

1 **Giga Engineering & Construction Sdn Bhd**

v

Yip Chee Seng & Sons Sdn Bhd & 2 Ors

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High Court, Kuala Lumpur – Suit No S2-22-562-2002

Aziah Ali J

March 8, 2010

10 *Civil procedure* – Action – Cause of action – Claim based on pre-tender agreement
– Agreement entered into between plaintiff and first defendant in view of securing sub-
subcontract works in relation to main project – Agreement subject to pre-condition that
first defendant would be awarded subcontract – Agreement voided as a result of non-
fulfillment of pre-condition – Non-fulfillment of pre-condition resulted from plaintiff's
actions – Whether plaintiff has cause of action against defendants – Counterclaim – Whether
15 first defendant entitled to counterclaim against plaintiff for losses and damages suffered

Contract – Agreement – Pre-tender agreement – Agreement subject to pre-conditions
– Agreement entered into between plaintiff and first defendant in view of securing sub-
subcontract works in relation to a main project – Agreement subject to pre-condition that
first defendant would be awarded a subcontract – Agreement voided as a result of non-
fulfillment of pre-condition – Non-fulfillment of pre-condition resulted from plaintiff's
20 actions – Whether plaintiff has a cause of action against defendants – Counterclaim –
Whether first defendant entitled to counterclaim against plaintiff for losses and damages
suffered

25 The plaintiff, the first defendant and the second defendant are companies
engaged in the business of building and civil engineering construction, with the
first defendant being engaged principally as earthwork constructor. The third
defendant is involved in the business of building construction. The plaintiff
claimed that it was invited by the first and second defendants to jointly participate
30 with them in a joint venture (“the three party joint venture”) to submit a tender
to the Jabatan Bekalan Air Negeri Pahang in respect of a certain project (“the
project”). The plaintiff proceeded to prepare a tender in respect of the project.
The essential feature of the three party joint venture was, inter alia, that the
plaintiff would be awarded a portion of the works arising from the project (“the
plaintiff's portion”) and the balance of the work would be shared between the
35 first and second defendants. Subsequently, the first defendant and the plaintiff
entered into a pre-tender agreement wherein it was agreed, inter alia, that the
first defendant would sub-subcontract the plaintiff's portion of the project to
the plaintiff. It was specifically provided that the pre-tender agreement would
be void in the event the first defendant was not awarded the subcontract of
40 the project and the relationship between the plaintiff and the first defendant in
relation to the pre-tender agreement would come to an end. The first defendant
was subsequently, not awarded the subcontract of the project. This was mainly
due to the high rates quoted by the plaintiff in the tender and its unwillingness
to make necessary adjustments to lower its rates.

The plaintiff proceeded to file this action against the first, second and third defendants based on the pre-tender agreement. The first defendant counterclaimed for losses and damage which it had suffered as a result of the plaintiff's refusal to lower its price as quoted in the tender which had caused it to lose the subcontract of the project.

Issues

1. Whether the plaintiff had a cause of action against the first, second and third defendants.
2. Whether the first defendant was entitled to claim damages for losses as a result of the plaintiff's failure to lower its rate.

Held, dismissing the plaintiff's claim against the defendants with costs to be taxed; the first defendant's counterclaim allowed with costs

1. (a) The pre-tender agreement provided that if the first defendant was not awarded the subcontract, then the said agreement would be voided and would no longer subsist. On the facts, the subcontract was never awarded to the first defendant. In the circumstances, the legal relationship between the parties had ended, and the plaintiff therefore had no cause of action against the first defendant. [see p 848 para 42 lines 17-22; p 849 para 45 lines 6-14]
- (b) The evidence of the director of the plaintiff ("PW1") showed that there was never any representation made by DW1 that he was representing the second defendant or the third defendant in his negotiations with the plaintiff. Though DW1 was the project manager for the second defendant, he could not be its representative, as the second defendant was a partner in the two party joint venture with the third defendant, who was the majority shareholder and the controlling partner. Thus the plaintiff had no cause of action against both the second and third defendants. [see p 849 para 48 lines 31-40; p 850 para 49 lines 13-14]
2. It was evident that the first defendant was unable to secure the sub-contract due to the plaintiff's refusal to review its price and as a result thereof, had suffered losses and damages. The first defendant in the circumstances is entitled to its claim for such losses and damages, against the plaintiff. [see p 849 para 46 lines 17-22]

Legislation referred to by the court

Evidence Act 1950, ss 91, 92

Michael Chow and Barbara Wong (Michael Chow) for plaintiffs

HV Yoong (Ho & Co) for first defendant

Justin Voon and Alvin Lai (Sidek Teoh Wong & Dennis) for second defendant

Vijay Kumar and Denise Leong (Kumar Jaspal Quah & Aishah) for third defendant

Judgement received: March 17, 2010

1 **Aziah Ali J**

5 [1] The plaintiff is a company registered in Malaysia and is engaged in the business of building and civil engineering construction. The first and second defendants are companies incorporated in Malaysia and are involved in the business of building and civil engineering construction works with the first defendant being engaged principally as earthworks contractor. The plaintiff claims that the first and second defendants are part of a group of companies managed and/or controlled by the Yip family with common and/or connected officers and shareholders. Both the first and second defendants deny this and aver that the first and second defendants are separate entities with no common directors and shareholders. The third defendant is a local bumiputra entity involved in the business of building construction. The second and third defendants are partners in a joint venture (hereinafter referred to as “the AAY-MMN joint venture”).

15 **Background**

20 [2] The plaintiff’s claim arose out of a project known as “*Rancangan Bekalan Air Greater Kuantan Fasa II-Pakej 3 Membina Dan Menyiapkan Empangan Serta Kerja-Kerja Berkaitan di Sungai Chereh, Kuantan, Pahang Darul Makmur*” (“the project”). The plaintiff claims that it was invited by the first and second defendants to jointly participate with them in a joint venture between the plaintiff, the first and second defendants (“the three party joint venture”) to submit a tender to the Jabatan Bekalan Air Negeri Pahang Darul Makmur in respect of the project. According to the plaintiff on the basis and pursuant to the said joint venture, the plaintiff proceeded to prepare the tender. Numerous meetings were conducted between the plaintiff through its representative, BC Kok (“PW1”) and CP Lim (“PW2”) who was with the plaintiff’s company from 1997 till June 2000. The plaintiff said that the first and second defendants on most occasions were represented by one Ng Kai Wai and Yip Kok Weng (“DW1”).

30 [3] According to the plaintiff, the essential features and the basic understanding of the three party joint venture between the plaintiff and the first and second defendants were as follows:

- 35 (a) given the plaintiff’s experience in such and/or related field of engineering and construction works, the plaintiff was requested by the first and second defendants to provide its expertise in the preparation of the tender for the said project which included aspects of pricing for the tender and preparations of the work programs and technical schedules;
- 40 (b) the tender for the said project would, however, be submitted through another joint venture between the second defendant and the third defendant (the AAY-MMN joint venture);
- (c) upon the AAY-MMN joint venture securing the said project, the plaintiff would be awarded a portion of the works arising from the said project

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2 (“the plaintiff’s portion”) with the balance to be shared by and/or
3 between the first and second defendants (“the excluded portion”).

4 The plaintiff says that the works for the project were divided into 12
5 sections. Upon the conclusion of the said tender preparation exercise the
6 plaintiff says that it was agreed as follows:

- 7 (a) all works under bill sections D, E, F,G, H, I, J, K and L and part of
8 the works under section A arising under what is known as “method
9 related charges” would fall under the plaintiff’s portion for which the
10 plaintiff had priced at RM37,994,385.80 and RM3,939,200 respectively
11 (the plaintiff’s portion);
- 12 (b) the balance works falling under sections B and C as well as those
13 remaining under section A would come under the excluded portion
14 for which the plaintiff had priced at RM19,442,147.10.

15 The total tender price prepared by the plaintiff was RM61,375,732.90
16 excluding the portions for bonds, insurance and CIDB contribution.

17 [4] This three party joint venture was later followed by a “pre-tender
18 agreement” executed on August 9, 2001 by the plaintiff and the first defendant
19 (exh P13). This pre-tender agreement envisaged the entire project being
20 subcontracted by the AAY-MMN joint venture (between the second and third
21 defendants) to the first defendant. The first defendant would then subcontract
22 the plaintiff’s portion of the project to the plaintiff. The second and third
23 defendants did enter into a joint venture agreement dated January 10, 2001
24 (“the JVA”) and a supplemental agreement dated October 1, 2001 (“the SA”)
25 whereby the third defendant holds a majority of 70% shareholding and the
26 second defendant holds 30%. According to the plaintiff by mid-August 2001
27 the defendants submitted the tender for the project through the AAY-MMN
28 joint venture. The plaintiff said the tender was submitted using, amongst
29 others as the starting basis, the prices which the plaintiff had prepared. By a
30 letter dated January 18, 2002, the Jabatan Bekalan Air Negeri Pahang Darul
31 Makmur awarded the said project to the AAY-MMN joint venture for a total
32 contract sum of RM69,300,000.

33 [5] The plaintiffs contend that DW1 is the alter ego of the second and
34 third defendants. The plaintiff contends that having regard to inter alia the
35 relationship between the parties arising from the three party joint venture
36 and further upon the defendants having obtained the benefits of the plaintiff’s
37 input and efforts, the defendants, in particular the first and second defendants
38 were under the implied obligation not to act in any manner inconsistent with
39 the three party joint venture on the plaintiff’s portion and to cooperate and
40 take all necessary steps to ensure that the plaintiff be awarded the plaintiff’s
41 portion.

[6] With regard to the third defendant, it is the plaintiff’s contention that
the third defendant was aware of the understanding and agreement between

1 the plaintiff and the first and second defendants, and that even if the third
defendant denies this, as the third defendant was the second defendant's
joint venture partner in the AAY-MMN joint venture, therefore the third
defendant is bound by the acts of the second defendant, its joint venture
5 partner. The plaintiff contends that the third defendant is bound by the pre-
tender agreement on the plaintiff's portion on the basis that the AAY-MMN
joint venture between the second and third defendants is in substance a
partnership or alternatively the second defendant was at all material times
the lead partner within the AAY-MMN joint venture *de jure* and/or *de facto*
10 control thereof. However according to the plaintiff, notwithstanding the award
of the project to the AAY-MMN joint venture, and despite various reminders
and demands by the plaintiff, the plaintiff claims that the defendants have,
in breach of the three party joint venture and the JVA, failed and/or refused
to award or cause to be awarded to the plaintiff the plaintiff's portion of the
project.

15 [7] By way of this action the plaintiff prays for the following reliefs:

- 20 (1) a declaration that the joint venture was constituted and continues to
subsist between the plaintiff and the first and second defendants;
- (2) a declaration that the defendants, through the AAY-MMN joint venture,
hold the plaintiff's portion as constructive trustees for the plaintiff;
- (3) an account of the profits made by the defendants from the plaintiff's
portion;
- 25 (4) an order for specific performance of the said agreement for the plaintiff's
portion as evidenced by, inter alia, the pre-tender agreement;
- (5) an order that the defendants pay to the plaintiff the profits found to
have been made by them on the taking of account;
- (6) damages in lieu of and/or in addition to the order for specific performance
30 to be assessed against the defendants;
- (7) a declaration that the information and documents, including in particular,
the work program and technical schedules, produced in the course of
and/or forming part of the said tender submitted by the AAY-MMN
joint venture are property of the plaintiff;
- 35 (8) such other orders or directions as this honourable court deems just and
fit;
- (9) interest;
- (10) costs.

40 At the trial, counsel for the plaintiff, Mr Michael Chow, informed the
court that it has been agreed that the issue for determination by the court is
liability with the issue of quantum of damages to be assessed by the registrar.

Plaintiffs' case

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[8] The evidence for the plaintiff came primarily from PW1, who is a director of the plaintiff. PW1 said in respect of the project, he dealt primarily with DW1. PW1 said it was his impression that DW1 as the eldest son made all the decisions in the YCS (Yip Chee Seng) group of companies. The other person he dealt with was Ng Kai Wai, the contracts manager for DW1. According to PW1 it was Ng Kai Wai who contacted him some time between July 5 and 10, 2001 about DW1's request for assistance for the structural quotation for the project.

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[9] PW1 then spoke to PW2 who has experience in dam constructions. PW2 agreed but wanted the plaintiff's involvement to be formalised. PW1 then called DW1 who told him that he (DW1) has strong connections to get the project through the assistance of the third defendant based in Kuantan and well connected. PW1 said he told DW1 that he wanted to form a joint venture to bid for the tender for the project. According to PW1 he was told by DW1 that he would give all other works except earthworks which DW1 is interested in.

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[10] On July 20, 2001, PW2 and DW1 visited the project site. Subsequently at a meeting with DW1 attended by PW1, PW2 and Ng Kai Wai, PW1 said that he proposed a joint venture between the plaintiff and the second defendant. On DW1's request, PW1 said he came up with a draft "pre-bid agreement" which proposed a joint venture between the plaintiff and the second defendant. He gave this first draft to DW1.

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[11] Subsequently PW1 said DW1 told him that the plaintiff and the second defendant would not bid directly but the bid would be made through the AAY-MMN joint venture and this joint venture would then subcontract the entire project to the second defendant. PW1 then prepared a second draft (exh P6) which provided for a joint venture between the plaintiff and the second defendant to which the AAY-MMN joint venture would subcontract the entire works. PW1 said he was not told the details of the role of the third defendant in the tender. He understood that the third defendant was the local contact to assist in securing the project.

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[12] Pursuant to the understanding that DW1 was only interested in the earthworks and the remaining works would be given to the plaintiff, PW1 said that the works falling under sections D, E, F, G, H, I, J, K and L of the bill of quantities together with works under section A ("method related charges") would be done by the plaintiff and the remaining works relating to earthworks would be carried out by DW1.

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[13] PW1 said he prepared a third draft of the pre-bid agreement (exh P10) because DW1 said the second draft was too complicated. He passed the third draft to DW1 at a meeting in Kuantan with the third defendant. However

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1 due to the extension of the date for submission of the tender (exh D30), he
did not pursue the third draft with DW1.

5 [14] PW1 said the base price of the tender worked out by him and PW2 was
RM61,875,732.90 and it was up to DW1 to mark up the price to the AAY-
MMN joint venture. He was told by DW1 that it would not be convenient for
the plaintiff to contract directly with the second defendant since the second
defendant was in the AAY-MMN joint venture but DW1 assured him that
10 the first defendant had entered into an agreement with the AAY-MMN joint
venture whereby the first defendant would carry out the entire works in the
event the AAY-MMN joint venture was successful in securing the project.

15 [15] The pre-tender agreement was eventually signed on August 9, 2001 by
the plaintiff and the first defendant (“exh P13”). This agreement stipulates the
portion of works PW1 said was due to the plaintiff. As far as PW1 is concerned,
he regarded the first and second defendants as companies belonging to DW1
and therefore it made no difference to him whether the first or the second
defendant signed P13. To PW1, the defendant and the second defendant are
the same and belong to DW1. Whether it was YCS or AAY, DW1 was the one
who made decisions. Therefore PW1 says it does not matter to him whether
it was YCS or AAY that signed the pre-tender agreement.

20 [16] At a meeting in Kuantan on August 1, 2001, PW1 said that Mohamed
Mokhtar bin Dato’ Nadzri (“DW4”) from the third defendant asked to what
extent can the price be reduced further to make the bid competitive and at
what price should AAY-MMN joint venture submit the tender and PW2 said
25 it should not be more than RM70 million. They were then told to reduce the
price further and PW2 reworked the price (exh P17). After a discussion with
DW1 and based on PW2’s price, PW1 said that he produced his own copy
(exh P18). The tender price was maintained at RM70 million but the rates for
earthworks was increased to RM4,290,840. PW1 said he assumed that the
tender price submitted would be based on the RM70 million since the figures
30 had been carefully computed.

35 [17] Upon being informed that the tender was successful, PW1 said that DW1
became evasive. PW1 then issued a letter on February 6, 2001 to DW1 as a
reminder and that the plaintiff’s portion of works was RM41,933,585.80 (exh
P22). However in March 2001 Ng Kai Wai passed to him a bill of quantities
offering RM28,269,606.68 for the plaintiff’s portion. PW1 asked PW2 to check
the bill of quantities and they found that substantial reductions were made in
each respective sections (exh P23) and the plaintiff would get RM37,650,095
only. When he saw DW1 about this, he was given a printout of a detailed bill
of quantities which DW1 told him reflected the offer made by the AAY-MMN
40 joint venture to DW1 (exh D35). Upon a comparison with the computation
done by PW2 (exh P25), they found that the offer by DW1 to the plaintiff
was ridiculous. On March 23, 2002 PW1 and PW2 attended a meeting with

DW1, Ng Kai Wai and Yip Kok Sun (“DW2”), where PW1 said he expressed his dissatisfaction with the offer by DW1. The same day PW1 said he sought legal advice and various letters were issued (exhs P26, P27). 1

[18] In cross-examination by counsel for the first defendant the plaintiff said that the plaintiff knew all along that the first defendant intended to carry out the works under section B and C and the portion under section A themselves, except the method related charges. PW1 agreed that the first defendant and the plaintiff signed exh P13 which is the only agreement signed by both parties. Counsel referred PW1 to clause D of exh P13 which reads as follows : 5

YCS has agreed and covenanted that he shall engage GEC as the subcontractor for the works in the event and only in the event that YCS is awarded the project by the main contractor. Unless there is amendment in any part of the Tender Document, the contract sum for the works amounting to RM37,994,385.80 (Thirty Seven Million Nine Hundred Ninety Four Thousand Three Hundred Eighty Five Ringgit and Eighty Cents) with method related charges amounting to RM3,939,200.00 (Three Million Nine Hundred Thirty Nine Thousand Two Hundred Ringgit) shall be awarded to GEC. 10 15

Counsel puts to PW1 that the above clause shows that the plaintiff’s quotation is subject to rationalisation. He agreed that rationalisation could not happen at the pre-tender stage or on the day of tender but the price under clause D was still negotiable and not final. 20

[19] Counsel for the first defendant referred PW1 to clause E of exh P13 which states that “All rate submitted by GEC in the tender exercise shall be subjected to rationalisation by YCS in accordance with the main contract rate”. PW1 disagreed with counsel that the reason the first defendant failed to get the subcontract was because the plaintiff refused and/or failed to make their rates competitive. 25

[20] PW1 was referred to clause F of the pre-tender agreement which provides that “This pre-tender agreement shall be void if YCS is not awarded the project” PW1 agreed that based on clause F, the pre-tender agreement is a conditional agreement as it will become void in the event the first defendant is not awarded the project. He agreed that the first defendant did not get the project. Counsel put it to PW1 that based on the clause, the plaintiff has no cause of action against the first defendant since the first defendant was not awarded the subcontract for the project. PW1 said he would not know since as far as he was concerned he was dealing with DW1. 30 35

[21] PW1 agreed that the first defendant made two offers i.e. RM28 million and RM32 million to the plaintiff but the plaintiff disagreed as the amounts offered did not match the sum in the pre-tender agreement. The plaintiff did not make any counter-offer to the first defendant. Under cross-examination by counsel for the third defendant, PW1 agreed that the final tender price would be decided by the AAY-MMN joint venture and his base price for the subcontract would be affected by the tender price. 40

1 [22] PW1 agreed that DW1 did not at any time tell him that he represented
the AAY-MMN joint venture. However he assumed that DW1 represented the
AAY-MMN joint venture since AAY was the third defendant's joint venture
partner. He assumed that apart from the first and second defendants, DW1
5 also represented the third defendant because DW1 brought him to the office
of DW4. PW1 agreed that the AAY-MMN joint venture did not have a direct
subcontract with the plaintiff but the third defendant was sued because it is
linked with DW1.

Defendants' case

10 [23] The first and second defendants deny the plaintiff's claim that the first and
second defendants had invited the plaintiff to jointly participate with them in
a joint venture to submit a tender for the project. The third defendant denies
knowledge of this claim by the plaintiff. It is the first defendant's case that the
scope and terms agreed upon between the plaintiff and the first defendant
15 had been reduced into writing in the pre-tender agreement signed by the
plaintiff and the first defendant (exh P13). It was the understanding that any
award of works to the plaintiff would be conditional upon the first defendant
successfully securing a subcontract from the AAY-MMN joint venture which
is the main contractor, competitiveness of the rates quoted by the plaintiff and
20 the plaintiff's willingness to make the necessary adjustments in accordance
with the offer rates from the AAY-MMN joint venture.

[24] DW1 in his witness statement said that the first defendant and the
second defendant are separate and independent entities. The first defendant
is not a subsidiary or holding company of the second defendant. There are
25 no common shareholders or directors in the first defendant and the second
defendant (exhs D44, D45, D46H). The second defendant holds a "Pusat
Khidmat Kontraktor Kelas A" licence which enabled it to secure government
projects whereas the first defendant did not hold such a licence but has vast
experience and ability in the civil engineering and construction line. The first
30 defendant and the second defendants had a working arrangement that if the
second defendant is able to secure substantial government projects, it may
then subcontract the works or part of the works to the first defendant.

[25] DW1 said it was a common practice for the second defendant to designate
him as a project director for the second defendant's projects including this
35 project, mainly for marketing purposes to assist the second defendant to secure
government projects as the credentials of the first defendant will enhance
the second defendant's image. As project director of the second defendant,
DW1 said he has to act within the authority of the managing director of the
second defendant, DW2. For marketing purposes, his business cards carry the
40 names of several companies including the first defendant (exh P5) to show
the working relationship between the companies.

[26] DW1 testified that the second and third defendants through the AAY-MMN joint venture applied on January 10, 2001 to pre-qualify and tender for the project as main contractor. It was orally agreed by the AAY-MMN joint venture that if the Jabatan Bekalan Air Negeri Pahang Darul Makmur awards the project to the AAY-MMN joint venture as main contractor, the first defendant would be engaged as the principal subcontractor for the said project, provided that the first defendant's rates will subsequently be in line with the AAY-MMN joint venture's offer rates for the award of the project. 1
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[27] By a letter dated June 25, 2001 from the Jabatan Bekalan Air Negeri Pahang Darul Makmur, the AAY-MMN joint venture was invited to submit their tender for the project. The AAY-MMN joint venture then sought to appoint the first defendant as principal subcontractor for the entire works in respect of the project provided the first defendant can comply with the terms of the appointment, in particular the offer rates of the AAY-MMN joint venture, if they successfully secured the award of the project. 10
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[28] The AAY-MMN joint venture requested the first defendant to provide quotation and tender work programme which is an initial or preliminary type of work programme used for tender purposes only. It is a schedule setting out milestones and timetable for completion of works. After a job is awarded, normally another detailed work programme is prepared for the purpose of executing the project. A copy of the tender documents were handed to DW1 by Encik Hazrin bin Basri ("DW3") of the third defendant to assist and enable the first defendant to provide its quotation and the tender work programme. 20

[29] DW1 said as the first defendant was thinking of appointing the plaintiff as a subcontractor, therefore the first defendant approached the plaintiff and requested the plaintiff to furnish a quotation for the works under sections D to L and a portion of section A for the project which are certain structural works. It was agreed that the plaintiff perform the parts of the works relating to sections D until L and a part of section A called "method related charges". Works under sections B and C and part of section A dealing mainly with earthworks would be carried out by the first defendant. The first defendant also approached several other subcontractors and requested them to furnish quotations for the construction works for the project. DW1 said the second defendant had nothing to do with the proposed agreement to subcontract to the plaintiff. He was working for the second defendant as a project director on a personal basis. Since the second defendant was in a joint venture with the third defendant therefore the second defendant cannot make any decision without involving the third defendant. 25
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[30] DW1 said that in his discussion with PW1 it was understood that the plaintiff may not be able to maintain the plaintiff's fixed quote of RM37,994,385.80 for sections D to L and another portion of section A known as "method related charges" of RM3,939,200 if there is an amendment by the 40

1 AAY-MMN joint venture to the proposed tender price and that much depends
on the eventual offer rates that the AAY-MMN joint venture is prepared to
give to the first defendant if they are awarded the project. Upon the signing
of P13 on August 9, 2001 PW1 provided the quotation to the first defendant.
5 DW1 said P13 was to confirm in writing the agreement between the plaintiff
and the first defendant, that if the first defendant was awarded the subcontract
works by the AAY-MMN joint venture, the first defendant would engage the
plaintiff as subsubcontractor for certain structural works under the tender
bill sections D, E, F, G, H, I, J, K and L and a certain portion of section A,
10 provided that the plaintiff shall rationalise their rates so as to comply with
the rates ultimately proposed by the first defendant based on the AAY-MMN
joint venture's offer rates to the first defendant for the subcontract.

[31] P13 was made conditional because if, for any reason the AAY-MMN
joint venture does not award the subcontract to the first defendant, the first
15 defendant is in no position to appoint the plaintiff as a sub-subcontractor. At
that time whether the first defendant are themselves successful in securing
the subcontract works would depend on how competitive the rates quoted by
plaintiff would be and their willingness to make the necessary adjustments
to be in line with the rates proposed by the first defendant, which in turn is
based on the offer rates of the AAY-MMN joint venture for the subcontract
20 works.

[32] DW1 says that PW1 knew that he was signing P13 with the first defendant
only as this was the understanding all the while. If the first defendant does
not get the subcontract from the AAY-MMN joint venture, P13 will be void.
25 Therefore the plaintiff's quote is expected to be competitive as stated in clause
B of P13. DW1 says that the plaintiff simply cannot expect to provide a quote
of RM37,994,385.80 and RM3,939,200 and expect to be awarded the very same
amount later on. Much depends on how competitive the plaintiff's rates are,
the actual award given by Jabatan Bekalan Air and the offer rates given by
AAY-MMN joint venture. DW1 says that except for P13, there was no other
30 understanding, representation or agreement between the plaintiff and the
first defendant. There was also no joint venture, partnership or understanding
whatsoever formed between the plaintiff and the first and second defendants.

[33] The tender work programmes and technical schedules were given by
the plaintiff to the first defendant for submission to the AAY-MMN joint
35 venture together with the quotations for the tender exercise. DW1 said that
when the first defendant prepared the pricing based on the quotation given
by the plaintiff as a reference for the purpose of preparing the pricing for the
quotation, the first defendant realised that the plaintiff actually underquoted
for the first defendant's portion of section A and also sections B and C. The
40 plaintiff suppressed the prices for the first defendant's portion and the first
defendant had to make adjustments to the pricing.

[34] The first defendant submitted their quotation and the plaintiff's work programme showing the timeline and the total subcontract sum of RM65,625,935.17 to the AAY-MMN joint venture (exh D31). The first defendant also included its recommended quotes for the AAY-MMN joint venture based on the expected margin of 9% to 10%. The first defendant intended that the AAY-MMN joint venture would tender to the Jabatan Bekalan Air Negeri Pahang Darul Makmur at the rate of RM71,782,630.56. However the AAY-MMN joint venture did not adopt this tender work programme and technical schedules and submitted their own work programme and technical schedules to the Jabatan Bekalan Air Negeri Pahang. DW1 said he was informed by DW3 from the AAY-MMN joint venture that the AAY-MMN joint venture would not be following the first defendant's quote but would be tendering their own quote of RM69,300,000 instead.

[35] On January 24, 2002, the AAY-MMN joint venture faxed a copy of the letter of award from Jabatan Bekalan Air Negeri Pahang Darul Makmur dated January 18, 2002 informing that their tender for the sum of RM69,300,000 is accepted (exh D42). The AAY-MMN joint venture offered rates to the first defendant for the sum of RM63,000,000 which was lower than the quotation given (exh D35). DW1 said the downward adjustment from RM71,872,630.56 to RM69,300,000 for the main contract and from RM65,625,935.17 to RM63,000,000 for the subcontract amounts to a drop of about 3% to 4%. DW1 then requested PW1 to revise their rates to be in line with the main contract rates. However by letter dated February 6, 2002 the plaintiff enclosed the same quotation again and demanded the award of the sub-subcontract (exh P22). The first defendant made a firm offer of RM36,385,600.22 to the plaintiff for the plaintiff's portion of works under sections D to L (exh P24) not including method related charges. DW1 requested the plaintiff to rationalise their rates to RM36,385,600.22. The plaintiff refused to revise or reduce and rationalise their rates and PW1 rejected the offer in breach of P13. Since the plaintiff did not agree on the main part of the works which is under sections D to L, discussion on the method related charges for the remaining portion of section A did not take place. DW1 said that the plaintiff has no claim based on P13. The plaintiff could not rationalise their prices. The first defendant also could not get the job as well. This has caused losses to the first defendant. Therefore the first defendant counterclaims against the plaintiff for loss of profit. The first defendant wishes to assess damages after the issue of liability is determined. The project was completed by the second and third defendants through the AAY-MMN joint venture.

[36] On behalf of the first defendant DW1 informed DW4 that the plaintiff refused to revise their rates to make them in line with the offer rates of AAY-MMN joint venture. On or about April, 2002, Mr Yip Kok Sun (DW2) the managing director of the second defendant informed DW1 on behalf of the AAY-MMN joint venture that the sub contract for the said project would not be awarded to the first defendant. DW1 said he then verbally informed PW1

1 that the sub contract was not awarded to the first defendant and therefore,
the pre-tender agreement was void. In response to the plaintiff's solicitors'
letter the solicitors for the first defendant wrote to the plaintiff's solicitors
informing them that the first defendant was not awarded the subcontract
5 by the AAY-MMN joint venture due to the plaintiffs refusal to rationalise its
rates.

[37] Muhamad Zuki bin Mat Zin ("PW3") was employed by the third
defendant as project manager for the project from February 15, 2002 until
April 30, 2005. He was in charge of supervision of the works, planning the
10 works, construction schedule, material and manpower requirements, cash
flow and to deliver the works according to the contract schedule. According
to PW3 the leader of the AAY-MMN joint venture was the third defendant,
the majority shareholder. He was aware that it was DW4 who arranged the
financing facilities in excess of RM10 million for the project. The head of the
15 AAY-MMN joint venture was DW4 with DW1 as deputy project director. PW3
would take instructions from DW4, from DW1 and from DW3 the contract
manager of the third defendant. PW3 said that the third defendant supplied
the entire requirement of concrete for the project besides diesel, machinery
and equipment and other construction materials like steel bars. The manpower
for the project was supplied by AAY. PW3 said that he had not really heard
20 of the plaintiff and neither did he know whether the plaintiff was involved
with the project. PW3 had never heard of the first defendant.

[38] The third defendant in its statement of defence vide para 3.2 avers that
it was aware that DW1 is a director of the first defendant and the project
director of the second defendant. According to DW4, the managing director
25 of the third defendant and who was generally regarded as the head of the
AAY-MMN joint venture, the person representing the second defendant in the
joint venture and with whom DW4 will discuss about the project was DW2.
As far as DW1 was concerned, DW4 dealt with him on technical matters only.
From the evidence of DW4, DW1 was not regarded as part of the AAY-MMN
30 joint venture.

Decision

[39] The plaintiff's case against the first and second defendants is premised
on P13 signed between the plaintiff and the first defendant and the dealings
35 between PW1 with DW1 who PW1 assumed was representing all the
defendants. The claim against the third defendant is on the evidence of PW1
because according to the plaintiff the third defendant knew of the arrangement
or understanding between the plaintiff and DW1 and because PW1 assumed
that DW1 was also representing the third defendant.

40 Claim against the first defendant

[40] It is to be noted that from the evidence, P13 was executed by the plaintiff
and the first defendant after previous drafts were found unacceptable by

the first defendant. Hence in my opinion, P13 is an agreement which is a culmination of the negotiations between the plaintiff and the first defendant and this agreement embodies all the terms and conditions that the plaintiff and the first defendant intended to rely on to regulate their relationship. P13 manifests the intention of the parties and by virtue of ss 91 and 92 of the Evidence Act 1950, no oral evidence may be adduced to contradict or vary the terms of the agreement.

[41] Both the plaintiff and the first defendant as contracting parties know the terms and conditions of P13. There is no mention in this agreement of any three party joint venture relationship (see the plaintiffs letters to the first defendant exhs P22, P26 and P27). If at all there was a three party joint venture as claimed by the plaintiff, it would appear that such alleged joint venture did not materialise by the time P13 was executed. P13 is the only contract executed between the plaintiff and the first defendant. There are no written agreements between the plaintiff and the second defendant, much less the third defendant with whom the plaintiff had no direct dealing at all.

[42] The plaintiff's claim is primarily based on P13 it executed with the first defendant. There is no doubt that PW1 knows that the other contracting party is the first defendant. That is clear from P13. The continued subsistence of P13 is provided by clause F. It is the intention of the plaintiff and the first defendant that their relationship created through P13 shall end in the event that the first defendant is not awarded the project.

[43] A perusal of the terms of P13 shows that clause D provides that the first defendant will appoint the plaintiff as a subcontractor in the event and only *in the event that YCS (first defendant) is awarded the project by the main contractor and that unless there is amendment in any part of the tender document the contract sum for the works mentioned in clause D shall be awarded to the plaintiff*. There is no provision in P13 that the first defendant is bound to give the plaintiff the exact rates that they proposed i.e. RM37,994,385 for sections D to L. On the contrary clause E allows the first defendant to rationalise the plaintiff's quotation to be in accordance with the main contract price. By clause F it is provided that *the pre-tender agreement shall be void if YCS (first defendant) is not awarded the project*. Clauses D and F of P13 makes it crystal clear that the first defendant may not necessarily be awarded the subcontract.

[44] From the evidence the tender price submitted by the AAY-MMN joint venture to Jabatan Bekalan Air Negeri Pahang was lower than the quotation submitted by the first defendant. The AAY-MMN joint venture was only prepared to offer the subcontract to the first defendant at RM63,000,000. Consequently the plaintiff was requested to review its price in order to enable the first defendant to accept the offer from the AAY-MMN joint venture to be its subcontractor. There is evidence that the plaintiff refused to do so. The first defendant could not lower the rates to RM63,000,000 because the plaintiff

1 refused to lower their rates from the sum set out in paragraph D of P13. The
approximate offer of RM36,000,000 by AAY-MMN joint venture to the first
defendant for the sections D to L of the project could not even be agreed upon
by the plaintiff. This resulted in the first defendant being unable to accept the
5 offer to be the main contractor's subcontractor.

[45] It is not disputed that the first defendant was not awarded the project. P13
clearly provides that if the first defendant is not awarded the subcontract, P13
is voided. The plaintiff does not allege that the first defendant has breached
P13. Therefore upon the happening of the event contemplated under clause
10 F, the legal relationship between the plaintiff and the first defendant ended.
P13 no longer subsists. For these reasons I agree with counsel for the first
defendant and I find that the plaintiff does not have a cause of action against
the first defendant. The claim against the first defendant is dismissed with
costs to be taxed.

15 **First defendant's counterclaim**

[46] With regard to the counterclaim, it is evident that the first defendant
was disabled from accepting the offer to be the AAY-MMN joint venture
subcontractor due to the refusal of the plaintiff to review its price. Hence the
20 first defendant has suffered losses and damages arising out of the plaintiff's
action. The first defendant's counterclaim against the plaintiff is allowed with
costs and damages to be assessed by the registrar.

Claim against the second and third defendants

25 [47] The second and third defendants are not parties to this agreement. The
plaintiff sought to show that both the second and third defendants are also
liable for the consequences of the act of the first defendant primarily because
the plaintiff claims that DW1 represents both the first and second defendants
and also the third defendant on the basis that the second defendant is a partner
30 in the joint venture with the third defendant.

[48] The evidence of PW1 shows that there was never any representation
made by DW1 that he was representing the second defendant or the third
defendant in his negotiations with the plaintiff which culminated in P13. I
accept the evidence of DW1 that though he was the project director for the
35 second defendant, he could not deal with the plaintiff as a representative
of the second defendant in view of the fact that the second defendant is a
partner in the AAY-MMN joint venture and any decision if made on behalf
of the second defendant would have to take into account the third defendant
who is the majority shareholder and the controlling partner in the AAY-MMN
40 joint venture.

[49] As regards the joint venture between the second and third defendants,
the evidence shows that the financing facilities for the project was secured

by the third defendant. It was DW4 who decided the final tender price to be submitted to the Jabatan Bekalan Air. PW3 who was appointed by the third defendant as project manager for the project states that the overall supervision of the project was exercised by the third defendant. PW3 took instructions from DW4 who is the managing director of the third defendant and who was regarded as the boss of the AAY-MMN joint venture, DW1 of the second defendant and DW3 who was the contract manager of the third defendant. In so far as the joint venture was concerned, DW4 was regarded as the person in control and the third defendant as the controlling partner. Though the evidence suggests that works on the project was undertaken by the second defendant, the third defendant was involved in the supply of machinery, building equipment and construction materials for the project. Having considered the evidence I find nothing to suggest that the AAY-MMN joint venture was not genuine. Therefore on the evidence I find that the plaintiff has no cause of action against both the second and third defendants. For the aforementioned reasons I dismissed the plaintiff's claim against the second and third defendants with costs to be taxed.

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