

ADJUDICATION APPLICATION NO SOP/AA 11/2006

**IN THE MATTER OF
THE CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2004
AND IN THE MATTER OF AN ADJUDICATION BETWEEN**

COMPANY BC

Claimant

AND

COMPANY BD

Respondent

ADJUDICATION DETERMINATION

SEAH CHOO MENG

ADJUDICATOR

25th September 2006

1. This is the determination of Seah Choo Meng of No.1 Magazine Road, #05-01 Central Mall, Singapore 059567, the Adjudicator appointed by the Singapore Mediation Centre, the Authorised Nominating Body, under the *Building and Construction Industry Security of Payment Act 2004* (hereinafter referred to as "the Act") to determine a payment dispute between the Claimant and the Respondent.

Determination

2. I determine that:
 - 2.1. The Respondent shall pay the Claimant the sum of \$43,961.99 hereby recorded as the Adjudicated Amount.
 - 2.2. The date on which the Adjudicated Amount becomes due is the 10th Aug 2006 hereby recorded as the Due Date.
 - 2.3. That rate of interest payable is 6% per annum from the Due Date for payment.
 - 2.4. The costs of these adjudication proceedings shall be borne equally by the parties.

The Contract

3. By a Letter of Intent dated 19 September 2005, parties had agreed that the Claimant would be engaged as the Respondent's Sub-contractor for the piling works for the proposed erection of a block of 5 storey building with mezzanine for *Company BE* (hereinafter referred to as "the Project").

The Claim

4. Taking into account the Adjudication Application, Adjudication Response, and both parties' closing statement, the following figures are agreed upon by parties:
 - a. \$651,254.75 being the final work done, including piling, work load test, ultimate load test;
 - b. \$579,340.12 being the sum already paid by the Respondent to the Claimant;
 - c. \$30,046.07 being the accepted back-charges the Respondent is entitled to deduct; and
 - d. \$43,961.99 being the balance from above (inclusive of GST but excluding socketting into rock).

5. The Claimant is also claiming variation work for socketting into rock, amounting to \$102,643.20 together with GST of \$ 5,132.16.

The respective documents and materials considered and referred to in this Determination

6. The Claimant on the 18th August 2006 filed their Adjudication Application with a brief Statement of Case and listing of attached documents (2 volumes). Following the Adjudication Conference held on the 13th September 2006, the Claimant filed their closing submission with documents (1 volume).

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7. The Respondent on the 28th August 2006 filed their Adjudication Response with a Summary of Respondent's case and documents (1 volume). On the 31st August 2006 they filed an addition to paragraph no. 21(a) of their Summary of Respondent's case and a set of documents marked tab-12. A fresh set of this (marked "Volume 2 from the Respondent") was submitted by the Respondent at the Adjudication Conference held on the 13th September 2006. On the 18th September 2006, the Respondent also filed their closing submission (which included documents not disclosed before).

Chronology of Events

8. Following the parties' negotiations on the contract, the Respondent on the 11th August 2005, wrote to the Claimant informing the Claimant to quote including socketting works. This letter is however a subject of dispute as the Claimant denies receiving this letter, until when the Adjudication response was filed.
9. On the 17th August 2005, the Claimant made a tender offer which excluded socketting works and set out that 2½ months (from the installation of the first working pile) will be required to complete the works.
10. Completion of the Works - By the Letter of Intent of the 19th September 2005, the Respondents required the works to be completed by 24th November 2005.
11. Parties had corresponded on various issues about load test, pile penetration length, size, socket length, pile capacity, resubmission of pile length calculation, enlarged pile.
12. Issues about the socketting – These were raised by parties through their correspondence on the 11th, 13th, 14th, 15th, 22nd, 25th & 28th October, 10th, 11th, 14th & 16th November 2005 and 11th April 2006.

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13. Issues about delay in the works – These were raised on various dates specifically the 12th, 15th, 17th, 22nd, 25th & 31st Oct 2005, 2nd, 12th, 14th, 15th, 16th, 17th, 23rd, 25th & 29th Nov 2005, I shall deal with these in more detail shortly.
 14. The Respondent in support of the issue of socketting and delays relied on independent reports by *Company BF* and *Company BG* on the 10th & 28th Oct 2005 respectively.
 15. On the 13th Dec 2005, the Respondent sent out the Sub Contract Agreement (dated the 1st Oct 2005).
 16. On the 14th Dec 2005, the Claimant wrote to the Respondent requesting the Respondent amongst other things, amend the contract period to 2½ months.
 17. On the 19th Dec 2005, the Claimant completed their works and raised their first claim on the 19th Dec 2005, for additional rig and time spent on socketting amounting to \$89,521.10.
 18. On the 20th Dec 2005, the Claimant raised their second claim for further similar works amounting to \$102,643.20.
 19. On the 23rd Dec 2005, the Respondent rejected the Claimant's claim. This was followed by correspondence by lawyers engaged by both parties on the dispute.
 20. On the 15th May 2006, the Respondent issued their Final Accounts which reflected the amount of sub-contract work - \$797,180.80; the claims payable - \$651,254.75; the amount already paid - \$579,340.12; and the balance amounted - \$71,914.63.

21. By way of letters of the 8th, 23rd & 28th June, 16th, 24th & 28th Aug 2006, parties through their respective lawyers proceeded to arrange meetings and/or negotiations to resolve the outstanding amount payable.
22. On the 20th July 2006, the Claimant submitted their Payment Claim for \$174,781.04. There was no Payment response filed thereafter by the Respondent.

The Present Proceedings

23. On the 20th July 2006, the Claimant served their payment claim for the sum of \$174,781.04 being the balance from \$651,477.96 (works carried out), \$102,643.20 (for socketting into Rock) and less \$579,340.12 (sums previously paid).
24. On the 11th August 2006, the Claimants gave notice to the Respondents of their intention to apply for adjudication and on the 18th August 2006 filed their adjudication application.

The submission made in the Adjudication Application and Response

25. The Claimant in their Adjudication Application claimed the following:-
 - a. That CPG Consultant had changed the design criteria that ultimately had the claimant changing their scope of work from supply and installing of cast-in piles to carry the design working load to carrying the pile capacity.

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- b. That they informed the Respondent of the additional cost and time. This was raised in 2 letters of the claimant dated the 25th October 2005.
 - c. That they then recorded the time spent for socketting into rock and raised these claims on the 19th and 21st Dec 2005.
 - d. That they then on 20th July 2006 revised their payment claim and on the 11th Aug 2006 gave notice that they would proceed to make the Adjudication Claim.
 - e. That the sum of \$174,781.04 was due and owing.
26. The Claimants in their Adjudication Application claimed the following:-
- a. That the Claimant is estopped from and/or has no basis for making the claim.
 - b. That the Final Accounts of the 15th May 2006 was the payment response and there were negotiations continuing between parties.
 - c. That on the balance sum of \$43,961.99, a sum of \$55,000.00 being liquidated damages (at a rate of \$2,000.00 per day) should be deducted because the Claimant completed the works on the 19th Dec 2005, 25 days after the actual date of completion (i.e. 24th Nov 2005).
 - d. That the Respondent had not agreed to the Claimant's letter of 14th Dec 2005 extending the completion date.
 - e. That the socketting into rocks formed part of the contract as evidence by the Claimants letter of 15th June 2005 and as requested for in the Respondents letter of 11th Aug 2005.

- f. That in any event the socketting works were required as a consequence of the Claimant's own breach as confirmed by the 2 independent experts and therefore the rectification was within the Claimant's scope of works.
- g. That CPG and the Respondent had in their emails of 14th Oct and 16th Nov 2005 not agreed to the Claimant's claim for variation order and extension of time.

Clarifications made at Adjudication Conference

- 27. Following my appointment (on the 24th August 2006) as the Adjudicator, I had on the 8th September 2006, directed parties to attend an Adjudication Conference before me fixed for the 13th September 2006 at 9.30am.
- 28. On the 13th September 2006, parties appeared before me as directed for the Adjudication Conference. I asked parties to address me on their respective positions and any further information they wished to provide. Parties provided their clarifications on the matter.
- 29. The Claimant's clarification included the following:-
 - a. That the Claimant had in their letter of the 17th Aug 2005 to the Respondent indicated that the Claimant required 2½ months to complete the works and that while carrying out the works, the Claimant merely tried to accommodate the Respondents with a 3rd rig brought in to speed up the works.
 - b. That CPG Consultants themselves by way of their letter of 25th Oct 2005 changed the specifications to constructing the testing bored piles based on pile capacity.

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- c. That until the submission of Adjudication Response, the Claimants had not seen the Respondent's fax dated 11th Aug 2005. And that in any event, the contents of the fax was inconsistent with the Claimant's own letter of the 16th and 17th Aug 2005 in which the Claimant's offered a higher price for the Respondent's supply of steel.
- d. That the letter of the 15th June 2005 referred to by the Respondent was in fact not to the Respondent but to another company, *Company BH*. This latter company was one which the Claimant had previous dealings with and therefore had a different working relationship with. The offer made to that company was not made to the Respondent.
- e. Explained the problems the Claimant had with having to change from working load to pile capacity instead.
- f. That by the email from the Respondent's Project Manager *Mr U* on the 16th November 2005, they acknowledged that the issue of variation and extensions of time will be dealt with later while the works proceeded.
30. The Respondent's clarification included the following:-
- a. That the letter of the 15th June 2005 was given to the Respondent and the parties carried out discussions based on this.
- b. That the Respondent's letter of the 11th Aug 2005 had been sent out and that they would in their closing submission disclose the fax transmission slip to show that it was indeed sent out.
- c. That with respect to the issue of liquidated damages, the Respondents were themselves imposed with Liquidated Damages and would in their closing submission disclose the documents in support of this.

- d. That work had commenced on the 18th Sept and maintained that work would be completed with 1½ months.

The Closing Submissions

31. The Claimants in their Closing Submissions confirmed the points set out in paragraph No. 25 a to e above and also submitted on the following:-

- a. That they were contractually entitled to claim for socketing into rock. The Claimant made reference to the tender drawings, the particulars specifications and the test reports in support of this.
- b. That clause 12 of conditions of prices on piling Sub Contract specifically stated that there would be no liquidated damages for piling Sub Contract.

32. The Respondent in their Closing Submissions confirmed only the following:

- a. That the letter of the 15th June 2005 (which was addressed to a third party) was sent to the Respondent.
- b. That the Respondent's letter of 11th Aug 2005 was sent out to the Claimant.
- c. That the Respondent operated on the basis that socketing work was included in the cost.
- d. That the Claimant commenced mobilization on the 19th Sept 2005 and that the changes in design of the piles were required due to the failure of the load tests.
- e. That the works were to be completed by the 24th Nov 2005 but that the Claimant only completed the works by 19th Dec 2005.

Finding and Reasons**A On the matter of \$43,961.99**

33. Parties have as a result of the Adjudication Conference and their respective submissions confirmed that this is the amount in balance. For reasons I shall explain in paragraphs numbered 36 to 39 below, I find no reason to withhold this sum and I therefore determine that the Claimant has succeeded in this portion of their claim and the Adjudicated Amount is \$43,961.99.
34. As the Claimant in their Adjudication Application indicated that the due date of Payment Response was the 10th August 2006, I therefore determine the Due Date for payment to be the 10th August 2006.
35. As the Contract did not provide for any specified rate of interest on the unpaid amount of claim that has become due and payable, the provisions of *Section 5(b)* of the *Act* become applicable. I therefore determine interest on the Adjudicated Amount to be at a rate of 6% per annum from the Due Date for payment.

B On the sum of \$55,000.00 the Respondent claims should be deducted

36. The Respondent has taken the position that as the Claimant had only completed the works on the 19th December 2005, the Respondent is entitled to deduct liquidated damages for a period of 25 days at a rate of \$2,000 per day.

37. While the issue of what is the actual contract period and which of the clauses (clause 7 & 25 of the Subcontract raised by the Respondent or Clause 12 of the Conditions of Prices on Piling Sub-Contract annexed to the letter of offer dated the 17th August 2005 raised by the claimant) applies, I am of the view that the followings have a more important bearing on this matter:
- a. the Respondent by way of their email of the 16th November 2005 acknowledged the issues of extension of time;
 - b. the Respondent had not raised nor served any notice of delay on the Claimant;
 - c. no liquidated damages were included in the Final Account dated the 15th May 2006;
 - d. the Respondent raised the clause for liquidated damages only in the Adjudication Response; and
 - e. despite the Respondent making clarification on the 13th September 2006 that liquidated damages was imposed on them, the Respondent in their closing submission have not provided any evidence in support of their claim.
38. Under the circumstances, there is no evidence before me that liquidated damages had been imposed on the Respondent. In any event these were never raised with the claimant other than in the Adjudication Response.
39. Accordingly, I find no reasons to allow any deduction for the claim of \$55,000.00.

C On the sum of \$107,775.36 being the variation work for socketting into rock

40. This issue is far more complicated than the parties had made it out to be.
41. The Claimant's position in essence is that socketting was not within the terms of the Contract; the Claimant's letter of the 15th June 2005 was addressed to another company and had no bearing on the contract with the Respondent; CPG had changed the design criteria resulting in a change in the scope of the works which the Claimant informed the Respondent they would make a claim for; and the letter (dated the 11th August 2005) relied upon by the Respondent was never received by them but more importantly that it was inconsistent with the scheme of things. The said letter stated that the Respondent would supply steel at \$700/t whereas the Claimant's later letter of the 17th August 2005 offered a higher price at \$710/t.
42. The Respondent's position in essence is that the price was already inclusive of the socketting works; the letter of 15th June 2005 addressed to a 3rd party was sent to the Respondent and parties and agreed upon. On this the Respondent has however only in their closing submission disclosed a page from a diary. No name of the writer was however disclosed; and the socketting works was required because of the Claimant's breach in the failed loading test. The Respondent raised various reports of 2 separate experts *Dr V* from *YYY* University and *Dr W* of *Company BG*.
43. I am satisfied that this is an on going dispute about possible variation and the final accounts. It requires a detailed analysis of the provisions of the contract; of the scope of works; and a technical review of the works carried out. These points together with the letters of 15th June 2005 and 11th August 2005 need to be examined carefully with other relevant parties being cross examined. These are clearly matters that can not be dealt with under the provisions of the *Act*.

44. As the aim of the *Act* is to solve cash flow problems on monies unreasonably withheld, it is clear to one that it cannot resolve every payment issue especially one as I have described in paragraph No 43 above. The Claimant can not just disregard the entire event that had taken place and simply raise their Payment Claim in the hope that it will be dealt with and disposed of under the *Act*. It must also be recognised that the payment obligations by the Respondent had largely been performed.
45. I therefore determine that the issue of the socketting is not within the scope of the *Act* and would advise the parties to seek an expert professional engineer's help to resolve the outstanding matters.

Adjudicator's Fee

46. Taking into account that the Claimant has succeeded in part, I determine that the costs of the adjudication proceedings be borne equally by both parties.

Dated this the 25th September 2006

SEAH CHOO MENG

ADJUDICATOR