IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50655
Summary Calendar

SURFACE PREPARATION AND
COATING ENTERPRISES, INC.,

Plaintiff-Appellant,

versus

ELITE MASONRY, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Texas
(SA-93-CA-973)

(February 24, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Surface Preparation and Coating Enterprises ("SPACE") appeals the district court's judgment accepting the magistrate judge's recommendation that confirmed an arbitration award against SPACE and in favor of Elite Masonry ("Elite"). For reasons described below, we affirm the district court's judgment.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I

SPACE was the general contractor for the construction of a Blood Donor Center for the United States Department of the Army at Fort Sam Houston, San Antonio, Texas. As a part of this work, SPACE entered into a subcontract on March 2, 1992, with Masonry Constructors ("Masonry"), the predecessor to Elite. In this subcontract, Masonry agreed to do all of the masonry work for the building, screen walls, and mechanical pads for the Blood Donor Center.

As a part of the subcontract, Masonry and SPACE agreed that their disputes would be resolved in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (the "AAA"). The subcontract contained a mandatory arbitration clause that stated that the place of arbitration would be Baton Rouge, Louisiana, where SPACE was located. The subcontract also prohibited Masonry from assigning the subcontract without SPACE's consent.[1]

By December 1992, a dispute had arisen between Elite and SPACE regarding a claim by Elite that SPACE owed it $30,683.70 as payment for completed work. Pursuant to the subcontract, Elite made Demand

[1]It is unclear from the briefs at what point Elite became the successor in interest to Masonry. Correspondence dated December 7, 1992, from Elite's attorney to Luis J. Gonzalez, president of SPACE, however, specifically refers to Elite as "f/d/b/a Masonry Constructors Inc. of San Antonio," thereby indicating that the company's name and/or ownership had changed at some point during 1992 and that SPACE had notice of this change.

for Arbitration on April 6, 1993, demanded the $30,683.70 payment, filed copies with the AAA, and served the original Demand upon SPACE. The April 6 Demand for Arbitration contained a request that the arbitration hearing locale be San Antonio, Texas, contrary to the subcontract's designation of Baton Rouge, Louisiana. On April 22, 1993, the AAA sent a letter to SPACE that notified it that Elite had requested that the hearing be held in San Antonio. The AAA's notice pointed to the provisions of Construction Industry Arbitration Rule 11[2] and specifically drew attention to the fact that if SPACE failed to file an objection within ten days, San Antonio would be designated as the locale for the arbitration. On May 6, the AAA sent a letter to SPACE confirming San Antonio as the location for arbitration because it had received no response from SPACE.

SPACE claims that at the time the April 6 Demand for Arbitration and the April 22 and May 6 letters from the AAA were received by SPACE, its only person authorized to deal with legal disputes, its president, Luis Gonzales, was out of the office.

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[2]Rule 11 of the Construction Industry Arbitration Rules states that

> [t]he parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within ten days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale and its decision shall be final and binding.

When he returned to the office, Gonzales met with his attorney on May 11.

SPACE's attorney subsequently objected to the locale on May 17. On June 9, the AAA responded to this objection, stating that the locale remained San Antonio. Because no mutually agreeable arbitrator could be appointed, on July 7 the AAA appointed one and set July 28 as the hearing date. After 5:00 p.m. on July 26, SPACE lodged objections to the arbitration and filed its answering statement. In this last-minute correspondence, SPACE objected to the arbitration on two grounds: (1) that Elite was not a party to SPACE's subcontract with Masonry, thereby denying the existence of the AAA's jurisdiction over an arbitration invoked by a non-party to the subcontract; and (2) the subcontract required arbitration to be held at Baton Rouge, and thus the arbitration could not be legally held at San Antonio. By leave granted by the arbitrator, Elite filed a Supplemental Demand on July 27 to correct any defect that may have existed as to the parties. The arbitration hearing was held on July 28 and 29. On August 9, the arbitrator made an award in favor of Elite in the amount of $30,073.77, plus costs for the AAA's expenses ($248.02). All other monetary claims were denied.

The award was confirmed by the magistrate judge on July 13, 1994. After a de novo review of the record, the district court subsequently accepted the magistrate judge's recommendation and confirmed the award on August 19.

SPACE now appeals.

II

SPACE presents three issues on appeal. First, SPACE asserts that the arbitrator exceeded his powers under the subcontract by holding the arbitration hearing in San Antonio, rather than Baton Rouge. Second, SPACE contends that it was deprived of a meaningful opportunity to assert its objections to locale because its president did not receive actual notice of the proposed change in locale until after the deadline for responding had expired. Third, SPACE argues that the arbitrator exceeded his authority under the subcontract by rendering an award in favor of Elite because, it contends, Elite was not a party to the subcontract and there was not a proper assignment of the subcontract.

The standard of review of an arbitration award is firmly established. We conduct a de novo review of the district court's confirmation of the award, determining "'whether the arbitration proceedings were fundamentally unfair.'" R. M. Perez & Assocs. v. Welch, 960 F.2d 534, 540 (5th Cir. 1992)(quoting Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir. 1990)). Considering this guidance, we are also reminded that "[t]he federal courts will defer to the arbitrators' resolution of the dispute whenever possible." Anderman/Smith Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215, 1218 (5th Cir. 1990). Thus, the standard of review is a highly deferential. "This Court must sustain arbitration awards even if it does not agree with the arbitrators'

interpretation of the contract." Id. Moreover, as long as the arbitrator's award "draws its essence" from the contract, so that the award has a "'basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the . . . agreement[,]'" the award must be confirmed. Local Union 59, Int'l Bhd. of Elec. Workers v. Green Corp., 725 F.2d 624, 268 (quoting Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co., 415 F.2d 403, 412 (5th Cir. 1969)), cert. denied, 469 U.S. 833 (1984). Furthermore, the "'award must, in some logical way, be derived from the wording or purpose of the contract.'" Id. With this standard of review in mind, we turn to SPACE's objections.

III

A

SPACE first argues that the arbitration award is not enforceable because the arbitrator failed to follow the provision in the contract fixing the locale of the arbitration as Baton Rouge. We disagree. SPACE acknowledges that Rule 11 of the Construction Industry Arbitration Rules ("Rules") was incorporated by reference into the subcontract, but argues that Rule 1[3] allows

[3]Rule 1, the "Agreement of Parties," reads as follows:
The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) or under its Construction Industry Arbitration Rules. These rules and any amendment of them shall apply in the form obtaining at the time the demand for arbitration or submission agreement is received by the AAA. The parties, by written agreement, may vary the procedures set forth in

the parties to vary the procedures set out in the Rules by designating a hearing locale in the subcontract.

Examining the contract, we agree with the arbitrator's interpretation. We recognize that the Rules allow the parties to designate a location for arbitration. Article XXV[4] of the subcontract designates Baton Rouge as the arbitration location. The same article, nevertheless, states that the contract will be settled in accordance with the Rules. Fatal to SPACE's argument, moreover, is the fact that Article XXV neither prohibits a change in the hearing locale nor declares void the language in Rule 11 allowing a party to change the arbitration locale. Thus, we hold that the arbitrator's interpretation of this provision of the contract was logical and derived from the contract.

B

SPACE's argument that the arbitrator's award should be set aside because SPACE was denied due process by setting the hearing in San Antonio and because it had no meaningful opportunity to

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these rules.

[4]The relevant portion of Article XXV, "Disputes," section "a" reads as follows:

> Except as otherwise provided below, any controversy or claim arising out of or relating to this contract, or any breach thereof, shall be settled in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction thereof. The place of arbitration shall be Baton Rouge, Louisiana.

object to that locale is meritless. SPACE willingly submitted to the Rules by incorporating them into the subcontract. Therefore, SPACE indicated that it was ready to abide by the application of those rules in arbitration matters. Space neither offers any reasons explaining why its legal representative could not be contacted regarding this situation for nearly one month, nor does it offer any reasons for its delay in response once its legal representative received the Demand. Thus, the ruling rejecting SPACE's untimely objection to the locale is certainly not an adequate ground to deny enforceability of the award. Furthermore, SPACE was accorded full due process when it lodged its objections to the locale before the proceeding and during the hearing when its arguments were made before and considered by the arbitrator. Thus, because we find that the arbitrator's rulings are fully consistent with the Rules and the terms of the subcontract, we affirm the district court.

C

SPACE next argues that the arbitrator lacked authority to render an award in favor of Elite because Elite was not a party to the subcontract, and SPACE had not approved an assignment to Elite as was required by the subcontract. We find that this argument is without merit. We recognize that the subcontract contained a provision that stated that the "[s]ubcontractor shall not assign this Subcontract or any amount payable hereunder without the proper written consent of SPACE." We take note, however, of

correspondence between SPACE and Elite dating back to December 1992 in which Elite clearly stated that it was the successor in interest Masonry. SPACE did not lodge an objection to the lack of assignment until one day before the arbitration hearing in July 1993. The arbitrator could have made a logical interpretation of the subcontract to find that SPACE had waived this written assignment provision, and, thus, Elite was a proper party to the arbitration. Because the arbitrator's reasoning is rationally inferable from the letter and purpose of the subcontract, we hold that he did not exceed his powers by finding that Elite was a proper party to the arbitration.

IV

For the foregoing reasons, the district court's confirmation of the arbitrator's award is

A F F I R M E D.