UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

STEEL, LLC,

Plaintiff,

v. **Case No: 6:17-cv-1812-Orl-KRS**

SAUER GROUP, INC.,

Defendant.

ORDER AND DIRECTION TO THE CLERK

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION:	**DEFENDANT SAUER GROUP, INC.'S MOTION TO COMPEL ARBITRATION AND DISMISS THE COMPLAINT FOR DECLARATORY JUDGMENT (Doc. No. 8)**
FILED:	**November 2, 2017**

THEREON it is **ORDERED** that the motion is **GRANTED**.

I. INTRODUCTION.

Plaintiff, Steel, Inc. ("Steel"), sues Defendant, Sauer Group, Inc. ("Sauer"), seeking a declaratory judgment that a June 2014 sub-subcontract between Steel and Sauer requires Sauer to submit "all or some of the claims at issue in its Demand for Arbitration" (Doc. No. 1 ¶ 2) through the certified claims process set forth in Steel's subcontract with Hensel Phelps Construction Company ("Hensel Phelps"). These contracts arose in connection with the Modify the Vehicle

Assembly Building High Bay 3 for Space Launch System Project (the "Project") located at the Kennedy Space Center, for the use and benefit of NASA. Doc. No. 1.

Sauer seeks to compel Steel to submit all of the claims it asserted in the Demand for Arbitration to arbitration under the terms of the terms of the sub-contract between it and Steel and to dismiss the case when the claims are referred to arbitration. Doc. No. 8. Steel responds that this Court must first determine whether the claims in the Demand for Arbitration are subject to arbitration. Doc. No. 18. This dispute is before the undersigned for resolution on consent of the parties. Doc. Nos. 22, 23.

II. FACTUAL BACKGROUND.

NASA engaged Hensel-Phelps as the prime contractor for the Project. Hensel-Phelps hired sub-contractors to perform portions of the work on the Project. One of those sub-contractors is Steel, a steel fabrication firm. Doc. No. 1 ¶ 9. Hensel-Phelps entered into a subcontract with Steel on April 3, 2014. Doc. No. 1-4 (the "HP-Steel Subcontract"). Steel then hired sub-subcontractors to perform some of the work under the HP-Steel Subcontract. One of those sub-subcontractors is Sauer, which was hired to assemble ten prefabricated vehicle servicing platforms. Doc. No. 1 ¶ 10. The sub-subcontract between Steel and Sauer was entered into on June 5, 2014. Doc. No. 1-5 (the "Steel-Sauer Sub-Subcontract").

Both Steel and Sauer agree that there were delays and disruptions in performance of work on the Project. Doc. No. 1 ¶ 16; Doc. No. 8, at 2. Steel contends that "[d]efects and deficiencies with NASA's design documents led to inefficiencies on the Project, and disrupted Steel's fabrication of the Project's structural steel. . . . Steel and its sub-subcontractors were required to stop their work while NASA responded to requests for information ("RFI's") and worked on solutions to the deficiencies with NASA's design documents." Doc. No. 18, at 3. It submits that NASA issued

two change orders which extended the Substantial Completion date of the Project. *Id.* at 3-4. It contends that these delays by NASA "also imposed costly delays upon Sauer's pre-assembly work[.]" *Id.* at 4. Accordingly, Steel contends that the damages it and its subcontractors suffered are damages for which NASA may be responsible. Under the underlying contracts' terms, Steel argues that claims for which NASA may ultimately be responsible must be submitted through the "certified claims process" of the Contract Dispute Act ("CDA"), 41 U.S.C. §§ 7103, *et seq.*[1], rather than in an action directly against Steel. Doc. No. 18, at 4.[2]

Sauer contends that it incurred additional costs in performing work on the Project as a result of actions taken directly by Steel, including Steel delivering to Sauer materials that were misfabricated and delivering materials to Sauer later than they should have arrived. Doc. No. 8, at 2. Accordingly, Sauer argues that it need not proceed under the certified claims process of the CDA[3] because its damages were not the responsibility of NASA, and it may, instead, demand that its claims for which Steel may be responsible must be resolved in arbitration.

III. ANALYSIS.

To determine whether Steel may be compelled to arbitrate the claims that Sauer asserts against it directly, the Court must consider (1) whether Steel and Sauer entered into a binding agreement to arbitrate and (2) if so, whether the threshold issue of arbitrability is to be decided by

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[1] Formerly 41 U.S.C. §§ 601, *et seq.*

[2] Paragraph 13.2.2 of the Steel-Sauer Sub Sub-Contract provides the procedure for Sauer to make claims against Steel for which NASA (the Owner) is or may be liable. These claims must be made "in the same manner and within the same time limits" as claims by Steel against NASA. This provision, therefore, incorporates the provisions in the HP-Steel Subcontract requiring the submission of claims through the CDA certified claims process incorporated into the Steel-Sauer Sub Sub-Contract as to disputes for which NASA may bear responsibility. Doc. No. 1-5.

[3] See fn. 2 *supra*.

the Court or by the arbitrator. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648-50 (1986).

As to the first issue, Steel does not contend that it there is no binding agreement with Sauer to arbitrate certain disputes. The Steel-Sauer Sub-Subcontract contains the following agreement to arbitrate:

> 15.2 AGREEMENT TO ARBITRATE All claims, disputes and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof, except for claims which have been waived by the making or acceptance of final payment, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise. Notwithstanding other provisions in this Subcontract, or choice of law provisions to the contrary, this agreement to arbitrate shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, which shall not be superseded or supplemented by any other arbitration act, statute or regulation.

Doc. No. 1-5 ¶ 15.2. Under the second sentence of this paragraph, Steel and Sauer agreed that any disputes subject to arbitration under the Steel-Sauer Sub-Subcontract would be governed by the Federal Arbitration Act, notwithstanding the Florida choice of law provision in the contract.[4]

As to the second issue, Steel asserts that the claims Sauer makes against it are not the type of claims it agreed to arbitrate because, it contends, the damages Sauer claims may be the responsibility of NASA. This raises what the United States Supreme Court refers to as "the 'who' question"; that is, who has the primary power to determine whether the claims Sauer asserts against Steel are within the scope of the parties' agreement to arbitrate. This question is referred to as the arbitrability issue. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

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[4] The Federal Arbitration Act creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). As a matter of federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including "construction of the contract language itself[.]" *Id.* at 25.

When parties "clearly and unmistakably agreed" that the arbitrator should decide whether an issue is arbitrable, the arbitrability issue is to be decided by the arbitrator. *AT&T Techs., Inc.*, 475 U.S. at 649. In their "Agreement to Arbitrate," the parties agreed that arbitration would be conducted pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA"). Rule 9(a) of the Construction Industry Arbitration Rules provides as follows: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Construction Industry Arbitration Rules and Mediation Procedures, https://www.adr.org/sites/default/files/document_repository/Construction%20Rules.pdf (last visited Dec. 28, 2017). Courts have found that incorporation into an agreement of AAA Rules with this provision provides clear and unmistakable evidence that the arbitrator should decide issues of arbitrability. *See, e.g., Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*¸ 432 F.3d 1327, 1332 (11th Cir. 2005)(and cases cited therein).

Steel contends, however, that another provision in the Steel-Sauer Sub-Subcontract undermines a finding that the parties clearly and unmistakably agreed that the issue of arbitrability is to be decided by the arbitrator. Article 15 of the Steel-Sauer Sub-Subcontract, entitled Dispute Resolution, contains the following paragraph:

> 15.3 STAY OF PROCEEDINGS AND CONSOLIDATION In the event the Contractor and the Subcontractor determine that all or a portion of any claim, dispute or other matter in question between them is the responsibility in whole or in part of a person or entity who is under no obligation to arbitrate said claim, dispute or matter with Contractor and Subcontractor in the same proceeding, then the Contractor and Subcontractor may agree in writing to delay or stay any arbitration between them pending the determination, in a separate proceeding, of the responsibility and liability of said person or entity for the claim, dispute or matter involved. The Subcontractor agrees that any arbitration instituted under this Article 15 may, at the Contractor's election, be consolidated with any other arbitration proceeding involving a common question of fact or law between the Contractor and any other subcontractor(s) performing work in connection with the Contract.

> In any dispute concerning the application of this paragraph 15.3, the question of arbitrability shall be decided by the appropriate court and not by arbitration.

Doc. No. 1-5 ¶ 15.3. Steel's argument that paragraph 15.3 requires the Court to resolve the arbitrability question is without merit. To trigger the operation of paragraph 15.3, Steel and Sauer must "determine that all or a portion of any claim, dispute or other matter in question between them is the responsibility in whole or in part of a person or entity" who is not under an obligation to arbitrate. Steel and Sauer have not so determined. The factual dispute here is whether and to what extent the disputes between Steel and Sauer arise from actions by NASA, which has no obligation to arbitrate. There is, therefore, nothing for the Court to consider regarding the scope of paragraph 15.3 because Steel and Sauer have not yet triggered paragraph 15.3 by determining that all or any portion of their dispute is the responsibility of NASA.

"[I]t has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT & T Techs., Inc.*, 475 U.S. at 650 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). Sauer contends that its disputes with Steel are not the responsibility of NASA. To determine otherwise would require resolution of Sauer's claims on the merits, which is not something a court should do in deciding a question of arbitrability. *Id.* at 649-50 ("[I]n 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.").

For these reasons, it is **ORDERED** that Steel, LLC is compelled to participate in arbitration pursuant to Sauer's Demand for Arbitration. The arbitrator has the authority to determine whether all or any portion of Sauer's claims against Steel are arbitrable.

Because the Court has concluded that the disputes between Sauer and Steel must be submitted to arbitration, the declaratory judgment action is moot. Accordingly, the case is **DISMISSED** and the **Clerk of Court** is directed to close the file. *See Coffey v. Kellogg Brown & Root*, No. CIV A 1:08-CV-2911-JOF, 2009 WL 2515649, at *15 (N.D. Ga. Aug. 13, 2009).

DONE and **ORDERED** in Orlando, Florida on December 28, 2017.

Karla R. Spaulding

KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE