

Client Alert

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Goh Eng Lee Andy v Yeo Jin Kow Some Reminders about Design and Build Contracts

It is common for parties to enter into "design and build" construction contracts. The main feature of such contracts is that the duties and functions of design and construction are integrated and entrusted primarily to the contractor.

In *Goh Eng Lee Andy v Yeo Jin Kow* [2016] SGHC 110, the Singapore High Court considers the issue of whether a "design and build" contract necessarily incorporates a lump sum contract.

1. Background

Mr. Andy Goh (the "**Plaintiff**") wanted to reconstruct a property on a parcel of land which he owned with his wife. He engaged Mr. Yeo (the "**Defendant**"), a building contractor, for this purpose.

The Defendant submitted the first quotation on 16 August 2011. Subsequently, the Defendant engaged TAS Design Studio (the "**Architectural Firm**") on 27 September 2011 to undertake the architectural design for the construction. The Architectural Firm in turn retained a firm named JAL Atelier (the "**Project Architect**").

Following the preparation of three-dimensional drawings by the Defendant and his wife, the Defendant submitted the second and final quotations on 20 October and 10 December 2011 respectively. The main difference between the second and final quotations was that the fees for professional services (e.g., architectural fees, engineering consultancy service fees etc.) were left out of the final quotation. Significantly, the final quotation included an acknowledgement that indicated "design and build" in its description.

The Plaintiff accepted the final quotation on 6 March 2012 and work subsequently commenced in March 2012. Under the final quotation, the "estimated completion date" was stated as March 2013. However, the Defendant had failed to complete the construction work by 31 March 2013.

In September 2013, the Plaintiff took the view that the Defendant had abandoned construction and terminated the Defendant's services by a notice dated 11 October 2013. The Plaintiff engaged replacement contractors and the Temporary Occupation Permit for the property was obtained on 15 January 2015.

On 28 January 2014, the Plaintiff commenced proceedings against the Defendant for recovery of damages while the Defendant counterclaimed for the cost of variation works undertaken by him.

2. Issues before the High Court

The Singapore High Court had to decide on the issue of whether the contract was a "design and build" contract; and if so, whether a "design and build" contract necessarily incorporates a lump sum contract. The determination of this issue affected the parties' respective rights and obligations, such as whether the defendant had performed the contract works and was entitled to payment for the variation works claimed.

3. The High Court's Decision

Issue (a): Whether the contract is a "design and build" contract

The court considered the relevant objective and contextual evidence before it, and came to the conclusion that the contract was indeed a "design and build" contract.

First, the court stated that the term "design and build", which was expressly referred to in the final quotation, is a legal term of art carrying a defined meaning in law. The inclusion of this term was therefore *prima facie* evidence of the parties' intention to enter into a "design and build" contract.

Secondly, the court considered the conduct of the parties and held that the Defendant undertook a course of conduct that was consistent with the obligations that a contractor entering into a "design and build" contract would undertake.

For example, in the contract between the Defendant and the Architectural Firm, it was stated that the Defendant would be responsible for all direct coordination with the Plaintiff. The court held that this was in line with the concept of single-point responsibility, which is a feature of "design and build" contracts.

Another example would be the fact that the Defendant dealt directly with the professional engineer and other professional consultants (e.g., the structural consultants, the topographical surveyors, the soil investigators, the impact assessors etc.) in preparing to execute the design and construction of the property.

Thirdly, the court compared the second and final quotation and found that although the scope of works were largely similar, the price of the final quotation was significantly higher than the second quotation. This indicated that the parties intended to enter into a more expensive "design and build" contract.

Issue (b): Whether the "design and build" contract necessarily incorporates a lump sum contract and the implication

The court held that a "design and build" contract, in the absence of any terms to the contrary, necessarily incorporates a lump sum contract. In coming to its decision, the court discussed some of the main features of "design and build" contracts.

The court acknowledged that it was noted by Chow Kok Fong in *Law and Practice of Construction Contracts (Volume 1)* (Sweet & Maxwell, 4th Ed, 2012) ("**Chow Kok Fong**") at paragraph 2.35 that "design and build" contracts by default give the owner little latitude to change or alter the design once the contract has been awarded, without incurring additional cost.

In the same vein, the court also cited *Chow Kok Fong* at paragraph 2.41 that "[t]he contractor is only entitled to claim for additional payments where it is demonstrated that the works, as defined in the project brief or client's requirements, have been varied or where there has been breach of the obligations by the owner and, as a result of which, the contractor had to incur additional expense."

It was held that where an owner and a contractor enters into a "design and build" contract without more, the owner and the contractor are agreeing on a lump sum payment by the former in return for the construction and delivery of a project by the latter that is in accordance with an agreed design that is formulated by the contractor.

In this case, the court held that the "design and build" contract was a lump sum contract and so the Defendant had no basis to counterclaim for professional fees where these concerned the design of the property (unless specifically carved out). Further, the court held that the Defendant could not claim for additional payment for variation work unless the variation work was extraneous to the work contemplated under the contract (which they were not).

Issue (c): Whether the Plaintiff was entitled to terminate the contract

Finally, the court also decided that the Defendant had breached the contract by failing to complete the works by 31 March 2013 notwithstanding that it was stated in the final quotation to be an "estimated completion date". As a result, it was held that the Defendant had repudiated the contract and the Plaintiff was entitled to validly terminate the Defendant's services.

4. Conclusion

First and foremost, this case highlights that the court may go beyond the strict wording used by parties in the contract. In determining the completion date and whether the contract was a design and build contract, the court did not confine itself to the words and descriptions used in the contract. The court examined the extrinsic evidence available, including the conduct of the parties.

Secondly, where parties agree to enter into "design and build" contracts, they should be mindful of the following obligations:

- (a) "Design and build" contracts by default give owners little latitude to change or alter the design once the contract has been awarded, without incurring additional cost;
- (b) When entering into a "design and build" contract without more, the parties are agreeing on a lump sum payment by the owner in return for the construction and delivery of a project by the contractor that is in accordance with an agreed design that is formulated by the contractor; and
- (c) Contractors are only entitled to claim for additional payments where it is demonstrated that the works, as defined in the project brief or client's requirements, have been varied or where there has been breach of the obligations by the owner and, as a result of which, the contractor had to incur additional expense.