

ཚེ་མཚོ་ཁྲིམས་ཤྱི་འདུན་ལཱ།



HIGH COURT, BHUTAN

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ROYAL COURT OF JUSTICE

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High Court, BHUTAN

CASE CONCERNING CONTRACTUAL DISPUTE

Press Release

Judgement Rendered
10th October, 2011

Note: *This is a summary translated version of the Judgement. The main text in Dzongkha must be accordingly enforced in its entirety.*

Ministry of Works and Human Settlement (MoWHS).....Appellant Respondent

Vs.

Yarkey Group of Companies (Yarkey).....Appellant Plaintiff

I. Brief facts

On 2nd October 2007, three bidders submitted their bids to MoWHS for the construction of Supreme Court Complex. Of the three, Yarkey was the lowest bidder with a bid value of Nu. 585,424,892/-. Yarkey had appraised through tender that they have two works in hand namely:

- a) The construction of Bhutan Power Corporation (BPC) Head Office Complex, Thimphu at the bid value of Nu.84.072m; and



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b) The construction of Ministers Enclave at the bid value of Nu. 71.400m.

As per Construction Development Board (CDB) rules and regulations contractors cannot have more than 5 ongoing works in hand. The tender committee had disqualified Yarkey's bid on the grounds that they had 5 ongoing construction works in hand which included (BPC Project + 4 ministers' enclave). Consequently, the second lowest bidder with contract amount of Nu. 640m was evaluated as the lowest bidder for the construction of Supreme Court complex. The rejection of the Yarkey Group's bid for Supreme Court construction led its proprietor Phub Zam to file two cases against the MoWHS. One suit claiming that the four package works for Minister's Enclave was never considered in her view as four separate works but one and another suit claiming that she was unfairly and unjustly excluded her bid for Supreme Court construction although she was the lowest bidder.

The Thimphu District Court judgement held that the four package works for Minister's Enclave were one composite work which led the MoWHS to appeal to the High Court arguing that it was completely separate and independent works. The appellant respondent sought the High Court intervention to quash the trial court ruling and prayed for the revision of the decision thereon.

II. Contentions and arguments of the parties

(a) Yarkey Group's argument:

Aggrieved by the decision of the tender committee, Yarkey Group's entrepreneur Phub Zam has filed a suit against MoWHS with the following justifications show causing why the ministers' enclave should not be considered as one contract work. She relied her contention on the following grounds.

1. Total contract amount/price



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National Housing Development Corporation Ltd (NHDC) had awarded tender packages of 1,4,7 & 8 at a total contract amount of Nu. 71.400m to Yarkey in Feb. 2007.

2. Letter of acceptance

NHDC had issued one Letter of Acceptance in respect of 4 packages of work; packages 1,4,7 & 8 to Yarkey.

3. Performance Security

She had deposited one performance security of 10% of the contract amount for all 4 packages as desired by NHDC. She had also deposited one Bank Guarantee of Nu. 7,140,090.00 for all 4 packages.

4. Contractor's all risk insurance Policy

She has filed one single contractor's all risk policy from Royal Insurance Corporation for all 4 packages.

5. Bank Guarantee for mobilization advance

She had furnished one single Bank Guarantee amounting to Nu. 7,140,090.00 for payment of mobilization advance. The NHDC released the mobilization advance through one single cheque.

6. Monthly Bills and deductions of mobilization and TDS

It was all considered as one package and not treated as separate contract.

7. Conditions of Contract as per contract document

The agreement includes the following documents:



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- i. Letter of Acceptance
- ii. Notification for award of work
- iii. The said bid
- iv. Conditions of Contract
- v. Technical specification and the scope of work
- vi. The drawings
- vii. BoQ and addendums and
- viii. Supplementary Information submitted by the contractors

8. *Conditions of Contract Article 1 General provisions*

Yarkey argues that ‘**contract price**’ is the price stated in the letter of acceptance and means that four packages is one single work contract as all the packages have been clubbed together under one contract price of Nu.71.400m. Yarkey relied and emphasized on the importance of the Letter of Acceptance which the MoWHS has expressly accepted the enclave as one project by issuing one Letter of Acceptance.

Yarkey argued that the contract documents must be read in conjunction with each other and contract conditions therein must be considered on totality wherein 4 packages are one work. The appellant petitioner submitted that the term contract means a combination of ALL documents and what conditions are stipulated in those documents have to be read in its entirety to define and come to a logical conclusion i.e 4 packages as one work. Just by numbering the packages does not construe that each package is a separate contract. She asserts that the Letter of Acceptance is the most crucial part in the contract wherein the contractual



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obligations like letter of acceptance, contract price, and performance security equivalent to 10% of contract price are reflected. The issuance of one letter of acceptance for package 1, 4, 7 & 8 indicated of the existence of only one contract. The appellant petitioner further stressed that the contract price being clubbed together for Nu. 71.400m also connotes of being one contract.

It was further argued that the submission of one performance security is merely based on the reason that there was only one contract. If it was 4 different works then 4 different performances would be sought – the reason being that if one of the works was to fail performance, security would be forfeited for that particular work. In this case, performance security was furnished as one meaning that if any one of the 4-package work were to fail, the entire security would be forfeited and not in fraction. Yarkey relied on the legal maxim that (*Quod per recordum probatum, non debet esse negatum* means what is proved by the record, ought not to be denied).

To support the Appellant Petitioner's argument, she relied on Ministry's past record and cited the precedent for the construction of Changlingmithang Public Gallery wherein the ministry has set a contractual practice by awarding 2 packages as one work. Following this precedent she argued that 4 packages should construe as one work than 4 separate contract.

Further, the Appellant Petitioner submitted that until 25.1.2008 the payment was made in single cheque and whereas after instituting a case, the payment was made by separate cheques. This according to the Appellant Petitioner meant that the change in the mode of payment indicated that the ministry had admitted the entire work as one work until such time.

(b) MoWHS's counter argument:



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The Appellant Respondent, the MoWHS contended that the construction package of the Ministers' Enclave is 4 separate contract work based on the following justifications and argued that:

- 1) The contract price has nothing to do with ascertainment of whether enclave is one or separate contract. The rules specify that work of Nu. 15m and above falls within the competence of 'A' contractors.
- 2) There were:
 - a) Separate bidding documents
 - b) Contract number
 - c) Bid price
 - d) Work order/notification of award
 - e) Technical specifications
 - f) Drawings
 - g) Priced bill of quantities
 - h) Agreement

If this was to be considered as one contract then there was no need of all the above documents and could have tendered out all the 4 packages in one tender document as mentioned above.

- 3) The intent and purpose of having separate tender documents for each of the works with separate tender documents was to be considered as separate contract.



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- 4) Different contract number attached with each package is to be deemed as separate contract and moreover agreement for all packages have been signed, executed and delivered separately rather than under one agreement. Had there been only one agreement signed and executed then Ministry would definitely have considered all the aforesaid four contract packages as one.
- 5) It justifies that the Letter of Acceptance though was issued in one letter; the details mentioned therein are specified against each tender package and this would in no way consider those 4 packages as separate works. The use of word 'Tender' against each package according to the appellant respondent amply denotes as separate contract work. Further it was argued that in each of the 4 packages of the contract work, there was a separate and independent agreement signed and executed by Yarkey Group.
- 6) The MoWHS submitted that all 4 packages have been bided separately by different bidders and evaluated separately. The appellant respondent argued that if this package was one, all the relevant documents should have similarly and must have tendered as one. The Notification of Award has also been separately issued to Yarkey and 4 agreements that have been executed, signed and sealed by an authorized person/official of Yarkey Group. Thus, based on the aforementioned submissions appellant respondent argued that contract was awarded as 4 separate works rather than being as one.
- 7) According to the appellant respondent, Bank guarantee for mobilization advance is a requirement in contract and it is not demanded by letter of acceptance. Therefore, it cannot form the basis for interpreting 4 packages as one work.



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- 8) As for the raising of bills, tendering payments, securing advances for materials at site for all the 4 packages of contract work together is purely for administrative and financial convenience.
- 9) Finally the appellant respondent reiterated that if all the four packages were only one contract work, then why would there be a need to prepare 4 different bids, technical evaluation and four different bid submissions (four different bids sealed in 4 different envelopes; one of each marked “original” and one of each marked “copy” for all the tender packages). If the 4 packages were to be one then there would have been only one bidding document, one evaluation and one bid submission in one envelope marked “original” and one marked “copy”. The letter of acceptance under which the performance security was demanded alone does not constitute a contract and it alone cannot be binding without having regard to the other documents and the contract agreement, which have been signed and executed by Yarkey. Concerning, the submission of bills and payments, there is no such rules that each contract work should be paid separately while the 4 separate works was awarded to one contractor. It was purely for administrative convenience.

III. Summary Court Findings and its Ruling

Based on the arguments of the parties, relied upon the scrutiny of evidence submitted at the trial court and having established the concrete case of controversy arisen by the nature of the case, the court deemed for the purpose of rendering appropriate conclusion and outcome of the case frames as to *Whether 4 packages of work in Ministers’ Enclave Project is to be interpreted as one single composite contract work or four separate and independent contracts.*



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After establishing the above case of controversy, it would have by inference established whether Yarkey Group was unjustly excluded from the award of the Supreme Court construction, which they had been the lowest bidder.

Construction Development Board (CDB) Rules and Regulation specifies that no “Class A” contractor who would have five works in hand be permitted to bid or works awarded. However, if any of the five works in hand had achieved 90% completion, the contractor would be allowed to bid. Accordingly, the MoWHS contended that although the Yarkey Group was the lowest bidder for the Supreme Court Construction, they were disqualified as they had five works at hand for the construction of four Minister’s Enclave and the construction of Bhutan Power Corporation Head Office. Countering the argument, the Yarkey proprietor Phub Zam asserts that the construction of Minister’s Enclave four works were never construed as four separate works rather than being one package. She argued that she had only two works in hand and prayed that the Trial Court decision be upheld and relief in the form of damages be granted to her.

Upon scrutiny of the case in controversy, the court established that the award of the eight packages of the Minister’s Enclave were prepared with separate tender packages and was solicited through the issuance of one tender notice. Accordingly, in all the eight packages of the Minister’s Enclave construction works, the Yarkey Group was the lowest bidder. However, they were awarded only four out of eight works that they have won. The four tender packages were:

- (1) MP-PMR-TP(1);
- (2) MEP-MR (B4/B5)-TP(4);
- (3) MEP-MR (B10/B11)- TP(7); and
- (4) MEP-MR9B12/B13-TP(8).



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It is established that Yarkey had never contended and cry foul of not awarding the rest of the works. It is only comprehensible that Yarkey, at that point of time, had never considered the four package works as one. It is beyond the court's comprehension of the explicit nature of the case as to why Yarkey had ever remained silent in not getting the rest of the four works despite they were actually the lowest bidder. It only proves that Yarkey had actually rescinded of considering the four packages as one work and rather considered *ab intio* (from the very beginning) as separate. As per section 155 of the Civil and Criminal Procedure Code, and by the application of the principle of the doctrine of *estoppel*, a party is prevented by his/her own act from claiming a right to the detriment of other party who was entitled to rely on such conduct and has acted accordingly. In the present case Yarkey had relied upon their conduct of not claiming the rest of the four works as one package although they were the lowest bidder in eight of the Minister's Enclave construction. The rejection of the four bids were by then acceptable to Yarkey Group and hence barred from claiming any justiciable rights to undo what was accepted as just and appropriate from the beginning.

Thus, the court upholds the argument of the MoWHS that:

“Yarkey Group has bid for 8 packages of contract works under the Ministers' Enclave Project. In all their bids, Yarkey Group was evaluated as the lowest in all the eight packages of contract works. However, Yarkey Group was awarded only four packages since Yarkey Group already had one work in hand (BPC Head Office Building). Yarkey Group knew that they were the lowest in all the 8 bids but accepted only four packages of the contract work. The result of this contract clearly shows that she had four contract works under the Minister's Enclave Project plus the BPC Head Office Building as five.”

Further, the evidentiary records presented by the parties to the case proves that the tender for all the Eight Minister's Enclave construction project there were separate contract packages with independent and separate contract agreement. It is also established that in



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all the four packages of the Minister’s Enclave construction project, the Appellant Petitioner had prepared and submitted four different bids sealed in 4 different envelopes; one of each marked as “original” and one of each marked “copy” for all the tender packages. Bids and technical evaluations were also established to have been done separately in all the tender packages. Therefore, the court upholds the fact that if the 4 packages were to be considered as one as argued by the appellant petitioner, it is only appropriate and practicable that there should have been only one bidding document, one evaluation and one bid submission in one envelope marked “original” and one marked “copy” rather than separate tender packages in each of the construction project.

The Court does not buy the argument of the appellant petitioner that the letter of acceptance under which the performance security was demanded alone in its entirety would constitute a contract without having regard to the other essential documents and the existence of separate contract agreement, which were entered into between the parties in accordance with section 35 of the Evidence Act. It is further established the Letter of Acceptance although issued in one letter number and letterhead in essence had separate aspects related to the four packages. The particular Letter of Acceptance submitted as an exhibit to the court reveals the following particulars that:

“Subject: Letter of Acceptance for Tender Package 1, 4, 7 & 8 of the Minister’s Enclave Project at Motithang”

- “1. Tender Package 1: Nu.17,213,119.00
2. Tender Package 4 : Nu. 18,290,761.75
3. Tender Package 7 : Nu. 18,161,873.21
4. Tender package 8 : Nu. 17,735,098.37”

It is conclusive enough for the court from the inferences drawn herein above to hold that the seeking of clubbed performance security, submission of bills and its payments were purely done for administrative convenience, save cost and time. The nature of the similar



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but separate construction works and having won by one singular contractor “Yarkey Group” made it more administratively convenient to issue singular cheques rather than multiple. Even if all the cheques were issued in multiple as it was later on done by the Ministry; in the realistic sense the cheque was after all issued to the same proprietor. It is only appropriate in good faith for the administrative authority in their due diligence to reduce administrative burden in all their dealings to deliver public services.

Based on the above reasons the Court hereby established that Yarkey Group’s had misrepresented by declaring only two works in hand instead of five works while bidding for the Supreme Court Construction. These had invariably led to their disqualification. Therefore, it was conclusive enough for the tender committee to consider in all essence that Yarkey had five works in hand at the point of soliciting bids submission for the Supreme Court construction since Yarkey Group had four separate contract packages 1,4,7, & 8 for Minister’s Enclave construction works in addition to BPC Head Office building.

Hence, the Court overrules the decision of the trail court as per Section 111(b) of Civil and Criminal Procedure Code which had interpreted and considered the Minister’s Enclave construction works as one rather that multiple for the reasons as stated herein in the Judgement.

The parties as per Sections 96.5 and 109.1(c) of the Civil and Criminal Procedure Code, has ten days to appeal to the Supreme Court.

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Sd/-

Sangay Khandu
(Acting Chief Justice)

Sd/-
(Lungten Dubgyur)
Justice

Sd/-
(Tashi Chhozom)
Justice