

Adjudicator's Determination

Adjudicator Registration Number 17
Identification No: 17.13.01

**Pursuant to the Construction Contracts (Security of Payments)
Act 2004 (NT)**

(Applicant)

And

(Respondent)

1. I, Charles H. Wright, as the appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act* (the Act), determine that the Adjudicated amount in respect of the Adjudicated Application served 29 July 2013 is \$120,139.49 inclusive of GST.
2. The date payable is no later than 3 September 2013.
3. No security is required to be returned.

Appointment of Adjudicator

4. I was appointed as Adjudicator to determine this dispute by the Master Builders Northern Territory on Tuesday 30 July 2013, and later, by agreement with the parties.

Acceptance of Adjudication Application

5. I confirmed my acceptance as adjudicator in a telephone conference call on Monday 12 August 2013 and recorded in Item 12 of the Minutes of Telephone Conference Call (item 8.10 below refers)

Documents Regarded in Making the Determination

6. In making this determination I have had regard to the following:
 - 6.1 The provision of the *Construction Contracts (Security of Payments) Act*;
 - 6.2 Submission by the Applicant under cover of a letter dated 29 July 2013 submitted with the Application for Adjudication;
 - 6.3 Attachments numbered from No. 1 to No. 23 inclusive and being supporting information to the Application for Adjudication;
 - 6.4 The Applicant's legal representative's deposition dated 15 August 2013 providing confirmation of service of the Application on the Respondent and the Respondent's legal representatives;
 - 6.5 A missing page to Attachment 16 (refer item 6.3 above) supplied by the Applicant's legal representative at my request.
7. A Response was not served in accordance with section 29(1) of the Act. The Act requires;
 - (1) *Within 10 working days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on:*
 - (a) *the applicant and on any other party that has been served with the application; and*
 - (b) *the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointer on which the application was served under section 28(1)(c).*

Conference with the Parties

8. A telephone conference was held with the parties on Monday 12 August 2013 to deal with formal and procedural matters. The following matters were agreed at the telephone conference;
 - 8.1 The individuals agreed that they had authority to make decisions and bind the parties they represent;
 - 8.2 The parties agreed that the Adjudicator had jurisdiction in this payment dispute;
 - 8.3 The parties agreed to adhere to the proposed timetable for any further responses required;
 - 8.4 The parties agreed that no other adjudication application had been sought;
 - 8.5 The parties agreed that this payment dispute is not subject to an order, judgement or other finding by an arbitrator or other person or a court or other body;
 - 8.6 The parties agreed that they were satisfied that no conflict of interested existed between the parties and the Adjudicator;
 - 8.7 The Respondent was unclear of the date he discovered the Application for Adjudication that was left at his premises but confirmed receiving it;
 - 8.8 It was confirmed by the Applicant's legal representative that the Application for Adjudication was served on the Appointer, the Respondent and the Respondent's legal representative on the 29 July 2013;
 - 8.9 Neither party has any objections to the Adjudicator being appointed;
 - 8.10 The Adjudicator accepted the appointment on Monday 12 August 2013;
 - 8.11 Both parties were given an estimate of the Adjudication fee with the Applicant accepting and the Respondent not dissenting. Both parties were requested to forward a deposit to be held on trust and were provided with the details for making payment electronically.

Determination

9. The Act requires (at s.33(1)(b)) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) -*
 - (b) *otherwise – determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to return any security and, if so, determine:*
 - (i) *the amount to be paid, or security to be returned, and any interest payable on it under section 35; and*
 - (ii) *the date on or before which the amount must be paid or the security must be returned.*

10. The Respondent's response was not received, and therefore, s.33 of the Act requires a determination to be made within the *prescribed time* in accordance with s33(3)(b) which provides that;

(b) *otherwise – 10 working days after the last date on which a response is required to be served under section 29(1).*

11. My determination is therefore required by 27 August 2013 taking into account excluded days within Darwin.

The Adjudication Application

12. The Application for Adjudication consists of the following papers;

12.1 Application for Appointment of Adjudicator consisting of 16 pages including cover letter and cover page detailing the dispute between the Applicant and the Respondent;

12.2 Attachments numbered 1 to 23 inclusive, providing supporting information.

The Adjudication Response

13. A Response was not served in accordance with section 29(1) of the Act.

14. Notwithstanding that a Response was not served as part of this Adjudication, an Affidavit as Attachment 16 of the Application for Adjudication prepared by the Respondent for a previous Court process dealing with this dispute was taken into consideration.

The Construction Contract for the purposes of the Act

15. The Act defines a *Construction Contract* (s.5(1)(a)) as:

(1) *A construction contract is a contract (whether or not in writing) under which a person (the **contractor**) has one or more of the following obligations:*

(a) *to carry out construction work;*

16. The contract is for work on a *site in the Territory*, is a contract undertaking *construction work* as defined in s.6(1)(c) of the Act and is therefore a *construction contract* under the Act.

Implied Provisions

17. Implied Provisions:

17.1 There is not written agreement between the parties;

17.2 The Applicant relies on the Implied Conditions of the Act, in particular Part 2 Division 2.

Conditions for Determining the Adjudications

18. The conditions for determining the adjudication have been met:
 - 18.1 The contract is a construction contract as defined by the Act;
 - 18.2 The site is a site in the Territory;
 - 18.3 A tax invoice has been issued that strictly complies with the requirements of clause 5 of the Schedule of the Act;
 - 18.4 The invoice remains unpaid and has not been disputed in full or part within the required time;
 - 18.5 There is a payment dispute;
 - 18.6 The Application for adjudication has been prepared and served in accordance with s.28 of the Act, within time limits, served on the parties and the Appointer;
 - 18.7 The Appointer appointed the Adjudicator with the prescribed time;
 - 18.8 The Respondent has not served a Response on each of the parties as required under the Act;
 - 18.9 The parties have confirmed that there is no other proceedings on a matter raised arising from the construction contract and being the subject of this determination;
 - 18.10 The adjudicator has no conflicts of interests that would prevent him from Adjudicating this matter.

The Payment Claim

19. The payment claim, the subject of this Adjudication, is Tax Invoice, Invoice #. 00003048 dated 2/04/2013 for the total sum of \$116,546.99 with a copy provided at Attachment 23 to the Application for Adjudication.
20. The Tax Invoice sets out in detail the work undertaken.

Payment Dispute

21. The Applicant was invited by the Respondent to provide a quotation to undertake certain construction work on a site within the Territory.
22. The Applicant provided a written quotation on 2 November 2012 in the sum of \$119,728.00 plus GST and allowing 19 days to perform certain Works.
23. The Respondent on 7 November 2012 requested the Applicant revise his quotation to perform the Works within 7 days.
24. The Work was to commence on 12 November 2012 but was delayed and commence on the 15 November 2012.

25. The Applicant assisted the Respondent in certain construction activities outside the agreed scope of Work on the afternoon of the 14 November 2012.
26. The Applicant issued a revised quotation based on known hours to the Respondent on 22 November 2012 in the sum of \$105,952.00 plus GST.
27. The Applicant left the construction site and returned to Darwin on 25 November 2012 leaving the Works uncompleted due to lack of material and some technical finishing issues caused by non-alignment of certain components.
28. The Applicant raised a non-compliant Tax Invoice on 19/11/2012 for the sum of \$61,899.37 including GST. This was not paid.
29. The Applicant raised a non-compliant Tax Invoice on 26/11/2012 for \$61,770.02 including GST. This was not paid.
30. On 27/11/2012 the Applicant raised a non-compliant Tax Invoice credit note for \$7,122.39 including GST.
31. The total outstanding amount as at 26/11/2012 was \$116,547.02 including GST.
32. At the request of the Respondent, the Applicant forwarded a breakup of cost for the Works to the Respondent on 6 December 2012 showing a total excluding GST of \$105,608.00 (note, there is an error in the addition it adds up to \$104,608.00).
33. The Respondent requested the Applicant travel to site and attends to some additional work which the Applicant refused to do until the invoices are settled.

Issues for Consideration

34. Issues that I need to consider are:
 - 34.1 Were the two invoices issued on 19/11/2012 and 26/11/2013 valid payments claims, copies provided in Attachment 6 and Attachment 11 of the Application for Adjudication?
 - 34.2 Does Tax Invoice #: 00003048 dated 2/04/2013 strictly comply with the requirements of the Act, a copy provided in Attachment 23 of the Application for Adjudication?
 - 34.3 When did the dispute arise?
 - 34.4 Was the Application for Adjudication served in accordance with the Act?
 - 34.5 What is the Contractor entitled to be paid as a *reasonable amount* for performing its obligations?

35. Taking Item 34.1 above;

- 35.1 The payment claim dated 19/11/2012 is not valid as it does not strictly comply with the Schedule, Implied Provisions, Division 4, section 5(1) items (b), (f) and (h);
- 35.2 The payment claim dated 26/11/2012 is not valid as it does not strictly comply with the Schedule, Implied Provisions, Division 4, s5(1) items (b), (f) and (h);
- 35.3 The credit note issued on 27/11/2012 is not valid as it does not strictly comply with the Schedule, Implied Provisions, Division 4, s5(1) items (f) and (h);
- 35.4 I find the Tax invoices issued on 19/11/2012 and 26/11/2013 and the credit note issued on 27/11/2012 to be invalid.

36. Taking Item 34.2 above;

- 36.1 The payment claim dated 2/04/2013 is valid as it does strictly comply with the Schedule, Implied Provisions, Division 4, section 5(1);
- 36.2 I find the payment claim issued 2/04/2013 to be valid.

37. Taking Item 34.3 above;

- 37.1 With the payment claims dated 19/11/2012, 26/11/2012 and the credit note dated 27/11/2012 being invalid, whilst there was disagreement between the Applicant and Respondent at that stage, the trigger for the Dispute comes into affect with the strictly compliant Tax Invoice dated 2/04/2013;
- 37.2 The Act at the Schedule, Division 5, section 6;

6 *Responding to payment claim by notice of dispute or payment*

(1) This clause applies if:

- (a) a party receives a payment claim under this contract; and*
- (b) the party;*
 - (i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or*
 - (ii) disputes the whole or part of the claim.*

(2) The party must:

- (a) within 14 days after receiving the payment claim:*
 - (i) give the claimant a notice of dispute; and*

(ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or

(b) within 28 days after receiving the payment claim, pay the whole of the amount of the claim.

37.3 The Respondent did not provide a Notice of Dispute within 14 days.

37.4 I find the Dispute arose 28 days after the 2/04/2013 that is 1 May 2013.

38. Taking Item 34.4 above;

38.1 As the Dispute arose on 1 May 2013, the Application for Adjudication would be required to be served within 90 days of that date, that is 30 July 2013;

38.2 The Application for Adjudication was served on the Appointer and the Respondent's legal representative on 29 July 2013;

38.3 The Respondent gave various accounts on when the document left at his office was discovered. In the teleconference between the parties on 12 August 2013 it was confirmed (refer item 8.8 above) by the Applicant's legal representative that the Appointer, Respondent and the Respondent's legal representative were served with the Application for Adjudication on the 29 July 2013;

38.4 Subsequently, by separate disposition by the Respondent's legal representative on 15 August 2013, it was confirmed that the Application for Adjudication was served on the Respondent on 30 July 2013 by way of delivery in person to the Respondent's office and placed adjacent the office door;

38.5 The date for service of the Application for Adjudication was concluded by being served on the remaining party on 30 July 2013;

38.6 I find that the Application for Adjudication was served within time.

39. Taking Item 34.5 above;

39.1 The Applicant is seeking payment of Tax Invoice #: 00003048 dated 2/04/2013 in the amount of \$116,546.00 inclusive of GST as the cost of performing their obligations;

39.2 In Attachment 16 of the Application for Adjudication there is a sworn Affidavit by the Respondent relating to an earlier legal process in which the Respondent accepts that the Applicant would be entitled to payment of the sum of \$48,577.00 plus GST.

39.3 The sum of \$48,577.00 plus GST has not been received by the Applicant.

39.4 A central issue in the dispute between the Applicant and the Respondent is the number of days required by the Applicant to perform their obligations.

- a) the Applicant originally based the 2 November 2012 quotation on 19 days;
- b) the Respondent sought to have the Applicant undertake the Works in 7 days on 7 November 2012;
- c) in the sworn Affidavit, the Respondent claims that the Works should have been completed in 7 days x 3 men, that is 21 man days, and cites a similar example claiming those works were completed in 6 days;
- d) the Applicant provides a documentary account of the project cited in c) above at Attachment 17 of the Application for Adjudication that demonstrates that the actual time taken was a total of 54 man days over three separate period of a total of 17 days;
- e) The actual time used in the Applicant's payment claim is 2 people by 13 days and 1 person x 10 days, a total of 36 man days;

39.5 In the sworn Affidavit by the Respondent, the Applicant's claim for other costs are challenged including cartage forward and return of the crane, crane hire, plant upgrade to comply with the Respondent's Client requirements, labour charge out rate, counting of time, safety clothing and equipment to suit the Respondent's Client requirements, vehicle travel costs, fuel costs and scaffolding costs.

39.6 The Applicant demonstrates in the various recitals in the Application for Adjudication and as Attachments in the supporting information that the amounts used in calculating the payment claim of \$116,546.99 are reasonable and factual.

39.7 Section 33 of the Act, Adjudicator's functions, requires:

- (1) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a):*
 - (a) *dismiss the application without making a determination of its merits if:*
 - (i) *the contract concerned is not a construction contract; or*
 - (ii) *the application has not been prepared and served in accordance with section 28; or*
 - (iii) *an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or*
 - (iv) *satisfied it is not possible to fairly make a determination:*
 - (A) *because of the complexity of the matter; or*

(B) because the prescribed time or any extension of it is not sufficient for another reason; or

(b) otherwise – determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to return any security and, if so, determine:

(i) the amount to be paid, or security to be returned, and any interest payable on it under section 35; and

(ii) the date on or before which the amount must be paid or the security must be returned.

40. On the balance of probability, I find the following;

40.1 The Applicant provided an initial quotation to the Respondent in the sum of \$119,728.00 plus GST based on a duration of 19 days;

40.2 The Applicant provided two people to attend site initially indicating an expectation that the Works would take 2 people 19 days, a total of 38 man days;

40.3 The Respondent was provided with the Applicant's quotation on the 2/11/2012 with commencement on site expected 12 November 2012. There was a period of time that the quotation could have been discussed and agreed, or, an alternative contractor could have been sought.

40.4 The expectation of the Respondent that the Works should take 7 days is not creditable given that the Respondent should have known or ought to have known that the six days cited for a previous project was not achieved. Actual time is reported to be 17 days duration with 54 man days of effort;

40.5 The Respondent considered the Works should take 7 days for 3 men, a total of 21 man days, including two days required travelling to and from the site;

40.6 The actual time taken and charged is 36 man days over 13 day's duration;

40.7 A substantial portion of the payment claim involves meeting the Respondent's Client occupational health and safety requirements, mobilising and demobilising plant, equipment and people to site and use of plant and equipment on site. The majority of these costs would have been incurred irrespective of the time taken to execute the Works;

40.8 The Applicant had previous experience on a similar system-type building in a remote location so would have been mindful of the true costs in undertaking this project and allowed for them in the original quotation to the Respondent. That the end cost is slightly under the original quotation suggested that is the case.

40.9 The Applicant was prevented from completing the Works due to material shortages which were outside of their control. The Applicant had performed or assisted in performing work outside of their intended Works.

41. For all the reasons set out above, I determine that the Applicant is entitled to be paid a reasonable amount for performing its obligation and that is the amount of the payment claim of \$116,546.99 including GST.

Interest

42. The Applicant submits that the applicable rate is 9% per annum with interest accruing from the date the payment claim should have been paid to 30 July 2013, that amount being \$2,586.60.
43. The Applicant further submits that the daily rate is \$28.74 and is applicable from 31 July 2013 to when the amount determined is ordered to be paid.
44. In accordance with Section 21 of the Act and clause 7 of the Schedule, interest is due and payable.
45. I require the amount determined to be paid on 3 September 2013 and further interest is payable at the rate of \$28.74 per day for a period of 35 days up to and including the day upon which the amount determined is to be paid. That amount is calculated at \$1,005.90.

Costs

46. The Applicant submits that no costs be ordered against them.
47. Seeking direction from section 46 of the Act to the Applicant's request I am referred to subsection (6) which refers me to section 36(2).
48. I am not satisfied that the Respondent's action or non-action was done frivolously or vexatiously.
49. I determine that each party pay one half of the cost of the Adjudication.

Summary

50. The adjudicated amount is made up of;

50.1	Tax Invoice #:00003048 dated 2/04/2013	\$116,546.99 including GST
50.2	Interest payable to 30 July 2013	\$2,586.60
50.3	Interest payable from 31 July 2013 to 3 September 2013	\$1,005.90
50.4	Total payable	\$120,139.49 including GST

Conclusion

- 51. For the reasons set out in this determination, I determine that the adjudicated amount is \$120,139.49 inclusive of GST.
- 52. The date payable is no later than Tuesday 3 September 2013.
- 53. There is no security due to be returned.

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Charles H. Wright
Adjudicator

27 August 2013