

Between

Company AU

...Claimant

And

Company AV

...Respondent

=====
ADJUDICATOR'S DETERMINATION
=====

Mr Giam Chin Toon, S.C.
Adjudicator
Singapore Mediation Centre
1 Supreme Court Lane, Level 4
Singapore 178879

Solicitors for the Claimant

M/s Rajah & Tann
4 Battery Road
#15-01 Bank of China Building
Singapore 049908
Tel: 6232 1164 / 6232 0682
Fax: 6438 1995

Solicitors for the Respondent

M/s Wong Partnership
1 George Street
#20-01
Singapore 049145
Tel: 6416 8000
Fax: 6532 5711

Dated this 18th day of August 2006

1. By an agreement dated 20th April 2006 (the Contract) the Respondent engaged the Claimant as Architects to provide architectural and civil & structural engineering services for the proposed erection of the 5th Refuse Incineration Plant on Lot XXX at YYY Avenue, Singapore at the lump sum fee of \$1,136,000.00. Payments are due in accordance with the various stages of the work done by the Claimant.
2. The Claimant had provided services for the Schematic Design Stage and submitted the plans and relevant drawings to the relevant authorities for planning approval. Under Condition 2.2 of the Contract, the Claimant was entitled to be paid 20% of the agreed fee for the stages of the work completed up to this point.
3. The Claimant submitted 3 tax invoices to the Respondent pursuant to Condition 2.2 of the Contract totaling \$238,560.00 as follows:-
 - (a) Invoice XXX dated 16th June 2006 for 5% of the agreed fee and GST of \$59,640.00;
 - (b) Invoice XXX dated 30th June 2006 for 15% of the agreed fee less the fee claimed previously and GST of \$119,280.00; and
 - (c) Invoice XXX dated 6th July 2006 for 20% of the agreed fee less the fee claimed previously and GST of \$59,640.00.
4. There was no payment of the 20% agreed fee of \$238,560.00 or any part thereof and there was also no payment response from the Respondent. The Claimant gave Notice of Intention to Apply for Adjudication on 27th July 2006 and lodged the Adjudication Application with the Singapore Mediation Centre on 27th July 2006.
5. The Adjudication Application was served on the Respondent on the 28th July 2006 and the Adjudication Response and related annexes were filed on 3rd

August 2006. The Claimant filed and served the Claimant's Response to the Respondent's submissions/Adjudication Response on 14th August 2006.

6. It does not appear on record that the Respondent is disputing the claimed sums in the 3 tax invoices as there was no payment response(s) from the Respondent. The Contract is a construction contract within the meaning of Section 2 of The Building and Construction Industry Security of Payment Act 2004 ("the Act").
7. The Respondent submits that the Adjudicator has no jurisdiction to adjudicate on:-
 - (a) the 1st tax invoice XXX dated 16th June 2006 and 2nd tax invoice XXX dated 30th June 2006 served on the Respondent on 16th June 2006 and 30th June 2006 respectively as both the Notice and the Adjudication Application with regard to these 2 tax invoices were made out of time; and
 - (b) the 3rd tax invoice XXX dated 6th July 2006 and served on the Respondent on 6th July 2006 is not a valid payment claim within the meaning of the Act.
8. The Claimant however, submits that as the Respondent has failed to serve a payment response to the Claimant's payment claim as required by the Act, the matters raised in the Adjudication Response cannot be considered. The Act requires that the adjudicator should ignore it. Section 15(3) of the Act clearly provides that the Respondent shall not include in the Adjudication Response and the adjudicator shall not consider any reason for withholding any amount unless such reason was provided in the relevant payment response provided by the Respondent to the Claimant.

DETERMINATION

9. I am of the view that an adjudicator duly appointed in accordance with the provisions of the Act has the necessary jurisdiction to consider and determine the claims and issues raised by both the Claimant and the Respondent.
10. I note the Claimant's submission and agree that in accordance with Section 15(3) of the Act the Respondent cannot include in any adjudication response any reason for withholding payment unless the reason was included in the relevant payment response. There was no payment response from the Respondent. However, the procedural arguments now raised by the Respondent on the 1st and 2nd tax invoices being out of time for this adjudication could not possibly be a part of the payment response since the argument could only be raised after time for the adjudication application begins to run in accordance with the Act.
11. This being the position, the procedural objection does not fall within the provisions of Section 15(3) of the Act. This is therefore a matter an adjudicator needs to consider under Section 16(2) of the Act which directs that an adjudicator shall reject any adjudication application that is not made in accordance with Section 13(3)(a), (b) or (c) of the Act which I shall accordingly deal with below.

WERE THE NOTICE AND ADJUDICATION APPLICATION FOR THE 1st and 2nd TAX INVOICES MADE OUT OF TIME?

12. Section 13(3) of the Act provides that an adjudication application:-

“(a) shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12;...”
13. Under Section 12 subsections (2) and (5) of the Act, the Claimant's entitlement to make an adjudication application would arise 14 days (7 days

for the payment response and 7 days for the dispute settlement period) after the payment claim was served.

14. As the 1st tax invoice was served on 16th June 2006 and the 2nd tax invoice was served on 30th June 2006, the respective Notice of Intention to Adjudicate and the Adjudication Application should be served and lodged in respect of the 1st tax invoice and the 2nd tax invoice by 7th July 2006 and 21st July 2006. However, the Notice of Intention to Adjudicate and the Adjudication Application for both these tax invoices were served and lodged on 27th July 2006.
15. Section 16(2) of the Act provides that an adjudicator shall reject any adjudication application that is not made in accordance with section 13(3)(a), (b) or (c) of the Act.
16. The Adjudication Application in so far as it relates to the amounts claimed in 1st tax invoice and 2nd tax invoice is not made in accordance with Section 13(3) of the Act and has to be rejected unless these amounts have been included in the 3rd tax invoice (See Section 10(4) of the Act).

IS THE 3rd TAX INVOICE A PAYMENT CLAIM UNDER THE ACT?

17. Section 10(3) of the Act provides that a payment claim:
 - “(a) shall state the claimed amount, calculated by reference to the period to which the payment claim relates; and
 - (b) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.”
18. Section 5(2) of the Building and Construction Industry Security of Payment Regulations 2005 (the Regulations) provides that every payment claim shall:-

- “(a) be in writing;
- (b) identify the contract to which the progress payment that is the subject of the payment claim relates; and
- (c) contain details of the claimed amount including:-
 - (i) a breakdown of the items constituting the claimed amount;
 - (ii) a description of these items; and
 - (iii) the calculations which show how the claimed amount is derived.”

19. The Respondent submits that the 3rd tax invoice is an invalid payment claim as it does not comply with Section 10(3) of the Act and Section 5(2) of the Regulations, as:

- (a) it does not stipulate from which date to which date “this period” in the tax invoice spans or to what it refers;
- (b) it does not contain the quantity or quantum of each item constituting the claimed amount of \$59,640.00;
- (c) there is no breakdown of the items constituting the claimed amount of \$59,640.00 and no calculations which show how the claimed amount is arrived at;
- (d) it is not clear whether the Claimant is claiming for complete payment of Stages A and B or the Claimants are making a claim for partial payment for Stages A and B as the Claimant is claiming 20% for Stages A and B instead of 22% as provided in the Contract; and

(e) it does not explicitly state it is a “Payment Claim” or otherwise in a form identifiable as a “Payment Claim” within the meaning of the Act.

20. The Claimant submits that:-

(a) the Respondent should have raised such issues in their payment response and as the Respondent failed to respond to the payment claim at all the adjudicator should not consider the reasons now put forth by the Respondent; and

(b) In any event, the 3rd tax invoice is a valid Payment Claim under the Act for the reasons set out in Paragraphs 25 to 31, 33 to 38 of the Claimant’s response.

21. In the light of my view on Section 15(3) of the Act stated in Paragraph 10 above, I agree with the Claimant and reject the Respondent’s submission on this point.

WHAT IS THE AMOUNT CLAIMED IN THE 3RD TAX INVOICE?

22. The Claimant submits that while the nett sum claimed under the 3rd tax invoice is \$59,640.00 it is clear that the cumulative total of \$238,560.00 is being claimed as the 3rd tax invoice makes reference to the claims due under the 1st tax invoice and 2nd tax invoice for the sum of \$170,400.00. As it is a tax invoice it cannot show the cumulative total of \$238,560.00.

23. I observe from the form in which the 3rd tax invoice is presented that even though the total fees claimed for the period up to the 3rd tax invoice is stated as \$227,200.00 and \$170,400.00 is stated as claimed previously, the 3rd tax invoice only represented a balance sum due of \$56,800.00 plus GST. It should be noted that no mention is made in the 3rd tax invoice that the \$170,400.00 previously claimed “has not been paid by the Respondent” as clearly required by Section 10(4) of the Act (See also Paragraph 16 above).

24. It is my view based on this that even if the total \$170,400.00 previously claimed or any sum previously claimed had been paid by the Respondent, the form in which the 3rd tax invoice would have been presented would have remained exactly the same i.e. showing that 20% has been claimed up to that period with \$170,400.00 as previously claimed and the balance sum due under the 3rd tax invoice as \$56,800.00.
25. I find that the 3rd tax invoice was meant to show the sum of \$59,640.00 as due and how it was arrived at. Hence Section 10(4) of the Act cannot be relied upon in this instance.
26. I therefore reject the Adjudication Application in so far as it relates to the 1st tax invoice and 2nd tax invoice and find that the Claimant is entitled to the sum of \$59,640.00 in respect of the 3rd tax invoice.
27. I hereby determine that:-
- (a) the sum of \$59,640.00 is to be paid by the Respondent to the Claimant;
 - (b) the date on which the above adjudicated amount is payable is 21st July 2006 (See Section 8(2)(a) of the Act);
 - (c) the Respondent pays the Claimant interest on the sum of \$59,640.00 at the rate of 6 per annum from 21st July 2006 to the date of payment; and
 - (d) Costs of the adjudication to be paid by the Respondent.

Determination dated 18th day of August 2006

Giam Chin Toon
Adjudicator