

Resource Piling Pte Ltd v Geocon Piling & Engineering Pte Ltd and Another
[2006] SGHC 134

Case Number : Suit 334/2004, 282/2004
Decision Date : 26 July 2006
Tribunal/Court : High Court
Coram : Tay Yong Kwang J
Counsel Name(s) : Leo Cheng Suan and Kalaiselvi (Infinitus Law Corporation) for the plaintiff in Suit No 334 of 2004 and for the defendant in Suit No 282 of 2004; Tan Joo Seng and Nicholas Narayanan (Ang & Partners) for the defendants in Suit No 334 of 2004 and for the plaintiff in Suit No 282 of 2004
Parties : Resource Piling Pte Ltd — Geocon Piling & Engineering Pte Ltd; Multi-Con Systems Pte Ltd

Damages – Measure of damages – Contract – Breach of sub-contract to carry out piling works – Whether claim for payment for piling works to be made on the basis of actual length of piles constructed or drawings and specifications – Whether defendant breached sub-contract by failing to ensure term relating to age of cranes was incorporated into main contract – Whether the parties agreed to vary scope of work – Whether delay was result of defendant's breaches – Whether plaintiff entitled to claim for loss of profits

26 July 2006

Tay Yong Kwang J:

Background facts

1 These two actions involving claims pertaining to construction works were consolidated pursuant to an order of court of 28 October 2005. As the parties' roles are reversed in the two actions, I shall refer to them by the following names for easy reference:

- (a) Resource Piling Pte Ltd as "Resource";
- (b) Geocon Piling and Engineering Pte Ltd as "Geocon" and
- (c) Multi-Con Systems Pte Ltd as "Multi-Con".

Geocon is the wholly-owned subsidiary of Multi-Con.

2 The dispute centred on a Land Transport Authority ("LTA") project to link the East Coast Parkway ("ECP") to the Pan-Island Expressway by means of the Kallang and Paya Lebar Expressway which involved the construction of underground tunnels from the ECP to Paya Lebar Road. The main contractor for the project was SembCorp Engineers & Constructors Pte Ltd ("SembCorp"). SembCorp awarded part of the contract for the project to Multi-Con which in turn subcontracted certain works to Geocon. Resource was Geocon's specialist bored piling subcontractor. The subcontract in issue concerned only the stretch between the ECP and Nicoll Highway. Resource's subcontract for the piling works was in three parts. Section 1 comprised Car Park A at the ECP. Section 2 involved the Kallang Practice Track area while s 3 was at Jalan Benaan Kapal. The total subcontract sum for the piling works was \$18.7m.

3 In October 2001, Tan Hang Meng ("Tan"), the managing director of Geocon (and also of Multi-Con), invited Resource to submit a quotation for the piling works. Resource prepared and

submitted a quotation dated 20 October 2001 to Tan, enclosing therewith a copy of Resource's "Conditions of Prices". It was agreed subsequently that there would be a reduction of two percent in the sum tendered but the terms and conditions in Resource's quotation remained unchanged. The final quotation was submitted by Resource to Geocon in November 2001.

4 In January or February 2002, Resource received a letter of award dated 17 January 2002 from Geocon in respect of the piling works. The piling works started in early 2002 until around April 2004, when the conflict between the parties came to a head and Resource then left the worksite.

5 On 10 April 2004, Multi-Con commenced Suit No 282 of 2004 against Resource, claiming damages amounting to some \$4.48m. Resource averred that it did not enter into the subcontract for the piling works with Multi-Con. On 28 April 2004, Resource launched Suit No 334 of 2004 against Geocon for breach of the subcontract and against Multi-Con for purportedly having undertaken to pay Geocon's debt ("the alleged oral guarantee"). In these proceedings, Resource claimed damages amounting to some \$9.5m against both Geocon and Multi-Con. This sum included an amount of \$345,953.15, allegedly for payments outstanding for work done in other projects by Resource for Geocon. Multi-Con made a counterclaim against Resource in Suit No 334 of 2004 on the same basis as its claim in Suit No 282 of 2004.

6 Before the trial proper commenced, Resource made an oral application for a preliminary issue to be tried, namely, whether the subcontract for the piling works was made between Resource and Multi-Con or between Resource and Geocon. The letter of award dated 17 January 2002 to Resource was on Geocon's letterhead and was signed by Tan as managing director of Geocon but subsequent dealings concerning the piling works appeared to be mainly between Resource and Multi-Con instead. Multi-Con's arguments that it was the true contracting party included an alleged mistake in using the wrong letterhead and estoppel by conduct (something which was not pleaded). After hearing the parties, I ruled that the contracting parties for the piling works were Resource and Geocon. On that basis, I dismissed Multi-Con's action in Suit No 282 of 2004 and also dismissed its counterclaim against Resource in Suit No 334 of 2004.

7 What followed were another two oral applications. The first was by Geocon to amend its defence in Suit No 334 of 2004 by transposing all the averments in Multi-Con's counterclaim to it and by adding an alternative defence of estoppel by conduct. Until then, Geocon's defence was a bare denial as it did not consider itself a party to the subcontract for the piling works. The second application was by Multi-Con for Resource's claim against it on the alleged oral guarantee to be struck out. After hearing the parties, I dismissed Geocon's application to amend its defence. As its existing defence was a bare denial, I granted judgment to Resource against Geocon on the issue of liability. I allowed Multi-Con's application and struck out Resource's claim against it. The trial therefore proceeded on only the issue of the assessment of damages to be awarded to Resource against Geocon.

The assessment of damages

8 Resource's tender dated 5 November 2001 addressed to Geocon stated:

In response to your invitation to piling contractor to quote for the above work, we take pleasure in submitting herewith our tender offer comprising:-

1. the revised BQ duly fill in.
2. our standard construction procedure.

3. our standard condition of prices.

We clarify our tender pricing as follows.

(i) Concrete and Steel Bars will be purchased through main contractor and deduct from our progress payment base on the following rate:-

a) concrete : \$59/- per cu m

b) steel bar : \$405/- per tonne

(ii) All crane with valid LM Certificate will be allowed to use.

(iii) The main contractor must apply for marine clay dumping ground from HDB the cost for the dumping ground fee (\$5.00 per ton) will be deduct from our progress payment.

9 The "Conditions of Prices" provided:

1. Main Contractor shall provide the following free of charge to [Resource]: -

(a) All necessary insurance including cost of excess clauses. Keep us indemnified from all liabilities resulting from piling work.

(b) Adequate and stable working platform and access for our men and machine.

(c) Removal, before commencement of piling works, of any known obstruction that may impede our operation.

(d) Washing facilities, water, electricity, toilet, telephone, general site lighting, space for storage and subcontractor's portable site huts.

(e) General attendance of the main contractor and on-site co-ordination and general use of site facilities and amenities.

2. Our price does not include the following: -

(a) Site facilities for main contractor's client and consultants.

(b) Goods and Services Tax (GST) which will be added in our invoice.

(c) We do not provide anchor reaction system for piling loading tests.

(d) Cutting of pile heads do not include excavation to expose pile heads, marking of pile cut-off level on piles, removal of concrete debris, checking of pile cut-off level after hacking and bending / straightening of projected steel bars.

(e) Provision for site security and safety.

(f) Road and traffic diversion, necessary fencing and hoarding, detection of underground services and subsequent removal and diversion well in advance of piling works.

(g) Noise and vibration monitoring and other forms of instrumentation.

3. We required two weeks notice to effect mobilisation to the site. We have assumed continuous work upon mobilisation of machinery except for stoppages due to inclement weather, Sundays and Public Holidays and occasional unavoidable machine breakdown.

4. Payment terms are negotiable.

5. Validity of our quotation is 30 days.

6. The main contractor will give us one manyear for every \$45,000/- worth of sub-contract work (labour, machinery, concrete, steel bar and earth removal etc inclusive)[.]

10 The 17 January 2002 letter of award from Geocon had the following salient terms:

We refer to your quotation reference : RPPL01-2014 dated 5th November 2001, for the above works.

We are pleased to award this subcontract for Bored Piling works to you subject to the following terms and conditions.

1. **General**

a. The Sub-contract is supplemental to a Main Contract between [Multi-Con] and [SembCorp] for the project.

b. Our contract with the Main Contractor is being prepared and thereupon shall be available for your inspection except for the details of the prices contained therein.

...

d. The terms and conditions annexed to your quotations and other correspondence prior to the date of this Letter of Award shall form an integral part of the contract, all cranes with valid L&M certificate will be allowed to use.

...

f. The documents forming the integral part of the Subcontract are being prepared. ... The subcontract shall be formalized once these are ready.

g. In the interim, this Letter of Award shall form a binding contract between us.

...

2. **Scope of Works**

a The Subcontract shall comprise of the supply and installation of Bored Piling works conforming to the design requirements of the Main Contract and to the satisfaction and approval of the Main Contractor.

...

4. **Prices and Unit rates**

1. This subcontract shall be administrated on a re-measurement basis according to the actual quantities of work done on site.

...

4. The subcontract prices are deemed to include for complying with all Main Contract Conditions, specifications and drawings.

...

6. Earth disposal is deemed to be included in the prices for bored piling works.

7. Geocon will reimbursed from your progress payments @\$5/ton for LTA dumping ground.

...

11. Terms and Conditions of Subcontract to Apply

The terms and conditions of this Letter of award shall prevail over anything to the contrary in the Subcontract between us.

...

13. Release of Retention

The release of retention monies under this subcontract shall only occur upon the release of retention from the Main Contractor to us.

11 Resource's claim against Geocon was under the following heads of damages:

(a) Man years

(i) Geocon was obligated by contract to supply 416 man years but had supplied only ten man years, causing Resource to suffer additional costs of more than \$3.2m in replacing its foreign workers with local ones. A man year is a certificate which entitles the holder thereof to employ foreign construction workers (other than those from Malaysia) in Singapore.

(ii) Geocon disagreed that Resource was entitled to another 406 man years. Geocon claimed that Resource did not apply for all 416 man years and did not need 416 foreign workers for the project. Geocon also claimed that Resource would not have the financial resources to meet the regulatory requirements for employing another 406 foreign workers in any event. Geocon also alleged that it was SembCorp which refused to issue the man years.

(b) Cranes

(i) Resource was not permitted to use cranes above 15 years of age despite the contractual term allowing all cranes with valid "LM" certificates to be used on site. An LM certificate is a lifting machine certificate issued by the Ministry of Manpower which authorises the certified crane to be used in construction activities. As a result, Resource was

not able to proceed with the work in a timely manner and was unable to carry out certain parts of the subcontract works at the East Coast Parkway Car Park A ("ECP Car Park A"). Resource also had to rent cranes that were less than 15 years old at an additional cost of \$167,031.98. Geocon allowed the use of cranes which were more than 15 years old on site by others.

(ii) Geocon's response was that it was LTA (as owner of the project) which disallowed the use of cranes of that age, Resource was aware of LTA's position on this and failed to appeal to LTA to reconsider its decision.

(c) Standby/delay costs

(i) Resource was not given unrestricted access to the relevant sites to enable it to do the work. This resulted in idle time and delay costs of its machinery and manpower amounting to \$678,844.80.

(ii) Geocon claimed that there was no delay on its part.

(d) Dumping fees and other *contra* charges

(i) Resource claimed that Geocon was not entitled to set off dumping fees amounting to \$270,627.50 and various other *contra* charges against Resource's progress claims. In respect of some *contra* charges, the dispute pertained only to quantum.

(ii) Geocon countered that the *contra* charges were necessary deductions as they were incurred for the benefit of Resource. Some of the *contra* charges had been accepted by Resource's representative on site anyway. Geocon also claimed that the dumping fees were contractually provided for in the letter of award (see cl 4(7) at [10] above).

(e) Value of work done

(i) Resource claimed that a sum of \$3,000,527.90 remained due from Geocon. While Geocon claimed that SembCorp was holding back some money until after the completion of all works, the fact was that SembCorp had already paid Multi-Con/Geocon practically the entire contractual amount of \$30m and only a balance of \$524,999.95 remained with SembCorp. There was therefore no reason to hold back the payments due to Resource.

(ii) Further, payments were supposed to be on a re-measurement basis according to the actual quantity of work done and were not based on the design lengths of the bored piles.

(iii) Geocon's computation of the value of work done was less than Resource's figures by about \$532,000. Geocon averred that payments were pegged to design length and not the actual length of the bored piles installed.

(f) Loss of profits

(i) Resource claimed that it was forced by Geocon's repudiation of the subcontract to abandon the balance of the works sometime in April 2004 and was therefore deprived of the profits it would have made for the abandoned works. It claimed that its profit margin for past projects was in the region of 14% to 15% of the value of the works.

(ii) Geocon denied any liability for this alleged loss. It claimed that it was Resource which breached the subcontract by abandoning the works.

(g) Value of work done by Resource for Geocon in ten other projects

(i) The amounts outstanding under this item were resolved by the parties along the way and are no longer in issue.

12 After hearing the parties, I awarded Resource \$13,744,417.03 as the value of work done (see the computations in the annexures to its closing submissions as modified by the computations in exhibit D1). After deducting the progress payments (\$3,830,131.36) that had been made, the amount due to Resource came up to \$9,320,675.24. I allowed Geocon to set off certain *contra* charges (with or without deduction) against the total amount payable to Resource. These *contra* charges amounted to \$6,726,885.79. The net amount due to Resource was therefore \$2,593,789.45. In addition, I allowed Resource \$77,821.84 as the amount it had to pay for crane rental after LTA did not allow cranes beyond 15 years old to be used for the works. I also found that there was delay in the project causing Resource to incur standby charges (when its machinery and manpower were ready to do the works but had to be left idle) amounting to \$233,325.00. Resource was also awarded loss of profits for the remaining works which it had to abandon after April 2004. The value of the remaining works was \$2,962,183.52. Based on a historical profit of 14% for Resource's subcontract work, the loss of profits amounted to \$414,705.55. These three heads added up to \$725,852.39. The final outcome was that judgment was given for Resource in the amounts of \$2,593,789.45 and \$725,852.39, together with interest at 6% per annum from the date of the writ of summons to the date of judgment. I did not allow Resource's claim for its alleged loss caused by Geocon's failure to provide 406 man years as I was of the view that such entitlement was, in the absence of anything to the contrary, to be used for the project in question only and was not meant as a sort of stockpile for Resource to use in future or other existing projects, which was the basis used by Resource in its claim against Geocon. In any event, this item would have to be taken into consideration for the purpose of computing Resource's profit margin and, as indicated above, Resource has already been compensated for loss of profits.

13 Geocon is appealing against the following parts of my decision only:

(a) Pursuant to the subcontract between Resource and Geocon, the latter should pay for the piling works carried out by the former based on the actual length, rather than the design length, of the bored piles installed.

(b) Resource was entitled to loss of profits and the amount of such loss suffered by Resource was \$414,705.55, based on a historical profit basis of 14%.

(c) The works at ECP Car Park A were omitted or varied by agreement between Geocon and Resource.

(d) The abandonment of work by Resource in April 2004 was caused by Geocon's repudiation of the subcontract.

(e) Resource was entitled to 255 days of standby charges amounting to \$233,325.00.

I shall therefore focus only on these areas of contention, adverting to Resource's other items of claims only where they are relevant to the discussion.

14 On ground (a) of Geocon's appeal, Resource's expert witness, John Dudley Baker, a chartered builder and chartered surveyor, testified that piling contractors were generally paid for the actual length of piles installed rather than the design length because site conditions, such as the condition of the soil at the pile location, made it practically impossible to construct piles having the precise design length. As a result, it was normal for piles to be a few inches longer than the design length. I accepted his expert testimony on this issue. Further, cl 4(1) of the 17 January 2002 letter of award from Geocon expressly provided that the "subcontract shall be administrated on a re-measurement basis according to the actual quantities of work done on site". There could therefore be no argument that Resource was correct in claiming payment for its work done on the basis of the actual length of the piles constructed rather than what the drawings and specifications indicated. It had to do more work out of necessity and could not do less than contracted for.

15 Geocon breached the subcontract by not ensuring that it secured the same conditions as to the use of cranes. Geocon had, in cl 1(d) of its letter of award, repeated the words of Resource's tender that "all cranes with valid L&M certificate will be allowed to use" (see [8] and [10] above). Both parties were aware that LTA might not allow cranes beyond 15 years of age to be used and Resource took the precaution of protecting itself contractually because its cranes exceeded the said age limit. It was incumbent on Geocon to ensure that this same term was incorporated in its contract with SembCorp but it failed to do so. It could not now assert that Resource was aware of LTA's requirement and that it was due to no fault of Geocon that Resource could not use its own cranes. For that reason, I allowed Resource to claim \$77,821.84 as the amount it had to pay for crane rental (see [12] above) when LTA was adamant about enforcing the prohibition.

16 As a consequence of the issue concerning the use of cranes, there was delay and Resource was handicapped in its performance of its works under the subcontract. It could not carry out the piling work effectively. This led to discussions between the parties resulting in a variation of the subcontract in that the works at ECP Car Park A were omitted from Resource's scope of works. This was borne out in an exchange of letters on 12 October 2002 between Multi-Con and Resource. Multi-Con, in its letter, stated that Resource had confirmed that it was unable to do the piling works at the said location at the chainage between "I210" and "+30" and "[a]s such, we have agreed to assist the bored piling works in this chainage". Resource replied immediately to state that this sentence should be amended to read, "As such we have agreed to omit the bored piling work in this chainage from your subcontract." There was no documentary evidence showing that Geocon or Multi-Con disagreed with Resource's understanding on the agreement reached. There was therefore no breach by Resource in not doing the works at this location. This disposes of ground (c) of Geocon's appeal.

17 Grounds (b), (d) and (e) may be considered together. As a result of Geocon's breach relating to the use of cranes and its failure to give free and unobstructed access to the site despite its obligation to comply with cl 1(c) of Resource's "Conditions of Prices" ("Removal, before commencement of piling works, of any known obstruction that may impede our operation") (see [9] above), which had been incorporated as an integral part of the subcontract between the parties, there was constant delay. The many letters written between Resource and Multi-Con/Geocon on the one hand and between Multi-Con/Geocon and SembCorp on the other, showed that there were delays due to man-made obstructions and lack of drawings or the changes made thereto and other causes. One of the reasons given by Geocon's general manager on why letters of this nature were written to SembCorp was that they were excuses to forestall any claim for liquidated damages by SembCorp. However, the letters indicated that delay was a constant difficulty plaguing the works. The documentary evidence also showed that there was idle time as a result of the delays as Resource had already been mobilised. After deducting days of idle time caused by machinery breakdown and unavailability of the machine operators, the figures showed a total of 255 days of idle time. Resource's expert quantified each day of standby charges for the idle time at \$915.00 per day. This

worked out to \$233,325.00 (255 x \$915.00).

18 At the same time, Resource was not being paid its dues by Geocon from February 2004. This culminated in Resource treating the breaches by Geocon as a repudiation of the subcontract and leaving the site in April 2004. Resource was ready and able to fulfil its side of the bargain but was forced to abandon the remaining works by Geocon's intransigence. It was therefore entitled to make a claim for loss of profit. I accepted Resource's evidence that its average profit margin for its piling projects would be around 14% to 15% and computed the loss of profits at the lower of these two percentages. The value of the remaining works after April 2004 was \$2,962,183.52, 14% of which amounted to \$414,705.55.

19 Resource was also awarded the costs of the assessment of damages.

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