CITY OF PHILADELPHIA

LAW DEPARTMENT
15th Floor, Municipal Services Building
Philadelphia, PA 19102

Send response to:
ARA Tower at Reading Center
1101 Market Street
Philadelphia, PA 19107

December 4, 1991

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DEC 0 6 1991
U.S. EPA WATER MANAGEMENT DIVISION
MUNICIPAL WASTEWATER CONSTRUCTION BRANCH

Rocco Imperatrice, III
Blank, Rome, Comisky & McCauley
Rose Tree Corporate Center
1400 Providence Road
P.O. Box 1210
Media, PA 19063

Re: Arbitration of Capital Payment Dispute

Dear Rocco:

As you are aware, the Superior Court has reversed the Delaware County Court of Common Pleas and has ordered Delcora to proceed with arbitration as previously demanded by the City.

The City has already proposed William Bulman, Chief, Municipal Wastewater Construction Branch, EPA, Region III, as the impartial arbitrator. Mr. Bulman is extremely knowledgeable in the areas of grant funding and the construction of treatment works and I believe his fairness and impartiality are beyond question.

However, if Delcora wishes to again reject Mr. Bulman, please propose Delcora's selections as soon as possible as I will be proceeding under Paragraph 9.03 of the Agreement to have the Philadelphia Office of the American Arbitration Association select our impartial arbitrator.

As always, should you have any questions, please feel free to call. Best wishes for the holidays.

Very truly yours,

DAVID A. KATZ
Chief Assistant City Solicitor

DAK:bs

bcc: William Bulman
John Plonski
Ron Coy
Joe Clare
Bernie Brunwasser
Jim Palladino

J. A30038/91

DELAWARE COUNTY REGIONAL WATER QUALITY CONTROL AUTHORITY, Appellee	)	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	)	
CITY OF PHILADELPHIA, Appellant	)	No. 46 Philadelphia, 1991

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JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of DELAWARE County be, and the same is hereby REVERSED.

BY THE COURT:

David A. Szefl

PROTHONOTARY

Dated: NOVEMBER 21, 1991

DELAWARE COUNTY REGIONAL WATER QUALITY CONTROL AUTHORITY, Appellee	) :) :)	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	) :)	
CITY OF PHILADELPHIA, Appellant	) :)	No. 46 Philadelphia, 1991

Appeal from Order of the Court of Common Pleas, Civil Division, of Delaware County, No. 90-14387.

BEFORE: ROWLEY, P.J., CAVANAUGH and WIEAND, JJ.

MEMORANDUM:

FILED NOV 21 1991

This appeal has been taken from an order which stayed arbitration between the parties because of a pending declaratory judgment proceeding. After careful review, we find it necessary to reverse.

The City of Philadelphia and the Delaware County Regional Water Quality Control Authority (Delcora) were parties to an agreement dated March 15, 1974, by the terms of which the City was to enlarge and improve its Southwest Wastewater Pollution Control Plant and reserve a portion of the enlarged capacity for treatment of wastewater from Delcora's Eastern Delaware County Service Area. In exchange, Delcora was to reimburse the City for a portion of the cost of expanding its plant. When a dispute arose between the parties regarding the calculation and time of payment of these and other charges under the agreement, the City requested arbitration. Instead, Delcora filed in Delaware County an action to stay arbitration and also an action for a

declaratory judgment to interpret the parties' agreement. On November 26, 1990, the court granted Delcora's petition to stay the arbitration. The instant appeal followed.

Paragraph 9.03 of the written agreement is as follows:

> **9.03 Arbitration**
>
> In the event of any dispute between the parties such dispute may be referred by either party to an impartial arbitrator to be appointed by mutual agreement of the parties.
>
> In the event that the parties are unable to agree upon such impartial arbitrator within fifteen (15) days, either party may make application to the Philadelphia Office of the American Arbitration Association for the sole purpose of selecting an arbitrator in accordance with the rules of that association. If any party to the dispute shall be dissatisfied with the Award of the Arbitrator from the American Arbitration Association, such dissatisfied party shall have the right to resort to the Court of Common Pleas of Philadelphia in accordance with the provision of the Act of April 25, [1927], P.L. 381, as amended.
>
> It is specifically understood and agreed that all of the provisions of the said Act of April 25, [1927], P.L. 381, as amended, shall apply and both parties hereto shall have all rights provided thereunder except only with respect to the selection of an impartial arbitrator from the American Arbitration Association if one cannot be agreed upon by the parties as aforesaid. (Emphasis added).

This agreement must be read in its entirety, and we must give effect to all its provisions. The language used by the parties must be given its plain meaning. Giant Markets,

Inc. v. Sigma Marketing Systems, 313 Pa.Super. 115, 123, 459 A.2d 765, 769 (1983). Delcora argues and the trial court held that the parties' agreement made arbitration discretionary and that neither party could require arbitration without the consent of the other party. We do not interpret the arbitration clause in the same manner. Rather, the arbitration clause here permits either party to submit a dispute to arbitration. When a demand for arbitration is made by either party, the agreement then provides for the manner in which an arbitrator is to be selected. A party's response to a demand for arbitration is not discretionary but mandatory.

In Wyoming Radio, Inc. v. National Association of Broadcast Employees and Technicians, AFL-CIO, 398 Pa. 183, 185, 157 A.2d 366, 367 (1960), the arbitration agreement provided in pertinent part as follows:

> If any dispute shall not be settled within ten (10) days after such discussion is initiated thereon, the matter may be referred by either party to an Impartial Arbitrator to be selected in accordance with the Rules of the American Arbitration Association, whose decision shall be final and binding on both parties. All expenses shall be borne in accordance with the AAA Rules and Regulations. (emphasis added).

In holding that the parties were bound to submit a legitimate dispute to arbitration under this language, the Court said:

> Arbitration is not a makeshift or a subterfuge. It is not an excuse for delay or a fan for the cooling off of tempers. It is a solemn and serious undertaking for the attainment of justice and when parties engaged in a

> common enterprise agree to settle by arbitration all differences which may arise between them they are bound by their commitments as much as if they had entered into a stipulation in Court.

Id. at 186, 157 A.2d at 367.

The word "may" as used by the parties in their arbitration agreement imports contingency, not ambiguity. It acknowledges that the parties may or may not make a request to arbitrate a dispute. When a party makes a demand for arbitration, however, the word "may" has a mandatory import. See: Carroll Township v. Jones, 85 Cmwlth Ct. 400, 403, 481 A.2d 1260, 1261 (1984). Indeed, there is no other common sense way in which to read the arbitration clause in this case. Any other interpretation would literally render the arbitration clause meaningless. If both parties agree to submit a dispute to arbitration, they can do so with or without a specific prior agreement to do so.

"In accordance with the general policy favoring the arbitration of contractual differences, an order enjoining [or staying] arbitration of a particular grievance should not be granted unless it can be said with positive assurance that the agreement involved is not susceptible of an interpretation that covers the asserted dispute." Sanitary Sewer Authority of the Borough of Shickshinny v. Dial Associates Construction Group, Inc., 367 Pa.Super. 207, 210-211, 532 A.2d 862, 863-864 (1987). See: 42 Pa.C.S. § 7304(b). Here, the agreement gave to the City of Philadelphia the right to require that contractual disputes

between it and Delcora be submitted to arbitration. When the trial court interfered with the exercise of that right, it fell into error.

Order reversed.