IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

GLENN IHDE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 4:15-CV-00585-CAN
	§	
HME, INC.,	§	
	§	
Defendant.	§	

ORDER

Before the Court is Defendant's Motion to Compel Arbitration and Stay Proceeding ("Motion to Compel Arbitration") [Dkt. 9]. Having considered the Motion to Compel Arbitration [Dkt. 9], Response [Dkt. 15], Reply [Dkt. 16], and all other relevant filings, the Court finds that the Motion to Compel Arbitration [Dkt. 9] is **DENIED**.

BACKGROUND

This lawsuit stems from a construction project at Laramie High School ("Laramie Project") in Laramie, Wyoming [Dkts. 9 at 1-2; 15 at 1-3].[1] Defendant HME, Inc. ("Defendant") was engaged by Haselden Wyoming Constructors, LLC ("Haselden Construction"), the primary contractor on the Laramie Project, as a subcontractor [Dkt. 9 at 1]. In early July 2014, Defendant and Haselden Construction entered into a subcontract agreement ("Subcontract Agreement" or "Subcontract") with an effective date of July 28, 2014 [Dkt. 9, Ex. 1]. The Subcontract Agreement contains, among other terms, an arbitration clause. *Id.* Section 26 of the Subcontract Agreement, entitled Disputes or Claims, states in relevant part:

[1] The Court references factual background from the Plaintiff's Complaint [Dkt. 1] and Defendant's Answer [Dkt. 4] to the extent such facts were admitted by the Parties and are therefore not in dispute.

> (e) Any or all claims, disputes and other matters in question between Subcontractor and Contractor arising out of or related to the Work, this Subcontract or the Project, except as specifically governed by the foregoing provisions, and except for claims which have been waived by another provision of this Subcontract or by the making and acceptance of final payment, shall, at the sole option of the Contractor, be decided by arbitration….
>
> (g) Completion of the dispute resolution procedure shall be a condition precedent to the right of the Subcontractor to commence or continue any legal action against Contractor.

Id. at 5-6.

Plaintiff, Glenn Ihde d/b/a Glenn Idhe & Company ("Plaintiff"), in turn, was approached by Defendant to perform structural steel detailing services as a subcontractor of Defendant [Dkts. 9 at 1-2; 15 at 2-3]. On July 4, 2014, Plaintiff sent Defendant an email quote ("Plaintiff's Quote") for structural steel detailing services for the Laramie Project [Dkt.15, Ex. 2]. Plaintiff's Quote states, in relevant part:

> This quote shall control and govern all work performed by Glenn Ihde & Company under subsequent verbal and/or written purchase orders, work orders, or agreements. Any agreement or stipulation in any such purchase order, work order, delivery ticket, e-mail, or other instrument that is not in conformity with the terms, conditions, and/or provisions set forth herein shall be null and void. No waiver by Glenn Ihde & Company of any terms, conditions, and/or provisions set forth herein shall be effective unless said waiver is expressly set forth in writing and signed by an authorized representative of Glenn Ihde & Company…All unresolved disputes to be mediated per NISD mediation guidelines.

[Dkt. 15, Ex. 2 at 2-3]. Plaintiff's Quote includes a description of the services to be provided and payment terms for the transaction. *Id*. at 1-3. On September 25, 2014, Defendant drafted and sent Plaintiff a Purchase Order ("Defendant's Purchase Order" or "Purchase Order") engaging Plaintiff to provide structural steel detailing services for the Laramie Project [Dkt. 9, Ex. 2]. Defendant's Purchase Order states, in pertinent part:

> Detailing services for fully checked shop and erection drawings, including anchor bold layout drawings, bolt and hardware lists, production files and Tekla model. Items to be detailed per HME scope, HME Detailing Manual, and all contract documents. Must use HME Templates and file formats… All items per quote, HME scope, and Contract Documents… All submittals per scheduled agreed to per 9/24/2014 e-mail.

[Dkt. 9, Ex. 2]. Plaintiff performed some services on the Laramie Project, but was later told by Defendant to stop work [Dkts. 1 at 3-4; 4 at 1-2]. Plaintiff was paid $28,170.00 of the total contractual amount for his services, but Plaintiff and Defendant ultimately became embroiled in a payment dispute regarding whether any remaining amounts were due and owed to Plaintiff under the contact between Plaintiff and Defendant [Dkts. 1 at 3; 4 at 2].

The dispute resulted in litigation and on August 28, 2015, Plaintiff filed his Complaint alleging two causes of action: (1) breach of contract and (2) quantum meruit [Dkt. 1]. On December 28, 2015, Defendant filed its Answer [Dkt. 4]. On March 7, 2016, this case was assigned to the undersigned by consent of all Parties for further proceedings and entry of judgment [Dkt. 6]. On March 15, 2016, Defendant filed a Motion to Compel Arbitration claiming the issues raised by the Complaint are referable to arbitration [Dkt. 9]. On April 7, 2016, Plaintiff filed a Response [Dkt. 15], and on April 13, 2016, Defendant filed a Reply [Dkt. 16].

LEGAL STANDARD

Defendant moves the Court to compel arbitration under the Federal Arbitration Act ("FAA") [Dkt. 9]. The FAA states that a written provision in a document, "to settle by arbitration a controversy thereafter arising out of such contract or transaction [between the parties]... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983). The Court must perform a two-step inquiry to

determine whether parties should be compelled to arbitrate a dispute. *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 445 (5th Cir. 2001). The first step requires the Court to determine whether the parties have agreed to arbitrate their dispute by determining: (1) whether there is a valid agreement to arbitrate between the parties, and (2) whether the dispute in question falls within the scope of the arbitration agreement. *Id.* The second step requires the Court to assess whether any federal statute or policy, external to the parties' agreement, renders the claims nonarbitrable. *Id.* at 446. Once a valid agreement to arbitrate has been found at step one, strong federal policy favors arbitration and doubts concerning the scope of coverage of an arbitration clause should be resolved in favor of arbitration. *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004); *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 37 (5th Cir. 1990). Under the FAA, once the Court finds that arbitration is required, it must stay the underlying litigation to allow arbitration to proceed. 9 U.S.C. § 3. The Court has the discretion to dismiss cases in favor of arbitration when all of the issues raised must be submitted to arbitration, but there is no obligation to do so. *Apache Bohai Corporation, LDC v. Texaco China, B.V.*, 330 F.3d 307, 311 (5th Cir. 2003) (citing *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992)).

Here, it is undisputed that Plaintiff is a nonsignatory to the Subcontract. "Arbitration agreements apply to nonsignatories only in rare circumstances." *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 358 (5th Cir. 2003) (citing *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002). Where a nonsignatory to the agreement to arbitrate is involved, the Court must find that the nonsignatory meets one or more of six theories in order to bind the nonsignatory to arbitrate a dispute: (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) estoppel, or (6) third-party beneficiary. *Hellenic Investment Fund v. Det*

Norske Veritas, 464 F.3d 514, 517 (5th Cir. 2006). Defendant asserts herein only incorporation by reference and estoppel, and as such the Court does not consider the remaining theories [Dkt. 9 at 4].

ANALYSIS

The Parties agree that if a valid agreement to arbitrate exists, the present dispute between Plaintiff and Defendant falls within the scope of the Arbitration Clause in the Subcontract Agreement [Dkt. 9 at 7-8; *see generally* Dkt. 15 (not disputing step two of the arbitration analysis)].[2] The Court's analysis therefore focuses solely on whether a valid agreement to arbitrate exists between the Parties as a result of either incorporation by reference or estoppel [Dkt. 9 at 4-8]. The Court addresses each in turn.

I. Incorporation by Reference

Defendant asserts that the entirety of the Subcontract Agreement, including the Arbitration Clause therein, was incorporated by reference into Defendant's Purchase Order. Specifically, Defendant argues the following language in the Purchase Order clearly requires incorporation by reference of all clauses of the Subcontract Agreement: "[i]tems to be detailed per HME scope, HME Detailing Manual, and *all contract documents*," (hereinafter "Clause 1") and "[a]ll items per quote, HME scope, and *Contract Documents*," (hereinafter "Clause 2") [Dkts. 9 at 2, 4-5, Ex. 2; 16 at 3-4] (emphasis added). Defendant asserts, in the alternative, that if

[2] The Court discerns a threshold choice of law issue, given the presence of diverse parties performing a contract in yet a third state [*see* Dkts. 1 at 1-2; 4 at 1]. The Parties conceded in their briefs, and during the status conference on April 15, 2016, that Texas law applies with respect to the issue of arbitrability [Dkts. 9; 15; 16]. Further, the Court acknowledges that the Fifth Circuit has, in some cases, applied federal substantive law, rather than state substantive law, in the area of arbitration agreements binding nonsignatories. *See Washington Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004) (applying federal substantive law, not Mississippi law); *see also DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 314 (5th Cir. 2011). The Court therefore considers both Texas and Federal law with respect to the issues of incorporation by reference and estoppel, with due consideration that the result would be the same under either choice of law in this case. The application of Texas law to the issue of arbitrability is without prejudice to any future conflict of law disputes with respect to the underlying contracts. The Court further notes in this regard the result herein would also be the same under Wyoming law.

the Court finds the language in Clause 1 and Clause 2 to be ambiguous, the Court should construe the language to refer to all contracts involved in the Laramie Project, including the Subcontract Agreement [Dkt. 16 at 3-5]. Plaintiff argues, to the contrary, that the aforementioned language merely references a narrow subset of the contractual documents involved in the Laramie Project, specifically, the job specifications; and/or that the Court should narrowly construe the aforementioned language to refer only to the Laramie Project specifications, as contained in various documents [Dkt. 15 at 4-7].[3] Plaintiff also contends that he was never provided with a full copy of the Subcontract Agreement. *Id*. at 7.

"Under the general principle of 'incorporation by reference,' a written provision that is not attached to a physical contract may nevertheless be made part of the contract and, in fact, may be binding even upon a nonsignatory." *Oceanconnect.com, Inc. v. Chemoil Corp*., No. H-07-1053, 2008 WL 194360, at *10 (S.D. Tex. Jan. 23, 2008) (citing *Hellenic Invest. Fund, Inc.*, 464 F.3d at 517; *Jureczki v. Banc One Texas, N.A.,* 252 F. Supp. 2d 368, 373 (S.D.Tex.2003); *Gilliam v. Global Leak Detection U.S.A., Inc.,* 141 F. Supp. 2d 734, 737-38 (S.D.Tex.2001); *EZ Pawn Corp. v. Mancias,* 934 S.W.2d 87, 90 (Tex.1996)). "[A]s a matter of contract law, incorporation by reference is generally effective to accomplish its intended purpose where, ... the provision to which reference is made has a reasonably clear and ascertainable meaning." *JS & H Const. Co. v. Richmond Cty. Hosp. Auth.*, 473 F.2d 212, 216 (5th Cir. 1973). However, merely referencing another document, without more, "does not incorporate the *entire* document when the language used in the incorporation clause does not indicate the parties' intent to do so." *Valero Mktg. & Supply Co. v. Baldwin Contracting Co.*, No. CIVA H-09-2957, 2010 WL

[3] As an initial matter, the Court notes that Clause 1 and Clause 2 of the Purchase Order do not expressly reference the Subcontract Agreement, the Haselden Construction agreement, or any similar derivative thereof; rather, the Purchase Order merely generally references "all contract documents" and "Contract Documents" [Dkts. 9, Ex. 2; 15, Ex. 3]. The Parties each assert in the alternative, based on this lack of expressed reference, that the terms "all contract documents" and "Contract Documents" are ambiguous [*see* Dkts. 9 at 4-5; 15 at 4-6; 16 at 3-5].

1068105, at *4 (S.D. Tex. Mar. 19, 2010). The Fifth Circuit has consistently applied this principle to contractual references to arbitration clauses. *Oceanconnect.com, Inc*., 2008 WL 194360, at *10 (citing *Hellenic Invest. Fund, Inc*., 464 F.3d at 517; *JS &H Const. Co*., 473 F.2d at 215; *Jureczki*, 252 F. Supp. 2d at 373; *Gilliam*, 141 F. Supp. 2d at 737-38).

Consider *Valero Marketing* wherein the issue was whether a forum selection clause was incorporated by reference and could, therefore, bind a nonsignatory. *Valero Mktg. & Supply Co.,* 2010 WL 1068105. In that case, the defendant purchased asphalt from the plaintiff, and the parties signed a contract that stated "[a]ll prices quoted above are subject to Valero's General Terms and Conditions for Petroleum Produce Purchases/Sales." *Id*. at *1, 3. The referenced "General Terms and Conditions" included a forum selection clause. *Id*. at *3. The district court held that the language in the parties' agreement reflected an objective intent to only incorporate the "General Terms and Conditions" for a limited purpose – the quotation of prices for the purchase of asphalt – which did not include the forum selection clause. *Id*. at *5. Similarly, in *Tribble & Stephens*, a subcontractor signed a subcontract that contained a clause binding it "for the performance of Subcontractor's Work in the same manner as" the contractor was bound to the owner in the primary contract. *Tribble & Stephens Co. v. RGM Constructors, L.P*., 154 S.W.3d 639, 663-64 (Tex. App. – Houston [14th Dist.] 2004, pet. denied). The Fourteenth Court of Appeals held that the subcontractor was bound to the terms of the primary contract only in so far as it related to the subcontractor's performance of its work. *Id*. at 663-65.

Even assuming *arguendo* that the Purchase Order terms "all contract documents" and "Contract Documents" in Clause 1 and Clause 2, respectively, encompass the Subcontract Agreement, the specific language of the Purchase Order reflects an objective intent – as

discussed in *Valero Marketing* – to only incorporate the Subcontract Agreement for a limited purpose. As previously noted, the Purchase Order's "DESCRIPTION" section states:

> Detailing services for fully checked shop and erection drawings, including anchor bold layout drawings, bolt and hardware lists, production files and Tekla model. ***Items to be detailed per HME scope, HME Detailing Manual, and all contract documents***. Must use HME Templates and file formats. Add Alternate #13 – Area A High Roof Option Modifications per GC RFI#26[.] Add Alternate #13 – Area B High Roof Option[.] *** All items per quote, HME scope, and Contract Documents *** *** All submittals per scheduled agreed to per 9/24/2014 e-mail.

[Dkt. 9-2 (emphasis added)]. This language is not, as Defendant argues, language that clearly and expressly states that the Purchase Order is subject to the whole of the Subcontract Agreement. Rather, the language of the Purchase Order states only that Plaintiff's work for Defendant (e.g. the items to be detailed) is bound by the specifications and details for completion of the services and deliverables in the Subcontract Agreement. The language used does not indicate the Parties intent to incorporate the entirety of the Subcontract Agreement. Thus, the Arbitration Clause is not incorporated by reference and no valid agreement to arbitrate exists under such theory.

II. Estoppel

Defendant also contends that Plaintiff has embraced the Subcontract by asserting claims that must be determined by reference to the Subcontract [Dkts. 9 at 5-7; 16 at 1-3]. Plaintiff argues, to the contrary, that his claims are based on Defendant's Purchase Order – not the Subcontract – and that his claims stand alone because they "do not depend upon or necessarily refer to the terms of the [Subcontract]" [Dkt. 15 at 6-8].

Under Texas and Federal substantive law, direct benefits estoppel may be used to estop a nonsignatory claimant from seeking benefits under a contract it did not sign, but simultaneously avoiding the burdens of the same contract. *Hellenic Inv. Fund, Inc.*, 464 F.3d 514, 517–18 (5th

Cir. 2006); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005). "Whether a claim seeks a direct benefit from a contract containing an arbitration clause turns on the substance of the claim, not artful pleading." *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131 (Tex. 2005)); *Shanks v. Swift Transp. Co. Inc*., No. CIV.A. L-07-55, 2008 WL 2513056, at *5 (S.D. Tex. June 19, 2008) (noting that a party cannot engage in artful pleading to avoid arbitrating a dispute and courts must look at the nature of the claims, not just the complaint). Nonsignatories "can 'embrace' a contract containing an arbitration clause in two ways: (1) by knowingly seeking and obtaining 'direct benefits' from that contract; or (2) by seeking to enforce the terms of that contract or asserting claims that must be determined by reference to that contract." *Noble Drilling Servs., Inc. v. Certex USA, Inc.,* 620 F.3d 469, 473 (5th Cir. 2010); *Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 814 F.3d 300, 305-06 (5th Cir. 2016) (finding no estoppel where plaintiffs sought benefits available under general principles of law and plaintiff's own separate agreements with defendants, not under the contracts containing arbitration clauses). It is insufficient that the nonsignatory's claim(s) relate to the contract; "[t]he claim [and defendant's liability] must 'depend on the existence of the contract', and be unable to 'stand independently' without the contract." *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 527-30 (Tex. 2015) (internal citations omitted) (finding claims relied upon other agreements between the subcontractor and each party, and not on the agreement between subcontractor and prime contractor).

In *Auto Parts Manufacturing*, a contractor and law firm sought to compel a subcontractor to arbitrate an interpleader payment dispute based on an arbitration clause in the engagement contract between contractor and law firm. *Auto Parts Mfg. Mississippi Inc. v. King Const. of Houston, LLC*, 74 F. Supp. 3d 744, 758-60 (N.D. Miss. 2014) ("*Auto Parts I*"). The district court

found that: (1) the subcontractor's claims did not seek to enforce any term of the engagement contract; and (2) the subcontractor's claims were based on the relationship between the parties (contractor/subcontractor) and the contract between the parties, not the engagement contract. *Id.* The Fifth Circuit, affirming the district court, found it particularly persuasive that the subcontractor's claims could be established without reference to the engagement contract, even if portions of the engagement contract could help establish the same claims. *Auto Parts Mfg. Mississippi, Inc. v. King Const. of Houston, L.L.C.*, 782 F.3d 186, 197-98 (5th Cir. 2015) ("*Auto Parts II*").

The Court similarly finds that direct benefits estoppel is inapplicable in this case. Defendant has not shown Plaintiff had sufficient knowledge of the contents of the Subcontract to assert claims based on it; and, in any event, the weight of the evidence suggests that Plaintiff's claims rely on and seek benefits provided under Defendant's Purchase Order and Plaintiff's Quote without need to reference the Subcontract. *See Auto Parts I*, 74 F. Supp. 3d at 758-60; *Auto Parts II*, 782 F.3d at 197-98. Indeed, Plaintiff's Complaint, on its face, relies solely on Defendant's Purchase Order dated September 25, 2014 and an email to HME, Inc. on July 4, 2014, and does not reference the Subcontract in support of any claims [*see* Dkt. 1]. Further, Defendant's estoppel argument necessarily assumes that Plaintiff was provided a copy of the Subcontract and had knowledge of its contents, a fact the Parties dispute [Dkts. 15 at 7; 16 at 5]. Plaintiff cannot seek benefits or attempt to avoid burdens he had no knowledge of. The Court acknowledges that Defendant will likely rely, in substantial part, on the Subcontract to assert its defenses, and Plaintiff may refer to the specifications and requirements therein (to the extent he received them) to refute those claims [Dkts. 1 at 2-5; 4 at 3-5; 15 at 6-8; 16 at 2-3]. However, direct benefits estoppel requires more than the mere fact that Plaintiff's claims may

relate to the Subcontract (e.g. refutation of defenses). It requires that Plaintiff seek benefits he would not have had in the absence of the Subcontract. *G.T. Leach Builders, LLC*, 458 S.W.3d at 527-30 (explaining that more than a mere relation between the claims and the contract is necessary for estoppel); *Al Rushaid*, 814 F.3d at 305-06 (finding no estoppel where claims were based in individual contracts between plaintiffs and defendants or general legal principals, and not on the contracts containing arbitration clauses). Plaintiff's current Complaint neither states nor seeks benefits under the Subcontract. Plaintiff's claims stand independently of the Subcontract [*see* Dkt. 1].

CONCLUSION

Based on the foregoing, the Court finds that the Arbitration Clause in the Subcontract Agreement has not been incorporated by reference into Defendant's Purchase Order, and that Plaintiff should not be estopped from denying the application of the arbitration clause. Thus, the Court finds that the Parties have not agreed to arbitrate. Accordingly,

It is therefore **ORDERED** that Defendant's Motion to Compel Arbitration and Stay Proceeding [Dkt. 9] is **DENIED**.

IT IS SO ORDERED.

SIGNED this 16th day of June, 2016.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE