

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2007 CA 1369**

**BERNHARD MECHANICAL CONTRACTORS, INC., et al.**

**VERSUS**

**BOARD OF SUPERVISORS, LOUISIANA  
STATE UNIVERSITY AND  
AGRICULTURAL AND MECHANICAL COLLEGE**

Judgment Rendered: May 2, 2008

\*\*\*\*\*

On Appeal from the 19th Judicial District Court  
In and For the Parish of East Baton Rouge  
Docket No. 542,936, Section "26"

Honorable Kay Bates, Judge Presiding

\*\*\*\*\*

John M. Delgado  
James R. Lewis  
Keely Y. Scott  
Michael T. Durham  
Baton Rouge, LA

Counsel for Plaintiff/Appellee  
Bernhard Mechanical  
Contractors, Inc.

Frederick R. Tulley  
Harry J. Phillips, Jr.  
Robin P. Toups  
Margaret G. Patton  
P. Raymond Lamonica  
Baton Rouge, LA

Counsel for Defendant/Appellant  
Louisiana State University and  
Agricultural and Mechanical College

**BEFORE: WHIPPLE, GUIDRY AND HUGHES**

\*\*\*\*\*

Handwritten signatures and initials in the left margin, including a large signature that appears to be 'WJW' and a circled '20' below it, and another signature below that.

**HUGHES, J.**

This is an appeal of a judgment that both denied a motion to vacate an arbitration award and sustained a motion to confirm the award, in favor of Bernhard Mechanical Contractors (Bernhard) and against Louisiana State University and Agricultural and Mechanical College (LSU). Bernhard filed peremptory exceptions with this court, raising for the first time the objections of res judicata, preemption, and no right of action. For the following reasons, we reverse the judgment of the trial court and remand the matter for further proceedings. The exceptions filed by Bernhard are denied.

**FACTS AND PROCEDURAL HISTORY**

This dispute arose out of a contract entered into between Bernhard and LSU on February 17, 2003, wherein Bernhard agreed to construct and maintain a cogeneration plant at the Baton Rouge campus of LSU. The contract, known as the Agreement for Consulting Services and Energy Efficiency Services and Equipment (the ESA), is a performance-based energy efficiency contract pursuant to LSA-R.S. 39:1496.1, and is deemed to be a consulting services contract within the meaning of Chapter 16 of Title 39.

Around April of 2005, Bernhard submitted to LSU a request for compensation for additional work performed, asserting that it was entitled to an additional \$2.3 million for construction of the cogeneration plant. By correspondence dated October 7, 2005, Bernhard requested “arbitration” of

various issues<sup>1</sup>, pursuant to Article 23 of the ESA. By correspondence dated October 21, 2005, LSU responded, objecting to the “jurisdiction or authority” of the “Panel of Engineers” to convene, consider, or take any action with respect to any of the disputed matters. On December 9, 2005 LSU filed an application with the Commissioner of Administration, pursuant to LSA-R.S. 39:1525<sup>2</sup>, requesting that the Commissioner stay the arbitration hearing and decide whether the ESA required arbitration of the issues presented.

An "arbitration" was held on December 20, 2005, over LSU's objection, with two of the three panelists in attendance.<sup>3</sup> On February 6,

---

<sup>1</sup> The following is a list of the issues in dispute, as set forth by Bernhard:

1. Whether Bernhard, after having been issued a Certificate of Substantial Completion and Punch List by LSU, completed the Punch List;
2. Whether Bernhard is entitled to payment for completion of the Punch List and whether LSU has unreasonably withheld the issuance of a Certificate of Final Completion;
3. Whether LSU and Bernhard agreed to certain change orders and whether Bernhard is entitled to payment for work performed under those change orders;
4. Whether the full amount of the funds held by the trustee (including interest) is the property of LSU, Bernhard, or both parties;
5. The appropriate time period for LSU to make maintenance payments under the ESA; and
6. Whether LSU is required to name Bernhard as an additional insured under insurance policies covering the gas turbine cogeneration plant and services performed in association with the operation of the plant.

<sup>2</sup> LSA-R.S. 39:1525 Action on contract claims

This Section applies to a claim by or controversy between the state and a contractor arising out of a contract for professional, personal, consulting, or social services. If such a claim or controversy is not resolved by mutual agreement, the commissioner of administration, or his designee, shall promptly issue a decision in writing. A copy of that decision shall be mailed or otherwise furnished to the contractor, shall state the reasons for the action taken, and shall inform the contractor of his right to judicial relief as provided in this Part. The decision shall be final and conclusive unless fraudulent, or unless the contractor institutes suit pursuant to R.S. 39:1526. If the commissioner of administration, or his designee, does not issue a written decision within one hundred twenty days after written request for a final decision, or within such longer period as may be established in writing by the parties to the contract, then the contractor may proceed as if an adverse decision had been received.

<sup>3</sup> Per the terms of the ESA, at the inception of the contract a panel of three engineers was formed. Each party was to choose one engineer and those two engineers would select the third. Bernhard chose Ed Tinsley, LSU chose Tony Zavanelli, and the two of them chose Thomas Gardner. Tony Zavanelli, the engineer chosen by LSU, did not attend or participate in the hearing.

2006, the panel rendered its decision.<sup>4</sup> The panel granted Bernhard an award of \$790,429.18 out of the \$2,277,867.09 that Bernhard originally claimed.

On March 3, 2006, the Commissioner issued his decision. Specifically, he found that the panel of engineers referenced in Article 23 of the ESA was “not the equivalent of an arbitration panel”, and further, the panel did not have the authority to consider monetary claims of the type made by Bernhard. The Commissioner’s decision further noted that although he had jurisdiction over the claims, he could not “provide the type of comprehensive evidentiary hearing which is necessary to fully consider the factual issues presented” and “deferred” the matter to the 19<sup>th</sup> Judicial District Court.

On May 2, 2006 Bernhard filed a petition in the 19<sup>th</sup> Judicial District Court requesting that the court: 1) confirm the arbitration award, pursuant to LSA-R.S. 9:4209,<sup>5</sup> and/or 2) review the decision of the Commissioner,

---

<sup>4</sup> The panel's decision is summarized as follows: Regarding the change order claims, the panel found that although LSU did not owe Bernhard for seven of the items claimed by Bernhard, LSU did owe Bernhard for nine of the items claimed, however, in an amount substantially less than the amount requested by Bernhard. The panel further found that LSU must issue payment to Bernhard for maintenance services on the first day of the month after the request is made, that LSU owed approximately half of what Bernhard claimed for interest on late construction phase progress payments, and that LSU owed only \$50,000.00 as opposed to the \$80,500.00 Bernhard claimed for unilaterally altered punch list amounts. The panel, however, was unable to reach a decision on the issue regarding LSU’s naming of Bernhard as an additional insured under the Hartford policy.

<sup>5</sup> LSA-R.S. 9:4209 Motion to confirm award; jurisdiction; notice

At any time within one year after the award is made any party to the arbitration may apply to the court in and for the parish within which the award was made for an order confirming the award and thereupon the court shall grant such an order unless the award is vacated, modified, or corrected as prescribed in R.S. 9:4210 and 9:4211. Notice in writing of the application shall be served upon the adverse party or his attorney five days before the hearing thereof.

pursuant to LSA-R.S. 39:1526.<sup>6</sup> (R., pg. 7) On May 18, 2006, LSU filed an answer to the petition (and a reconventional demand which challenged the accuracy of the Energy Savings Formula provided in the ESA). In its answer, LSU urged that the arbitration award Bernhard sought to confirm should be vacated, pursuant to LSA-R.S. 9:4210.<sup>7</sup>

On June 1, 2006, LSU filed an “alternative” motion to vacate the arbitration award of the panel, pursuant to LSA-R.S. 9:4210. LSU supplemented and amended that motion on June 27, 2006 and on September 15, 2006, Bernhard filed an opposition.

On September 25 and 26, 2006, a hearing was held in the district court on the motions to confirm the arbitration award filed by Bernhard and to vacate the arbitration award filed by LSU. On May 21, 2007, a judgment was signed which held, in pertinent part, that:

1. Bernhard and LSU are bound by the terms of the ESA;

---

<sup>6</sup> LSA-R.S. 39:1526 Jurisdiction; actions in certain cases

- A. The Nineteenth Judicial District Court, subject to appeal as provided by law, shall have jurisdiction over controversies involving the state in connection with a petition for review of a decision made pursuant to R.S. 39:1525.
- B. In any action by a contractor based upon any express or implied contract or breach thereof, no action shall be maintained based upon any contract or any act of any state officer which the officer is not authorized to make or do by the laws of this state, unless the contractor, acting in good faith and without actual or constructive knowledge of the lack of authorization, has commenced performance under the apparent contract. In that event, the court may (1) cancel the contract and reimburse the contractor only for the actual expenses incurred in performing the work already performed or (2) where the best interests of the state require, allow the performance of the contract to continue.

<sup>7</sup> LSA-R.S. 9:4210 Motion to vacate award; grounds; rehearing

In any of the following cases the court in and for the parish wherein the award was made shall issue an order vacating the award upon the application of any party to the arbitration.

- A. Where the award was procured by corruption, fraud, or undue means.
- B. Where there was evident partiality or corruption on the part of the arbitrators or any of them.
- C. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.
- D. Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

2. The actions of the Commissioner are without effect as the terms of the ESA control this matter;
3. Bernhard's motion to confirm the arbitration award was granted;  
and
4. LSU's motion to vacate the arbitration award was denied.

The judgment was designated as final and appealable.

### **ASSIGNMENTS OF ERROR**

In its appeal, LSU raises the following assignments of error:

1. The trial court erred in designating the judgment as "final," when LSU's alternative claim to have the contract declared null and void was still pending.
2. The trial court erred in holding that the Commissioner of Administration's decision that the parties did not agree to arbitration was not binding on the parties.
3. The trial court erred in holding that the Panel of Engineers is an "arbitration panel" with jurisdiction to rule on disputes concerning extra work and delay damage claims.
4. The trial court erred in holding that the award should not be vacated pursuant to La. R.S. 9:4210 due to Mr. Tinsley's "evident partiality" and undisclosed economic stake in the outcome of the case which disqualified him from sitting as an arbitrator.
5. The trial court erred in holding that the award should not be vacated pursuant to La. R.S. 9:4206 for failure of the parties to consent in writing to hearing of the case by less than all of the arbitrators.

### **ASSIGNMENT OF ERROR NO. 1**

LSU first alleges error in the trial court's designation of the May 21, 2007 judgment as "final" due to the remaining ongoing litigation between

the parties in the court below.<sup>8</sup> The First Circuit has previously held that LSA-C.C.P. art. 1915 authorizes the immediate appeal of partial final judgments. Specifically, LSA-C.C.P. art. 1915(B)(1) states that:

When a court renders a partial final judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories, whether in an original demand, reconventional demand, cross-claim, third party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.

The judgment at issue is clearly designated as final with an express determination that there is no just reason for delay of appeal. This court has recently recognized that when the trial court provides reasons for a 1915(B) certification, the standard of review is abuse of discretion. **Grace v. Crespo**, 2007-0397 (La. App. 1 Cir. 9/19/07), 970 So.2d 1007, 1011 writ denied (La. 12/7/07), 969 So.2d 636. And although the jurisprudence has long maintained a policy against multiple appeals that foster piecemeal litigation, of equal importance is the need to balance judicial efficiency and economy with the need for review at a time that best serves the interests of the litigants. **R.J. Messinger, Inc. v. Rosenblum**, 2004-1664, p. 13 (La. 3/2/05), 894 So.2d 1113, 1122.

The trial court found that “the central issue [in this case] is whether to confirm or vacate the arbitration award decision of the Panel of Engineers.” Particularly, the main issue in this matter involves a disagreement between LSU and Bernhard regarding the interpretation of Article 23 of the ESA and whether it requires arbitration between the parties. Because a final determination of that issue will affect the remaining litigation, we find that

---

<sup>8</sup> Subsequent to this action, Bernhard filed two additional motions for confirmation of subsequent arbitration awards rendered by the panel. The proceedings between Bernhard and LSU which remain in the 19<sup>th</sup> Judicial District Court have been stayed pending this appeal.

there exists a need for immediate review of this issue. We find no abuse of discretion in the trial court's LSA-C.C.P. art. 1915(B) certification and we will treat the judgment made the basis of this appeal as final.

### **ASSIGNMENT OF ERROR NO. 2**

A determination regarding the trial court's decision that the Commissioner of Administration's decision was not binding on the parties requires that we first determine the pivotal issue in this case: whether the parties agreed to arbitration under the ESA.

Disputes of this nature are generally governed by LSA-R.S. 39:1525, which states:

This Section applies to a claim by or controversy between the state and a contractor arising out of a contract for professional, personal, consulting, or social services. If such a claim or controversy is not resolved by mutual agreement, the commissioner of administration, or his designee, shall promptly issue a decision in writing. A copy of that decision shall be mailed or otherwise furnished to the contractor, shall state the reasons for the action taken, and shall inform the contractor of his right to judicial relief as provided in this Part. The decision shall be final and conclusive unless fraudulent, or unless the contractor institutes suit pursuant to R.S. 39:1526. If the commissioner of administration, or his designee, does not issue a written decision within one hundred twenty days after written request for a final decision, or within such longer period as may be established in writing by the parties to the contract, then the contractor may proceed as if an adverse decision had been received.

However, because the trial court concluded that the parties were bound to arbitrate under the ESA, and were therefore not required to seek review by the Commissioner, the trial court held that the actions of the Commissioner were without effect. In reaching its conclusion regarding mandated arbitration of all disputes, the trial court stated that "the ESA, signed by LSU and Bernhard, contains clear references to arbitration as the appropriate method of resolving disputes arising from the agreement" and "[p]ursuant to the clear language of Article 23, LSU and Bernhard agreed for



the Panel to issue conclusive and binding decision[s] resolving issues of dispute between the parties.”

Interpretation of a contract is the determination of the common intent of the parties. LSA-C.C. art. 2045. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties’ intent. LSA-C.C. art. 2046. Further, each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. LSA-C.C. art. 2050. Whether a contract is ambiguous or not is a question of law. **Sanders v. Ashland Oil, Inc.**, 96-1751 (La. App. 1 Cir. 6/20/97), 696 So.2d 1031, 1037, writ denied, 97-1911 (La. 10/31/97), 703 So.2d 29. When appellate review is not premised upon any factual findings made at the trial level, but instead is based upon an independent review and examination of the contract on its face, the manifest error rule does not apply. **Sanders**, 696 So.2d at 1037. In such cases, appellate review of questions of law is simply whether the trial court was legally correct. **Sanders**, 696 So.2d at 1037.

We have carefully reviewed the thorough and well-written opinion of the Commissioner and agree with his reasoning and conclusions. Article 23 of the ESA can be broken into two parts. Part 1 reads as follows:

Bernhard and LSU will each name an engineer possessing expertise related to the engineering required for the Project, which engineers together shall pick a third engineer, the three of whom shall be referred to in this ESA as the “Panel of Engineers.” For purposes of this Article, “engineer” shall refer to an individual, not a firm, partnership or corporation. In each instance in which the ESA or any exhibit hereto requires a decision by the three Panel of Engineers, a decision of two of the three shall be conclusive and binding on the parties hereto.

A review of the contract shows that it contains certain provisions that specifically require a decision by the Panel. This is the situation anticipated

by the language "[i]n each instance in which this ESA or any exhibit hereto requires a decision by the three Panel of Engineers." (Emphasis added). Obviously, the panel has jurisdiction and authority to render a binding decision where the contract specifically calls for it.<sup>9</sup>

The second half of Article 23 continues:

Furthermore, except as otherwise provided in section 6.2.2 and in section 9.6, in any instance set forth in this ESA or any exhibit hereto in which agreement of LSU and Bernhard or LSU, Bernhard and the Independent Engineer is required and agreement cannot be reached within the time period set forth or, when no time period is given, with thirty (30) days of the date that begins the period to reach agreement, established by notice or otherwise, the Panel of Engineers shall consider the matter and shall have an additional thirty (30) days to decide the matter unless the parties agree to a different time period for decision.

This provision grants the panel jurisdiction and authority to render a decision when an agreement between LSU and Bernhard, or LSU, Bernhard and the Independent Engineer is *required*, but cannot be reached<sup>10</sup>, except as provided in section 6.2.2 or 9.6.<sup>11</sup>

We do not find that Article 23 of the ESA is an arbitration clause covering each and every disagreement between Bernhard and LSU arising

---

<sup>9</sup> For example, Article 22.3, "Facility Conditions," specifically provides that the Panel of Engineers has jurisdiction when "(a) sub-surface or latent physical conditions at the Facility differ materially from those indicated in documents provided by LSU to Bernhard, or (b) unknown physical conditions at the Facility of any unusual nature differ materially from those ordinarily encountered." These types of situations are immediately within the jurisdiction of the Panel of Engineers.

<sup>10</sup> For examples, see Article 9.4, "Certificate of Substantial Completion," Article 13.1, "Plans and Specifications," Exhibit F, "Project Review and Inspection," Exhibit M, "Savings Guarantee," and Exhibit N, "Projected Savings Fees." Specifically, the agreements in these situations are required within a certain time frame, but if no agreement is reached during the specified time frame, the Panel of Engineers then has jurisdiction over the particular dispute or issue.

<sup>11</sup> Under Article 6.2.2, LSU is required to approve technical specifications before Bernhard orders equipment. If LSU and Bernhard cannot agree that the equipment meets the Final Plans and Specifications and/or appropriate standards and regulations, Bernhard can request in writing a review by a licensed design professional responsible for the equipment's specifications. Only after this review does the Panel of Engineers gain jurisdiction over this situation. Likewise, Article 9.6 is similar in that it also mandates an extra layer of review by a licensed engineer in instances in which, prior to the issuance of the Certificate of Substantial Completion, Bernhard disagrees with an item LSU placed on the Punch List. The article provides that subsequent to the issuance of the Certificate of Substantial Completion, if LSU and the licensed engineer cannot agree, the Panel will then have jurisdiction over the particular item in dispute. The record, however, does not indicate that Bernhard requested a 9.6 review. Further, the record indicates that Bernhard did not dispute whether the work was required, but rather is disputing whether, after the work was completed, additional compensation is required.

out of the contract. The language of Article 23 limits the panel's authority to specific instances provided for within the contract itself. And although in its reasons for judgment, the trial court noted that Exhibit M to the ESA refers to the procedure set forth in Article 23 as "arbitration," we note that this is the only reference to "arbitration" in the voluminous document. The testimony at the hearing reveals that the original Article 23 was entitled "Arbitration" and was rejected by LSU. In fact, the "Arbitration" was then replaced with the current language of Article 23 and entitled "Panel of Engineers." The new article does not call for the appointment of a panel of arbitrators, but rather a panel of three persons skilled in the area of engineering. Further, as noted above, the panel can only consider certain issues which are carefully defined and circumscribed in the contract. Many drafts of the contract were exchanged before the final version was accepted and all references to "arbitration" were removed with the exception of the one instance in Exhibit "M." We agree with the Commissioner that this single use of the word is an obvious oversight.

We conclude that Article 23 of the ESA does not require arbitration of disputes that arise pursuant to the contract. Instead, Bernhard's proper recourse was to file for a decision of the Commissioner, pursuant to LSA-R.S. 39:1525.

The judgment of the 19<sup>th</sup> Judicial District Court is reversed and this matter is remanded for further proceedings consistent with the views expressed in this opinion.

#### **ASSIGNMENTS OF ERROR NOS. 3, 4, and 5**

LSU's remaining assignments of error attack the fairness and/or correctness of the "arbitration panel" and the process utilized therein. Our

decision regarding the absence of an arbitration clause in the ESA renders these assignments of error moot.

### **BERNHARD'S EXCEPTIONS**

Bernhard has filed peremptory exceptions to LSU's motion to vacate, raising the objections of res judicata, preemption, and no right of action, on the basis that LSA-R.S. 9:4213 requires that a motion to vacate an arbitration award must be filed within three months of the filing or delivery of the award.

Pursuant to LSA-C.C.P. art. 2163<sup>12</sup>, this court may, in certain instances, entertain peremptory exceptions filed for the first time on appeal. The exceptions, however, hinge upon whether Article 23 of the ESA is an arbitration clause. Because it is not, the rules of arbitration are not applicable. The exceptions are denied.

### **CONCLUSION**

The contract of the parties does not call for arbitration. The matters in dispute are thus subject to the administrative proceedings set forth in LSA-R.S. 39:1524, *et seq.* and not the Louisiana Arbitration Laws. The judgment of the trial court is reversed, and this matter is remanded to the 19<sup>th</sup> Judicial District Court for further proceedings consistent with this opinion. The exceptions of res judicata, preemption, and no cause of action are denied. Bernhard is assessed with all costs.

**REVERSED AND REMANDED; EXCEPTIONS DENIED.**

---

<sup>12</sup> LSA-C.C.P. 2163 Peremptory exception filed in appellate court; remand if prescription pleaded. The appellate court may consider the peremptory exception filed for the first time in that court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of the exception appears of record.