

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

COKEN COMPANY, INC., :
Plaintiff :
 :
v. : CIVIL NO. AMD 04-2220
 :
THE CLARK CONSTRUCTION :
GROUP, INC., :
Defendant :
 :
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MEMORANDUM OPINION

Plaintiff, Coken Company, Inc. (“Coken”), instituted this action by filing a “Complaint and Petition to Stay Arbitration” against Clark Construction Group, Inc. (“Clark”). In count one of the complaint, Coken seeks damages for breach of contract. In count two of the complaint, Coken seeks a declaratory judgment that the dispute between the parties is not subject to arbitration. (Coken has also filed a separate motion to stay arbitration.) Clark has filed a motion to dismiss. For the reasons set forth herein, the motion to dismiss shall be granted.

Clark was the general contractor for the construction of a facility for the Environmental Protection Agency (“EPA”) at Research Triangle Park, North Carolina. Clark subcontracted the electrical work to Coken. Pursuant to a provision in the subcontract, the parties agreed to arbitrate all disputes (“the arbitration provision”).¹

¹The arbitration provision provided as follows:

To the extent not resolved under Article 11.b. above, any dispute between Clark and Subcontractor shall, at Clark’s sole option, be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American

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Following the completion of the project, as is customary in the construction industry, litigation ensued. Specifically, Clark commenced litigation against the GSA over additional payments allegedly due to Clark. Admittedly, as well, Clark owed additional payments to its subcontractors, including Coken. Predictably, therefore, Coken and Clark (and/or Clark's sureties on the construction bond) also engaged in litigation.

In due course, effective in January 2004, Coken and Clark settled their dispute pursuant to a so-called "Close Out Agreement." Therein, Clark agreed to pay Coken \$3.7 million "in full and final settlement of all claims by [Coken] against Clark" in accordance with the express terms of the Close Out Agreement. Among other things, the Close Out Agreement provided that the amount of "additional payments" by Clark to Coken, if any, based on Coken's so-called "pass through claims," i.e., claims "which involve the conduct of the [GSA]," would hinge on the application of an agreed algorithm. In short, Clark's liability for additional payments pursuant to the Close Out Agreement would depend on: (1) the outcome of the Clark/GSA litigation; (2) whether the outcome of the Clark/GSA litigation was by settlement or verdict and judgment; and (3) consideration of a potential "credit" to Clark for amounts incurred for attorney's fees and litigation costs in the

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Arbitration Association. If Clark elects to arbitrate, then the arbitration shall be in Montgomery County, Maryland The award rendered by the arbitrators shall be final and judgment may be entered upon it in accordance with applicable law in any court of competent jurisdiction In the event of any lawsuit under this clause, the Courts of Maryland shall have sole and exclusive jurisdiction . . .

Subcontract §11.c at 4.

Clark/GSA litigation, and a corresponding “allocable share” of such fees and costs to Coken. (This latter provision of the Close Out Agreement, “the attorney’s fees provision,” included an express agreement “to appoint Robert Wright of Whiteford, Taylor [a Baltimore law firm] to make a final and binding decision” on Coken’s “allocable share” of fees and costs if the parties could not reach agreement.) Manifestly, the parties intended that, except as “expressly modified” by the Close Out Agreement, the terms of the subcontract would continue to govern their relationship:

This Agreement is governed by Maryland law. Except as expressly modified by this Agreement, the Subcontract between Clark and Subcontractor and the bonds provided by Surety remain in full force and effect. Nothing herein should be considered as modifying, altering or extending the duties or obligations of the sureties (to Subcontractor or Clark), which are limited to the express terms of their bonds.

Close Out Agreement ¶10.

Eventually, Clark settled its dispute with GSA, thereby triggering the formula for possible additional payments by Clark to Coken pursuant to the Close Out Agreement. Clark and Coken disagree, however, as to Clark’s obligations under the Close Out Agreement, and also as to the proper forum in which to adjudicate the merits of the dispute. Clark argues that the arbitration provision set forth in the subcontract, *see supra* n. 1, applies; it has therefore commenced arbitration proceedings. Coken argues that the “pass through claims” are not within the scope of the arbitration agreement; it has therefore filed this action.

Coken’s Petition to Stay Arbitration (and its opposition to Clark’s motion to dismiss) is based on two contentions: (1) that the Close Out Agreement is a “separate document” not

containing an arbitration provision, and therefore disputes “arising directly from” the Close Out Agreement belong in court rather than in arbitration; and, alternatively, (2) assuming that the arbitration provision of the subcontract survives the parties’ execution of the Close Out Agreement, the Close Out Agreement in fact modified the arbitration provision contained in the subcontract by virtue of the parties’ agreement to appoint a local attorney to resolve any dispute over the issue of Coken’s “allocable share “ of attorney’s fees and costs in respect to the Clark/GSA litigation. Accordingly, Coken argues, the arbitration provision in the subcontract does not apply to disputes over the calculation of its pass through claims.

Neither of these contentions is persuasive. The first contention seeks to turn paragraph 10 of the Close Out Agreement on its head. In other words, Coken seems to contend that the recitation that the subcontract “remains in full force and effect” except as “expressly modified by this Agreement,” means that paragraph 10 makes the Close Out Agreement a “separate document,” whose provisions are subject only to the terms set out in the Close Out Agreement.² This is a *non sequitur*.

²The argument is presented as follows:

Coken requests payment solely under the clear and unambiguous terms of the Close Out Agreement, not the Subcontract. The Close Out Agreement does not contain an agreement to arbitrate disputes regarding payment for the pass-through claims and the present dispute arises directly from the terms of the Close Out Agreement. Clark is now impermissibly attempting to apply the arbitration clause of the Subcontract to a contract dispute involving the interpretation of a later, separate contract, the Close Out Agreement.

Pet. to Stay at 6. The flaw in this argument, however, is that, under the plain language of the Close Out Agreement, the subcontract (including its arbitration provision) is expressly

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The second contention, that in expressly providing for the appointment of a local attorney to resolve any dispute over the issue of Coken’s “allocable share” of attorney’s fees and litigation costs, the parties manifested an intention to preclude the arbitration of any other dispute that might arise under the Close Out Agreement, is marginally more plausible but no more persuasive.

Maryland law governs the issue of contract interpretation in this case. Maryland law follows the objective law of contract interpretation. *Taylor v. Nationsbank, N.A.*, 365 Md. 166, 178, 776 A.2d 645 (2001). “When language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed.” *Id* (internal quotations omitted). Whether a contract is ambiguous is determined by the court as a matter of law. *State Highway Admin. v. David A. Bramble, Inc.*, 351 Md. 226, 239, 717 A.2d 943 (1998); *Rothman v. Silber*, 245 Md. 292, 296, 226 A.2d 308 (1967) (“[I]f a written contract is susceptible of a clear, unambiguous and definite understanding . . . its construction is for the court to determine.”).

Paragraph 10 of the Close Out Agreement incorporates the broad arbitration provision in the subcontract:

Except as expressly modified by this Agreement, the Subcontract between Clark and Subcontractor and the bonds provided by Surety remain in

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incorporated into the Close Out Agreement. (“Except as expressly modified by this Agreement, the Subcontract between Clark and Subcontractor . . . remain in full force and effect.”). Plainly, as a matter of law, the Close Out Agreement is not a separate contract, but is a limited modification of the subcontract.

full force and effect. Nothing herein should be considered as modifying, altering or extending the duties or obligations of the sureties (to Subcontractor or Clark), which are limited to the express terms of their bonds.

Close Out Agreement ¶10. I conclude as a matter of law that the incorporation by reference of the subcontract, including the arbitration provision, into the Close Out Agreement, is unambiguous. There is no “express modification” of the arbitration provision in the Close Out Agreement. Thus, as a matter of law, the arbitration provision contained in the subcontract is every bit as much a part of the Close Out Agreement as it is a part of the subcontract itself, and disputes over the calculation of the pass through claims are subject to arbitration.

This result is not remotely affected by Coken’s argument that the parties’ express agreement to permit an identified local attorney to resolve any dispute over Coken’s “allocable share” of attorney’s fees and litigation costs compels an inference that *only issues related to Coken’s “allocable share”* are subject to “arbitration.” The word “arbitration” is not even used in the Close Out Agreement. And, even assuming that one were to infer *anything* about the parties’ decision to commit any potential dispute over Coken’s “allocable share” to the named attorney, one would not reasonably infer an intent to scuttle the arbitration provision contained in the subcontract. It is true, as Coken argues, that the parties could have explicitly stated that they would arbitrate the pass through claims. It is *at least equally true*, however, that if the parties wished to abrogate the broad arbitration provision contained in the subcontract, *they would have done so, in lieu of expressly incorporating the*

whole of the subcontract, including the arbitration provision, into the Close Out Agreement.

For the reasons set forth herein, it is plain that the present dispute over the pass through claims is subject to arbitration. Accordingly, this case shall be dismissed. An order follows.

Filed: September 27, 2004

/s/
Andre M. Davis
United States District Judge