

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

ZERO LAMOTTE STREET, LLC,)
d/b/a ZS TECHNOLOGIES, a)
Delaware limited liability company,)
Plaintiff,)

v.)

C.A. No.: 11C-11-095 FSS
(E-FILED)

THE DELAWARE RIVER & BAY)
AUTHORITY, an agency of the State)
of Delaware, and JAMES T.)
JOHNSON, JR., individually and as)
Executive Director,)
Defendants.)

Submitted: February 14, 2012

Decided: February 21, 2012

ORDER

Upon Plaintiff's Motion for Reargument - *DENIED*.

1. On February 1, 2012, the court denied Defendants' motion to dismiss without prejudice. The court also ruled, however, that the contract, if actually formed, was not an adhesion contract. It was a government contract, let through a formal bid process, starting with a RFP.

2. On February 7, 2012, Plaintiff timely filed a Superior Court Civil Rule 59(e) motion for reargument,¹ alleging: (a) the court's adhesion contract ruling

¹ Super. Ct. Civ. R. 59(e).

was premature; and (b) the contract's mandatory arbitration provision is unconscionable and, therefore, unenforceable. On February 14, 2012, Defendants timely replied.

3. A motion for reargument will be denied unless the court has “overlooked a controlling precedent or legal principles, or misapprehended the law or facts such as would have changed the outcome of the underlying decision.”²

4. Plaintiff now provides two cases supporting its adhesion contract theory. The cases should have been presented originally. While Plaintiff cited *Bochniak v. Blenheim at Bay Pointe, LLC*³ in its response to Defendants' motion to dismiss, it was for a different proposition.⁴ Anyway, neither case concerns an adhesion contract. Any adhesion contract discussion is *dicta*, in passing. Not only that, those cases involve private contracts.⁵ The contract here is a public materiel contract put out for a public bid.⁶ The nature of the DRBA contract is at the holding's

² *Radius Services, LLC v. Jack Corrozi Const., Inc.*, 2010 WL 703051, at *1 (Del. Super. Feb. 26, 2010) (Vaughn, P.J.).

³ 2011 WL 2184180 (Del. Super. May 31, 2011) (Ableman, J.).

⁴ See Pl.'s Resp. to Defs.' Mot. to Dismiss ¶ 10 (Alleging Defendant Johnson's animosity towards Plaintiff makes it unconscionable for him to exercise dispute resolution authority).

⁵ *HCR-Manor Care v. Fugee*, 2010 WL 780020 (Del. Super. Jan. 26, 2010) (Johnson, J.) (Involving a care facility's admissions agreement); see also *Bochniak v. Blenheim at Bay Pointe, LLC*, 2011 WL 2184180 (Involving a warranty dispute between a buyer and a homebuilder).

⁶ 29 Del. C. § 6902(15) (“‘Materiel’ means materials, equipment, tools, supplies, or any other personal property.”).

core. Plaintiff continues to ignore the implications of the contract's nature.

5. Public contracts performed are usually take-it-or-leave-it, largely to prevent favoritism and otherwise level the playing field.⁷ If Plaintiff did not like Defendants' RFP, it did not have to submit a bid. Plaintiff was not buying required insurance, renting an apartment, seeking treatment, etc. Plaintiff was trying to sell to a State agency, albeit on the agency's terms, through a regulated bid process.

6. In opposing reargument, Defendants remind the court that prospective bidders were able to provide feedback on bid proposals and provide alternative language for the proposed contract. That misses the point. The feedback provision, such as it was, does not undermine the contract's nature.⁸ The Delaware River & Bay Authority, in its sole discretion, could accept or deny the proposals.⁹

7. As to the arbitration provision, Plaintiff rehashes its argument that the provision is unconscionable and unenforceable. But, the court already rejected that. And, *Ruckman v. Delaware River & Bay Authority*, cited by Defendants, upheld

⁷ See 29 Del. C. § 6903.

⁸ 29 Del. C. § 6923(e)(2)b. ("The [agency's] invitation to bid shall include the . . . inspection and acceptance requirements of the contract.").

⁹ See 17 Del. C. § 1701 ("The Authority is hereby granted the . . . power[] to exercise all other powers . . . which may be reasonably necessary . . . to the effectuation of its authorized purposes."); see also Defs.' Mot. to Dismiss Ex. 3, at S-2 ("Sellers must identify any exceptions taken to any of the terms . . . and indicate suggested alternative language. The Authority in its sole discretion will determine whether or not to accept the suggested alternate language.").

an identical arbitration provision.¹⁰

For the foregoing reasons, Plaintiff's motion for reargument is **DENIED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
Richard L. Abbott, Esquire
Donald E. Reid, Esquire
Pauletta J. Brown, Esquire

¹⁰ 244 A.2d 277, 277-278 (Del. 1968).