

Dae Hanguru Infra Sdn Bhd v Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd and another appeal [2022] 4 MLJ 51

PROPOSAL TO CONSTRUCT, FINANCE, DESIGN AND BUILDING A HIGHWAY (KOTA BHARU → KUALA KRAI) ("PROJECT")

Kelantan State Government ("KSG") issued an open proposal to implement the Project, through D1, a special vehicle incorporated as a subsidiary of D2.

CDJV expressed interest to bid for the Project.

DRAFT AGREEMENT

JPZ requested for CJDV's details to prepare a contract document.

On 21.01.2013, P responded to JPZ.

In a meeting on 28.01.2013, P circulated a draft agreement of the Project, where P is denoted as a party instead of CDJV.

On 12.02.2013, P proposed various terms relating to financial matters.

D1 agreed to pay P only for site clearance for project launch, survey works and mobilisation expenses pending an agreement to be concluded and signed.

ULTIMATUM

D1 gave its ultimatum to P to proceed with the original terms proposed by D1 in the LOI and LOA by 15.05.2013. P was also to secure funding by 30.06.2013 or to withdraw from the Project.

Request for extension of time by P was declined by D1.

SUIT IN HIGH COURT

1. P claimed against D1 and D2 for breach of contract and sought for general damages, specific damages of RM5,488,497 for work done in reliance on the contract, plus interest and costs.
2. D1 pleaded that there was no contractually binding relationship between D1 and CDJV. D1 pleaded that it never had the intention to contract with P or treat P to be one of the entities of CDJV.
3. D2 pleaded that D1 and D2 were 2 separate entities and denied any contractual relationship with any party nor any contractual involvement in the project.

THE APPEAL

1. D1 appealed against the finding of liability.
2. P appealed against the dismissal of its claim against D2.

LETTER OF INTENT ("LOI")

D1 issued LOI to CDJV to purportedly appoint CDJV as a turnkey contractor.

In the same letter, CDJV was instructed to nominate or incorporate a company acceptable to D1 as the turnkey contractor to implement the project.

2 days later, CJDV indicated its acceptance of the LOI.

D1 issued a letter of acceptance ("LOA") dated 31.10.2012, which was accepted by CJDV.

On 05.12.2012, CJDV indicated that P (incorporated on 03.12.2012) would be the turnkey contractor.

THE LETTER OF INQUIRY

On 18.02.2013, D1 issued a letter of inquiry to CDJV.

D1 alleged CDJV had unilaterally changed the contracting party to P. D1 said it could agree to the change provided that P was part of CDJV and was supported by Daelim Industrial Ltd ("Daelim").

CDJV did not reply. P replied and stated that it obtained support from the majority of the CDJV members except for Daelim. P informed D1 that Daelim had withdrawn from the consortium.

JPZ wrote to each of the consortium members seeking confirmation on their alleged support of P. Instead of affirming their support, each of them proposed all sorts of new ideas to the project.

LAPSE OF NEGOTIATIONS

D1 wrote to P stating that it was unable to continue negotiations as P failed to comply with the LOA and supplementary terms to LOA.

All negotiations were considered lapsed and expired with effect from 01.07.2013. D1 is free to enter into negotiations with any other party for the Project.

HIGH COURT'S JUDGMENT

1. Allowed P's claim against D1. Dismissed claim against D2.
2. Held that there existed a binding contractual relationship between parties and not mere negotiations.
3. Agreed that P and CDJV were of the same entity and the alleged contract was concluded on 31.10.2012 pursuant to the LOA.
4. The Court relied on the principle of promoter and successor under s 35(1) of the Companies Act 1965.

COURT OF APPEAL'S JUDGMENT

1. Allowed D1's appeal. Dismissed P's appeal.
2. The Court held that:
 - a) There was no contractual relationship between D1 and P as the LOI and LOA does not carry P's name.
 - b) If there was any contract, it would be between CDJV and D1.
 - c) P was never a member of the consortium at the material time as P was yet to be incorporated. There was no consensus ad idem.
 - d) No evidence of novation of the contract to P. As P did not plead a lesser form of agreement, no payment could be made under other heads recognised in the Contracts Act 1950.

2012

Early 2013

13 October 2013

High Court

Court of Appeal

Parties:

- Plaintiff (P) – Dae Hanguru Infra Sdn Bhd
- 1st Defendant (D1) – Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd
- 2nd Defendant (D2) – Perbadanan Menteri Besar
- CDJV – Consortium Daelim JV (led by Daelim Industrial Co. Ltd, consortium consists of 13 members)
- JPZ – Jurutera Perunding Zakia, project management consultant appointed by D1