

**HOLMES SCHOOL LIMITED
PARTNERSHIP and W.P., L.P.**

vs.

THE DELTA ORGANIZATION

**: COURT OF COMMON PLEAS
: PHILADELPHIA COUNTY
: COMMERCE PROGRAM
:
: JUNE TERM, 2002
: NO. 03512
Control # 031737**

ORDER and MEMORANDUM

AND NOW, to wit, this 10th day of JUNE , 2004, upon review of defendant's Petition to Vacate the ADR Award dated February 16, 2004, and plaintiffs' response thereto, and upon consideration of plaintiff Holmes School's cross-motion to confirm the ADR Award, it is hereby ORDERED and DECREED that defendant's Petition is **GRANTED**.

It is further ORDERED that the parties are to submit to a renewed binding arbitration session before the architect pursuant to the contract within thirty (30) days of the date of this Order.

BY THE COURT:

GENE D. COHEN, J.

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MEMORANDUM

COHEN, GENE D., J.

The defendant in this construction dispute submitted a petition to vacate an ADR award dated February 16, 2004. The contract between the parties sets forth a method for the resolution of construction claims. The parties agreed that the project architect, Shraga Berenfeld Architects, shall be the person who makes the “determination of the value of the work” and the architect’s decision “shall be final and binding upon the parties hereto”.

On August 7, 2003 this Court ordered the parties to adhere to the Order of the Honorable George A. Pagano of the Court of Common Pleas of Delaware County, who sustained Holmes’ (otherwise known as the “plaintiffs” or “owners”) preliminary objections to the complaint of the Delta Organization and ordered Delta as the counterclaimant in an action initially brought by the owner to submit its counterclaims to “the Alternative Dispute Resolution process as set forth in the contract between the parties”.

On February 16, 2004, following a submission by the owners, the architect rendered his determination. He reviewed 60 items submitted by Delta and applied a value to each. In Items Nos. 1, 8, 9, 14, 15, 19, 20, 21, 22, 23, 26, 27, 28, 30, 32, 33, 34, 37, 39, 40, 41, 42, 43, 44, 45, 47, 49, 50, 52, 53, 55, 56 and 59, the architect assigned a \$0.00 value. In Items Nos. 3, 25, 46 and 48, the architect assigned a \$0.00 value. The architect’s award, in contradistinction to the common award one might encounter, for example, in the work of neutral arbitrators appointed by the American Arbitration Association, contained no discussion or any reference to the method of valuation. Thereupon hangs the complaint of the Delta Organization which filed this action seeking to overturn

the award.

The law governing arbitration provides that an arbitration award may be vacated or modified only if “a party was denied a hearing or that fraud, misconduct, corruption, or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.” *See* 42 Pa.C.S.A. §7341.

Delta here claims “irregularity” as defined as follows: “In the present case the architect did not abide by the process set forth in the contract between the parties that explicitly provided for the valuation of Delta’s work, not a legal determination of entitlement. As such the architect exceeded his authority and failed to comply with this Court’s order.” (*See* Paragraph 36 of Delta’s motion). The owner replies that “The architect properly followed the terms of the construction contracts and all applicable court orders, and made a valuation as to each items as set forth in the ADR Award.”

In addition to appointing the architect as the ultimate declarant of the value of the work, Article 4 of the contract between the parties says the following about the value of the work:

“(b) The OWNER reserves the right, from time to time whether the work or any part thereof shall or shall not have been completed to make changes, additions and/or omissions in the work as it may deem necessary, upon written order to the contractor. The value of the work to be changed, added or omitted shall be stated in such written order and shall be added to or deducted from the price.

4.2 The value of the work to be changed, added or omitted shall be determined by the lump sum or unit prices, if any, stipulated herein for such work. If no such prices are stipulated, such value shall be determined by whichever of the following methods or combination thereof the owner may elect.

(a) By adding or deducting a lump sum or an amount determined by unit price agreed upon between the parties hereto;

(b) By adding (1) the actual reasonable net cost to the contractor of labor, premiums the contractor is required to pay for workmen’s compensation and liability insurance, and payroll taxes on such labor, (2) the actual cost to the contractor of materials and equipment and such other direct costs as may be approved by the owner, less all savings, discounts, rebates and credits, and (3) an allowance of ten (10%) percent for overhead and profit on items 1 and 2 above.

The next paragraph of Article 4 has been quoted, and that is the paragraph that empowers the architect to make a final and binding determination of the value of the work. However, the so-called “ADR” clause does not conjoin the prior paragraphs and thereby impose upon the architect the

obligation to spell out how he is evaluating the work. Accordingly, the parties were left with merely a laundry list of items the architect purportedly looked at, somehow weighed, and evaluated. It is easy for the Court to see why the defendant should cry foul, especially when confronted with zero and negative evaluations. Where do the negative evaluations come from? The architect does not say. And there is a very wide discrepancy between the architect's valuation -- \$8,821.55 -- and what the Delta Organization claims it is entitled to -- \$434,545.10.

The Court notes that 42 Pa.C.S.A. §7341 provides that an Arbitration Award may be vacated or modified if “a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.” The Court finds an irregularity occurred in the underlying arbitration. The arbitrator simply failed to follow the mandate of the contract in assigning \$0 (zero) values to as many projects as he did. It beggars the imagination that, when conscripted to assign “value” to each portion of the project the architect imaginatively assigns no value to some items and a negative value to others. Negative value is not value according to the contract. Hence, there was an irregularity in the process utilized in reaching the award and the award itself will be vacated. Rather than modify it, this Court will direct the parties to proceed again to arbitration. *See Cherbenak, Keane & Co, Inc. (CKC Assoc.) vs. Hotel Rittenhouse Assoc., Inc.*, 477 A.2d 482 (Pa. Super. 1984).

An appropriate order will issue.

BY THE COURT:

GENE D. COHEN, *J.*