 597, 641 A.2d 1167, 1168 (1994); PBS Coal, Inc. v. Hardhat Mining, Inc., 429 Pa. Super. 372, 376-77, 632 A.2d 903, 905 (1993).

As per the Complaint, in November 2005, Plaintiff Delta/B.J.D.S. (“Delta”) commenced this action against Defendants claiming breach of a subcontract and payment bond obligations. The action arises out of a construction subcontract entered into between Defendant Williard, a Division of Limbach Company (“Williard”), as general contractor, and Delta, as subcontractor, in connection with HVAC and plumbing work performed at the South Jersey Regional Medical Center in Vineland, New Jersey (the “Subcontract”). Defendant United States Fidelity and Guaranty Company (“USF&G”), as surety, issued a Subcontractor Performance Bond and Subcontractor Labor and Material Payment Bond on behalf of Williard as principal (the “Bond”). The Subcontract contains a valid agreement for alternative dispute resolution in Article 17 which states:

Any dispute between the Contractor and Subcontractor arising out of this Subcontract or breach thereof, but not involving the Owner, Principal or Contract Documents, may at the option of the Contractor, be submitted to arbitration in accordance with the Construction Industry Rules of the American Arbitration Association.

Def. Mem. Exh. B at Art. 17. Clearly, under this language, the decision to submit the case to arbitration rests solely within the discretion of the contractor, which has elected this option.<sup>1</sup>

Thus, the pertinent inquiry then becomes whether the instant dispute within the scope of this provision. This court finds that it does.

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<sup>1</sup> While Plaintiff is correct that, under the clear and unambiguous language of the subcontract, this case would not go to arbitration if the principal of the construction contract, L.F. Driscoll Company (“Driscoll”), was a party to this litigation, however such facts are not before the court. Despite Defendants' representation that Driscoll was going to

It is well-settled that the issue of whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide. Shaddock v. Christopher J. Kaclik, Inc., 1998 Pa. Super. LEXIS 830, 713 A.2d 635, 637 (1998). Pennsylvania law advocates strict construction of arbitration agreements and dictates that any doubts or ambiguity as to arbitrability be resolved in favor of arbitration. Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 687 A.2d 1167, 1171 (1997). The fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties. Lower Frederick Township v. Clemmer, 518 Pa. 313, 543 A.2d 502, 510 (1988). In order to determine the meaning of the agreement, the court must examine the entire contract, taking into consideration “. . . the surrounding circumstances, the situation of the parties when the contract was made, the objects they apparently had in view and the nature of the subject matter.” Huegel v. Mifflin Const. Co., Inc., 2002 Pa. Super. 94, 796 A.2d 350 (2002).

In the present case, the Subcontract makes it clear that the decision to submit a dispute to arbitration is within the sole discretion of the Williard, which chooses to submit the claim to arbitration. Furthermore, the Bond specifically incorporates the Subcontract and otherwise integrates and incorporates its terms and conditions. Based on the foregoing, this court finds that the Subcontract defines the rights and obligations of the parties, including the requirement that the parties submit their disputes to arbitration, if Williard elects to do so, which it has. As such, the instant dispute is beyond the jurisdiction of this court.

In opposition, Plaintiff argues, *inter alia*, that the Bond itself contains express language which specifically contradicts the dispute resolution clause of the Subcontract. Specifically,

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be joined as a defendant, it has not been done as of this date, accordingly the issue is moot.

Delta relies upon the following language, “...no suit or action shall be commenced hereunder by any Claimant...other than in a state court of competent jurisdiction...and not elsewhere.” Pl. Exh. B. However, the court finds that Delta has misapplied this provision. While any “suit or action” must be commenced in state court, the Bond does not speak to the issue of arbitration and certainly does not expressly preclude it, as Delta argues.

Based on the foregoing, Defendants’ Preliminary Objections are **sustained** and Plaintiff’s Complaint **dismissed without prejudice**, as this matter is subject to alternative dispute resolution pursuant to the Subcontract.

The court will enter a contemporaneous Order consistent with this Opinion.

**BY THE COURT:**

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**HOWLAND W. ABRAMSON, J.**

