CS Bored Pile System Pte Ltd v Evan Lim & Co Pte Ltd
[2006] SGHC 11

Case Number : Suit 253/2005

Decision Date : 20 January 2006

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Alvin Yeo SC, Ian De Vaz and Elaine Tan Yi Ling (Wong Partnership) for the plaintiff; Tan Liam Beng and Eugene Tan (Drew and Napier LLC) for the defendant

Parties : CS Bored Pile System Pte Ltd — Evan Lim & Co Pte Ltd

Contract – Formation – Acceptance – Defendant company's executive director signing plaintiff's written quotation, placing defendant's stamp on quotation and writing note that terms and conditions of quotation to be agreed above signature – Whether signature constituting written acceptance of quotation or mere acknowledgment – Whether binding and enforceable agreement existing

Contract – Formation – Acceptance – Plaintiff signing document provided by defendant but withholding document from defendant – Whether such conduct amounting to acceptance

20 January 2006 *Judgment reserved.*

Choo Han Teck J:

1 The plaintiff is a company carrying on the business of bored piling works. The defendant is a company carrying on the business as a general building contractor. On or about 18 November 2004, the defendant was awarded two contracts by the Housing and Development Board ("the Employer") known as C34 and C35 at a site known as Sengkang Neighbourhood 2. Piling work was required for the construction at the site under both the C34 and C35 contracts. In this claim for damages for breach of contract, the plaintiff alleged that the defendant had an agreement whereby they would work out the most suitable quotation for the piling work under the main contract for the defendant to use in its tender submission to the Employer. It further alleged that as part of that agreement, the defendant would award the piling subcontract to the plaintiff should the former be awarded the main contract. The defendant denied such an agreement.

2 The relevant chronology of events is as follows. In August or September 2004, the defendant invited the plaintiff to submit quotations for the piling work in the C34 and C35 projects which the defendant was planning to bid for appointment as the main contractor. The plaintiff gave a quotation on the C35 project to the defendant on 8 September 2004. This was done by way of a letter setting out the plaintiff's terms and conditions of contract. There were a total of seven numbered conditions from (1) to (7). Shortly thereafter, when the plaintiff was informed that the defendant would be bidding for the C34 project as well, the plaintiff's representatives met with the defendant's representatives on 11 September 2004, and gave them another copy of their quotation to cover both the C34 and C35 projects, dated 9 September 2004. This new quotation was identical to the first quotation – with one important difference. In the second quotation ("AB 75"), the plaintiff added condition (8) which reads as follows:

> This offer is valid only if written confirmation of acceptance of offer by Evan Lim & Co Pte Ltd

[*sic*]. The whole bored piling works shall be awarded to CS Bored Pile/CS Construction, whichever is appropriate, if Evan Lim is awarded the project.

3 The second quotation was signed by Ken Lim, the defendant's Executive Director, and dated 10 September 2004. The plaintiff's witnesses, Jimmy Lim Chee Eng ("Jimmy Lim") and Koo Chung Chong ("Koo"), testified that the date was erroneously written as 10 September 2004 because the actual date of the meeting was 11 September 2004, a Saturday when such meetings usually take place. Both sides accept that it was not crucial to the dispute whether the date was 10 or 11 September 2004. The purpose of this meeting was to work out the rates for the various items of work, and thus the rates that the defendant would use in its tender documents to the Employer. According to Jimmy Lim and Koo, Ken Lim made the appropriate changes to the figures by hand to AB 75; thereafter, he placed the defendant's stamp on it and signed it as the defendant's Executive Director. Ken Lim had also written in his hand the words, "Terms & Conditions to be discussed" just below condition (8) and above his signature. I shall revert to this condition shortly.

4 On 6 October 2004, Ken Lim informed the plaintiff that another subcontractor, Millennium Master, had offered lower rates than that which the plaintiff and defendant had worked out on 11 September 2004 – I am using 11 September as the relevant date because I am of the view that the plaintiff's evidence is probable and reliable – and asked if the plaintiff would reduce the agreed rates, and also to bear the costs of removing the bored earth from the project site. It was conventional practice that the removal of earth and debris (and thus the costs of such) was to be undertaken by the main contractor. The plaintiff responded by reminding the defendant of its obligations under the conditions of the agreement (of 9 September 2004). At the same time, in its letter of 11 October 2004, the plaintiff made the conciliatory gesture of offering to clear the earth and debris from the piling works for the defendant.

5 The plaintiff's case was based on the acceptance of its quotation dated 9 September 2004, specifically, condition (8), grammatically imperfect, but hermeneutically accessible. It seemed to me to mean simply, that firstly, the prices quoted are binding only if that document (AB 75) was accepted by the defendant in writing. Secondly, in the event that the defendant was appointed the main contractor, it would appoint the plaintiff as the subcontractor for the entire bored piling subcontract. Implicitly, it also meant that once the defendant was appointed the main contractor, and awarded the subcontract to the plaintiff, the latter would be equally bound by the 9 September 2004 quotations (if the defendant had accepted them in writing). That is to say, under such circumstances, the plaintiff cannot resile from its position and demand to be paid a higher rate. If the plaintiff cannot do that, neither can the defendant ask for a lower rate. Such agreements are common in the building industry. They arise from the necessity of the symbiotic nature of the relationship between the main contractor and his subcontractors. When the job or project is awarded to the main contractor, he is bound by the prices he had quoted in his tender. He cannot afford to be subject to an equivocal subcontractor who might raise his prices as against him (the main contractor). The subcontractor, on the other hand, is not likely to disclose his price unless there is an assurance that the main contractor will not use his price to shop and negotiate with his competitors. That seemed to be precisely what the defendant had done in this case. An agreement such as that to which the plaintiff averred in this case is one of the industry's solutions to what would otherwise be a tricky problem for both the main contractor and his subcontractor. There are other solutions, of course, and a more transparent one would be an open tender to all competing subcontractors; but that may not be the ideal alternative in some cases. For example, where the main contractor has a preference for working with a specific subcontractor and wishes to make a bid for the project with that subcontractor as his preferred choice should he get the job, he would then work "off tender" with that subcontractor so that they can jointly work out a competitive price and go for the tender almost like partners, albeit in a segment of the main contract. The ways in which contractors come to

terms with their subcontractors will naturally vary from case to case. The examples I mentioned are general situations. In the present case, the negotiation on 11 September 2004 led to specific figures and a plan whereby in its tender submission to the Employer, the defendant used some of the figures from the plaintiff after a discount had been given, and in other items it used the undiscounted figures. This was clearly a commercial strategy to have some items priced lower to trump competing bidders. On the whole, the plaintiff would still reap its profits. Its profit margin had been factored in the calculations and negotiations with the defendant.

6 The defendant raised a number of defences to the claim. Firstly, it contended that there was no acceptance of the 9 September 2004 agreement. Two points were advanced on its behalf by its counsel, Mr Tan Liam Beng. First, it contended that Ken Lim signed the document without accepting it. Given the wording of condition (8), the stamp of the defendant company and the written position of the signatory, I am of the view that that was not an acknowledgement but an acceptance. There was no compelling reason why such a document required an acknowledgment in the context of this case. Secondly, Mr Tan contended that the insertion of the words, "Terms & Conditions to be discussed" by Ken Lim meant that there was no contract since the terms and conditions had not been agreed. Ken Lim testified that he recalled that at the meeting of 11 September 2004, Jimmy Lim had told him that they would discuss the terms after the defendant had successfully tendered for the project. This was denied by the plaintiff's witnesses, and between the two versions, I incline to the plaintiff's version as the more probable. I am left with a clear impression that the main purpose of that meeting was to calculate the prices for piling items so that the defendant could use them in its tender submission to the Employer; and the only reason the plaintiff was open and diligent in sitting through that session was the agreement that once agreed, the prices would also form the contract between them. It is not unusual that in construction contracts some terms and conditions might have to be worked out subsequently to the formation of the contract, but as long as the nature and structure of the general agreement is clear, that agreement is enforceable in law. In my view, such an agreement was reached orally at the meeting of 11 September 2004, and it was a mutually beneficial agreement between the plaintiff and the defendant – until Millennium Master seduced the defendant with a lower rate. In any event, it appeared that the contract embodying the conditions in the letter of 9 September 2004 was complete and whole in itself. Thus, the insertion of the words "Terms & Conditions to be discussed" was probably an act in excess of caution.

7 The defendant then referred to a meeting with the plaintiff on 10 November 2004 and maintained that that was a "tender interview" by which it meant that they were interviewing a number of possible subcontractors for the piling subcontract. At the meeting, the defendant tried to get the plaintiff to sign a document titled "Sub-contractor Selection Interview" but was a contract document with detailed terms and conditions, some of which differ materially from that previously agreed and evidenced in AB 75. I accept Jimmy Lim's evidence that he had initially signed it thinking it was not an important document; but when he noticed the heading, he withheld the document from the defendant, and ended the meeting. In those circumstances, whatever the nature of that document, nothing came of it because its acceptance, or rather, the purported acceptance (merely by reason only of Jimmy Lim's signature) was not communicated to the offeror (defendant).

8 For the reason above, I am satisfied that the plaintiff had proved its case and there will, therefore, be judgment for the plaintiff with damages to be assessed. Costs are to follow the event.