STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF LEXINGTON	)	**C/A # 2019-CP-32-01927**
Acadian Steel, Inc.,	)	
	)	
Plaintiff,	)	
	)	**ORDER**
v.	)	
	)	
Nan, Inc.; Fidelity and Deposit Company of Maryland; and Zurich American Insurance Company,	)	
	)	
Defendants.	)	

THIS MATTER comes before the Court on the Motion of Defendant Nan, Inc. ("Nan") for dismissal of this action under S.C.R.C.P. 12(b)(1), 12(b)(3), and 12(b)(6) or in the alternative, for a stay pending arbitration. This matter was heard before this court on August 28, 2019. Both parties submitted proposed orders to the court in support of their arguments.

FINDINGS OF FACT

This matter arises out of a contract between Defendant Nan and the Plaintiff, Acadian Steel, Inc. ("ASI") wherein ASI was to provide steel fabrication labor and materials to Nan for the construction of the Kamehameha Highway Station Group Construction Project (the "Project") in Honolulu, Hawaii. ASI contends Nan has failed to pay the contract balance due and owing for the labor and materials provided.

Nan bases its motion on an arbitration provision found in a purchase order it issued to ASI in May of 2017 (the "May PO"), which requires arbitration of all disputes arising out of or relating to the May PO in Hawaii and was fully executed by both parties. The May PO provided for a lump sum contract price of $5,654,330.00. Prior to the issuance of the May PO, Nan issued a series of documents to ASI related to the Project's steel work that was eventually led to the

issuance of the May PO. These included a Notice to Proceed, a Letter of Intent, and a Purchase Order issued in March of 2017 (the "March PO") for a contract price of $5,318,283.77. None of the documents issued prior to the May PO contained an arbitration provision

The May PO differed from these earlier documents in other respects beyond the arbitration provision. Specifically, the May PO included references two contract revisions dated April 13 and May 8, 2017, respectively, and one change order also dated April 13, 2017. These did not appear in the March PO. The stated value of the May PO's base scope of work, plus the first revision and the change order, equal the contract value of the March PO. However, the second revision adds $336,046.23 to the contract value, resulting in an overall increase to the contract price in that amount.

Attached to the May PO are two exhibits – Exhibit A is a 9-page document entitled "Standard Terms and Conditions" which contains the arbitration clause. Exhibit B is a 2-page document entitled "Scope of Work." The "Standard Terms and Conditions" section attached to the May PO differed in substance and appearance from the "Standard Terms and Conditions" attached to the March PO. Nan has also provided a two-page document entitled "Amendment No. 1," which was signed in June of 2017 and formally memorializes handwritten changes to the May PO. The May PO and Amendment No. 1 were executed by both parties. ASI never executed the March PO.

STANDARD OF REVIEW

The question of arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise. *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418 (1986). In deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying

claims. *Id.* To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause. *Hinson v. Jusco Co.*, 868 F.Supp. 145 (D.S.C. 1994); *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 437 S.E.2d 22 (1993). The policy of the United States and South Carolina is to favor arbitration of disputes. *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999).

ANALYSIS AND CONCLUSIONS OF LAW

ASI contends that the May PO is unsupported by consideration because it merely memorialized agreements previously reached by the parties. ASI points to references in the May PO to the first revision and change order dated April 13, 2017 – approximately one month before the issuance of the May PO. Nan contends that the May PO controls and supersedes the March PO, the Notice to Proceed, and the Letter of Intent based on the language in the May PO's terms and conditions and the fact that it added additional scopes of work to ASI's contract.

The parties' contract provides for the fabrication and provision of steel for a construction project in Hawaii. Interstate commerce is implicated through the sale and transport of goods and services for a construction project located outside of South Carolina. *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 747 S.E.2d 461 (2013).

The implication of interstate commerce brings this matter under the purview of the Federal Arbitration Act (the "FAA"). The FAA governs arbitration agreements in contracts involving interstate commerce. 9 U.S.C. § 2 (1988). This doctrine applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless

of whether or not the parties contemplated an interstate transaction. *Munoz v. Greentree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001); *McMillan v. Gold Kist, Inc.*, 353 S.C. 353, 577 S.E.2d 482 (2003). The FAA preempts any state statute governing arbitrations. *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); *Tritech Electric, Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E.2d 864 (2000).

After determining that the FAA applies, the Court must answer four questions in reviewing any Motion to Stay or Motion to Compel Arbitration: (1) whether the parties agreed to arbitrate; (2) what claims the parties agreed to arbitrate; (3) whether any congressional mandates prevent arbitration in the particular claim brought; and (4) whether to dismiss the case, stay the action pending arbitration, or compel arbitration. *See Henson v. Jusco Co.*, 868 F. Supp. 143 (D.S.C. 1994).

I. The parties agreed to arbitration.

ASI contends that it did not agree to arbitration because the arbitration provision was not included in Nan's Notice to Proceed, Letter of Intent, or March PO. The arbitration provision was first presented to ASI in May of 2017, after ASI had begun its work and had undertaken considerable expense in performing the contract. However, ASI has not directed this Court to any binding or persuasive authority suggesting that parties may only agree to arbitration of disputes prior to the start of performance. Nor has ASI offered any evidence that the arbitration clause was oppressive or entered under duress. To the contrary, it appears ASI could and in fact did negotiate with Nan as to the specific terms and conditions contained in the "Standard Terms and Conditions" attached to the May PO. Those terms and conditions include handwritten changes striking certain provisions of the contract, which are initialed by ASI. For whatever reason, ASI chose to accept the arbitration clause and did not seek its modification. Similarly, ASI executed Amendment No.

1 in June 2017, which formally integrated these handwritten changes but made no reference to arbitration.

ASI's contention that the May PO is not supported by adequate consideration is unfounded. The May PO resulted in $336,046.23 increase over the March PO and this price increase serves as new consideration to ASI. ASI's argument emphasizes the fact that the first contract revision pre-dates the May PO; therefore, ASI contends the May PO gives it no new consideration and merely memorializes a pre-existing agreement. However, the first contract revision did not increase the contract price. Instead, the May PO is the first documentation of ASI's contract price increasing from $5,318,283.77 to $5,654,330.00.

Also persuasive is the fact that while it did not execute the March PO, ASI did execute the May PO. Finally, the May PO specifically provides that it "shall supersede any prior or contemporaneous oral or written agreements or understandings between the parties relating to the subject matter hereof." Therefore, the parties agreed to an arbitration of certain disputes.

II. The parties agreed to arbitrate the disputes in this action.

In making the determination of whether claims are included within the scope of an arbitration clause, the Court is permitted to "look to the factual allegations underlying the claim. . . regardless of the legal label assigned to the claim in determining arbitrability." *See Henson v. Jusco Co.*, 868 F. Supp. 145 (D.S.C. 1994) (Charleston Division) (*citing J.J. Ryan & Sons v. Rhone Poulenc Textile*, 864 F.2d 315, 319 (4th Cir. 1988). ASI's Complaint asserts two causes of action against Nan: (1) breach of contract; and (2) unjust enrichment. A plain reading of these claims reveals that they arise solely out of Nan's alleged failure to fully pay for ASI's steel fabrication work on the Project.

The arbitration provision requires arbitration of "[a]ny and all claims arising out of or related to the performance of services under this PO, any provision or aspect of this PO, or any alleged breach thereof, including any dispute as to any amount owed under this PO." Therefore, ASI agreed to arbitrate the disputes it has brought in this action.

III. No congressional mandates prevent arbitration of this dispute.

The Court is unaware of any congressional mandate that would impact arbitration of this dispute; therefore, this question is also resolved in Nan's favor.

IV. The case should be stayed and not dismissed.

The last decision the court must make where an enforceable arbitration clause exists is whether to dismiss the case or stay it pending the arbitration hearing. In addition to its claims against Nan, ASI has asserted a payment bond claim against Nan's payment bond sureties, Fidelity and Deposit Company of Maryland and Zurich American Insurance Company.

In the present case, the matter should be stayed, because of the inclusion of the surety defendants who are not parties to the arbitration agreement. The sureties' liability can be no greater than that of its principal (Nan), and their liability derives from that of the principal. *Ward v. Federal Insurance Co.*, 233 S.C. 561, 106 S.E.2d 169 (1958); *Whisenhunt v. Sandel*, 177 S.C. 297, 181 S.E.2d 61 (1935). The claim against the surety defendants should be stayed until its principal's obligation is determined in arbitration.

WHEREFORE, based on the foregoing, IT APPEARS that Nan's Motion should be and therefore is GRANTED. This case is a stayed pending the outcome of arbitration between the parties. The Court further orders that, to the extent ASI desires to further pursue the claims asserted in this action against Nan, it shall do so in arbitration in a manner consistent with the parties' contract.

IT IS SO ORDERED.

The Honorable Walton J. McLeod, IV
Presiding Judge
Eleventh Judicial Circuit

September 20, 2019
Lexington, South Carolina

Lexington Common Pleas

Case Caption: Acadian Steel Inc VS Nan Inc , defendant, et al

Case Number: 2019CP3201927

Type: Order/Other

So Ordered

s/Walton J. McLeod, 2765