Determination 26.10.01

IN THE MATTER of an Adjudication
pursuant to the Construction Contracts
(Security of Payments) Act (NT) ("**The Act**")

BETWEEN:

The Applicant

and

The Respondent

REASONS FOR DECISION

1. On 1 December 2010 the Applicant served this application on the Institute of Arbitrators and Mediators Australia (**"IAMA"**) as prescribed appointer under the Act. The Respondent confirms it was also served a copy on or about the same date. By letter from IAMA dated 3 December 2010 I was appointed adjudicator to determine the payment dispute between the parties. I received the letter and Application on the same day.

2. On 6 December 2010 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I also sought submissions should either party object to the appointment. There were no objections to my appointment.

3. On 8 December 2010 I wrote to the parties requesting, *inter alia*, copies of the Tender documents. The parties did not provide these documents or any additional documents other than those in the application and response submissions. Absent this requested information, it is therefore common ground between the parties that I rely wholly upon the documents submitted in the Application and Response.

4. I received the Response from the Respondent on 15 December 2010.

Introduction

5. This adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent to undertake Boring and Civil Works as part of the [project description and site location] in the Northern Territory.

6. The Applicant claims it was entitled to a variation, VR15, to the contracted works as a result of it having to undertake an additional quantum of driveway reinstatement outside of that promised in the agreement.

7. In its Application, the Applicant seeks payment of $86,136.97, which includes GST, plus interest on the payment claim and costs for the adjudication to be wholly borne by the Respondent.

Procedural Background

8. The Application is dated 1 December 2010 and comprises a general submission and 15 attachments identified as A to O inclusive. The attachments include:

   (a) A – an extract from the tender submission that sets out the total subcontract price and a breakdown of that price across the tender Schedule “A”;

   (b) B –Respondent’s letter of tender acceptance dated 23 July 2008 advising commencement of the works on 11 August 2008;

   (c) C - Respondent’s Purchase Order 850702/49229 dated 1 August 2008;

   (d) D – Copy of the Sub-contract Agreement signed but undated;

   (e) E – Variation request VR15 dated 2 March 2009;

   (f) F –Respondent’s Purchase Order with Variations date stamped 25 May 2010;

   (g) G – Various email correspondence between the parties during the period of 26 February 2009 and 17 March 2009 inclusive;

   (h) H – Various email correspondence between the parties during 19 and 20 October 2009;

(i) I – Variation request VR15 cover page (1page) dated 2 March 2009;

(j) J – Certificate of Practical Completion dated 24 September 2009;

(k) K – Email and Letter correspondence between the parties dated 20 May 2010;

(l) I – Letter and email between parties of 3 June 2010 and 10 June 2010;

(m) M – Email from the Respondent dated 7 July 2010;

(n) N – Payment Claim for VR15 dated 24 August 2010; and

(o) O – Letter of rejection from the Respondent dated 3 September 2010.

9. The Payment Claim was submitted to the Respondent on 24 August 2010 and the Respondent rejected the claim on 3 September 2010.

10. The Response is dated 15 December 2010 and comprises a general submission and three attachments marked NR1 to NR3 inclusive. The attachments include:

(a) NR1 – Copy of the Sub-contract Agreement signed but undated;

(b) NR2 – Copy of the Sub-contract particulars undated; and

(c) NR3 – Letter from the Applicant dated 19 July 2010.

The Contract

11. The parties agree that they entered into a contract in the terms set out in the documents identified as attachment "D" by the Applicant and "NR1" by the Respondent. The Respondent also contend that their document, referenced NR1, is a "*true copy of the Contract*", the only difference between the two documents being the inclusion in NR1 of the design drawings for the works in site areas B2 and B3 of the contract. In all other aspects the documents are identical.

12. On 2 March 2009 the Applicant requested a variation to the contract, identified as VR15, in the sum of $78,306.34 (excluding GST) for concrete

driveway works it claimed were undertaken in addition to the scope works. The variation request VR15 was substantively made in two parts:

1) Driveway Reinstatement in the sum of $23,752.84; and

2) Foundation Excavation in the sum of $54,553.50.

The basis for the variation was also founded in two parts:

(a) the quantum of driveway reinstatement allowed for in their price was 1842 square metres, whereas the actual works totalled 2019.26 square metres. The additional works undertaken amounted to 177.26 square metres of additional concrete driveways; and

(b) the quantum of additional foundation excavation, expressed as a percentage, was calculated at or about nine percent (177.26 /1842 = approx 9%). This percentage increase was then globally applied to the excavation allowance in the price arriving at the sum claimed.

13. Between the period of 2 March 2009 and 20 May 2010 correspondence between the parties addressed claim methodology and pricing strategy etc, but at no time did the Respondent outright reject the Applicant's claim. On 20 May 2010 the Respondent wrote to the Applicant and denied the claim on the basis of:

"*reference to schedule of rates to justify claim is not warranted, schedule of rates were not quantified in tender submission*"

However, the Respondent then continued to engage the Applicant in the contractual variation process relating to VR15 up to and including 7 July 2010.

14. Following the Applicant's letter response of 19 July 2010 and their payment claim submission of 24 August 2010, the Respondent formally rejected the payment claim by letter dated 3 September 2010. This rejection of the Payment Claim satisfied section 8 of the Act which immediately triggered a Payment Dispute between the parties for the purposes of the Act.

The Respondent's Defences

15. In section 3 of the Response, the Respondent submits five reasons numbered (a) to (e) upon which the Applicant's Application must fail and I will deal with each submission in turn.

16. Response 3(a) – Lump Sum Contract and Scope of Works: In this submission, the Respondent argues that:

"*the Contract was a lump sum contract and the works the subject of VR15 formed part of the original scope of works*"

The submission relies upon the language in the contract being unambiguous, *re: Australian Broadcasting Commission v Australian Performing Rights Association Ltd (1973) 129 CLR 99*, and that the contract was expressly executed as a lump sum contract that has no application of a schedule of rates. The Respondent contends that the schedule of rates was relevant only at the tendering stage for pricing transparency and bid comparative purposes and has no place in the contract.

17. It is common ground between the parties that the Respondent accepted The Applicant's tender submission and has "*relied upon the assurances given*" by The Applicant in that tender.

18. The Respondent also contends that the Applicant entered into an express contractual warranty that it had fully informed itself and had assessed the risk it was assuming in the subcontract price pursuant to clause 7.1 of the Agreement.

19. In considering this first argument I turn to the contract price that was tendered by the Applicant and accepted by the Respondent in their letter dated 23 July 2008 which stated:

"*We are please to advise you that your tender for .....has been accepted at your tendered price of .....*"

The acceptance by the Respondent of the Applicant's tender was then reinforced by the Respondent issuing a Purchase Order 850702/49229, dated 1 August 2008 annotated:

" *....Works as per your tender quote dt 10/07/08*"

20. The tendered pricing and its makeup is at the core of this dispute and to establish what constituted the "*tendered price*" we must turn to the offer made by the Applicant in their tender dated 10 July 2008.

21. A tender is a bid made in writing formally offering a price and is distinguished from an expression of interest which merely provides information to the other party. The recitals (a), (b) and (c) of the Applicant's "*Tender Form*" clearly establish that the tender is intended to be the making of a formal offer to the Respondent on the terms and particulars of the tender, for the works set out in the scope. The fully executed "*Tender Particulars*" submitted by the Applicant offers The Respondent a "*Subcontract Price: from Schedule A*" of *"$4,941,557.50 including GST*", to perform the works. It has already been established that the Respondent accepted that offer and in so doing also accepted the breakdown of the price from Schedule A; that is, a Schedule of Rates.

22. Schedule A is named "*Schedule of Rates*" but a careful reading of the information contained in that schedule shows that it is an overall price breakdown and not rates *per se* that would normally be found in a schedule of rates contract. I am of the view that the contract is a lump sum contract which also contains a schedule of rates breakdown of the lump sum price applied against each discrete portion of the works. While this breakdown neither infects nor alters the overall subcontract price submitted to the Respondent, by construction and reference to the schedule a rate can be calculated for each discrete portion of the works. The primary reason for this breakdown has been stated by the Respondent as pricing transparency, a position which I accept. Further, as submitted by the Applicant, the Respondent used this breakdown to assess and pay other claims in the contract, a position which I also accept.

23. Correspondence between the parties during the period of 26 February 2009 and 20 October 2009 inclusive shows reference to the pricing of the works and the breakdown of that pricing under the schedule as a basis of claim in the contract. It was not until 20 May 2010 when the Respondent denied the Applicant's variation request, VR15, on the basis that "*schedule of rates was not quantified in tender submission*" that reference to the schedule as a basis of claim was disputed. The Respondent, in denying VR15, gave rise to the Applicant's payment claim dated 24 August 2010. Its claim was grounded both in the Contract and under the Act by application of Schedule A, that is a Schedule of Rates claim.

24. I now turn to the entitlement of the Applicant to claim for the additional work it says it undertook in the contract. The starting point is the Conditions of Subcontract clause 12.2 which expressly prevents a claim arising out of "*Quantities in a Schedule of Rates:*

.....*if the items of work or quantities are incorrect in that they:*

(a) contain an incorrect quantity;

(b) contain an item which should not have been included; or

(c) omit an item which should have been included."

25. This clause does not stand alone in its application but operates in concert with clause 12.3 to establish parameters or "*Limits of Accuracy*" under which clause 12.2 can reasonably be applied. The Application otherwise would or could be limitless and as such could be construed as excessively harsh or unjust. A claim can be made if:

(a) "the actual quantity of an item ..... is greater or less than the quantity shown in the Schedule of Rates;

(b) the Managing Contractor has accepted a rate for the item referred to in paragraph (a); and

(c) the actual quantity of the item referred to in paragraph (a) is outside the limits of accuracy stated in the Subcontract Particulars."

26. Turning to the Subcontract Particulars, the limits of accuracy for schedule of rates based claims are prescribed as 115% as the upper limit and 85% as the lower limit. In other words, for a successful schedule of rates claim to exist in the contract the work must be either 15% more or less than the scope works represented and allowed for by the subcontractor in their price.

27. The Applicant's claim for the additional driveway works equates to 9% additional works and falls below the 15% threshold that would allow and trigger a schedule of rates claim in the contract.

28. In any event, the calculation of the second part of the Applicants' claim for additional foundation excavation is fatally flawed. An increase of 9% arising from the driveway reinstatement works was globally applied to the entire site including the driveway and footpath works to the sum of $606,150.00, item 2.8 of the schedule – an allocation for "*Removal and disposal of Surplus Spoil etc*". However, the payment claim arising from Variation VR15 can only exist in the additional 177 square meters of driveway works and not the total works because the remainder of the works has already been paid by the Respondent.

29. I accept the proposition set out by the Respondent in paragraph 22 of its submission that the Applicant, pursuant to the provisions of clause 7 of the contract, held the risk of informing itself of the work it was to undertake in the contract and as a "*competent and experienced contractor*" it should have or ought to have made suitable allowance in its price for the expected rise and fall quantum in the works.

30. Response 3(b) – The Variation Process Ignored. In this submission, the Respondent argues that:

".....the VR15 was not accepted, however, the Applicant proceeded with the works notwithstanding"

This submission relies on two dates in the contract: the Applicant's variation submission VR15 dated 2 March 2009 and the Respondent's letter, purportedly dated 20 May 2009, denying the variation.

31. The Respondent contends that the Applicant "*either:*

    (a) proceeded with the works prior to receipt of any approval under clause11.9; and/or

    (b) proceeded with the works notwithstanding the rejection of the variation request."

32. The Respondent also contends that the right to issue a payment claim in the contract is conditional upon authorisation of the work being claimed and, as no such authorisation was provided, no right to claim exists.

33. I reject the Respondent's proposition on all counts in this response. A careful reading of the letter sent to the Applicant by The Respondent denying the variation VR15 shows the date of that letter to be 20 May 2010 and not 20 May 2009 as the Respondent contends. This is an error of material fact and one that is fatal to the Respondents' argument.

34. While the documents provided to me in this adjudication do not hold the information, it would be fair to say, given the efflux of time in the contract, that the works the subject of VR15 would have been either wholly or substantively complete by the time the Respondent denied the variation.

35. Response 3(c) – Claim Process Ignored. This argument also holds the same fatal error of material fact as that set out above and fails for that reason.

36. Responses 3(d) and 3(e) – A claim based in equity and therefore no jurisdiction arises and VR15 is not a Payment Claim. The argument put forward by the Respondent suggests that the Applicant's Application is cast in equity and, as such, no jurisdiction arises to adjudicate the claim and that the claim cannot therefore be a payment claim under section 8 of the Act. In other words, the Respondent suggests that the entire basis of the Applicants' claim is that the contract should be put aside and that, without establishing any contractual entitlement, the Applicant contends that it is entitled to remuneration on a cost reimbursable basis which is akin to a *quantum meruit*

claim. That is, a claim "outside" the contract, which relies on no contract being on foot, as opposed to being a claim "under" the contract.

37. I do not accept the Respondents' proposition that the claim is based in equity. The Act can only be called in aid to enforce payment of a payment claim made pursuant to a construction contract. Claims on a *quantum meruit* basis or claims that are not made in accordance with the terms of the contract cannot be the subject of an adjudication application.

38. Payment claim VR15 submitted by the Applicant on 24 August 2010 has been grounded in the Contract and under the Act. It is a schedule of rates based claim and has been expressly calculated under the Schedule A, a Schedule of Rates, and as such falls under the provisions, *inter alia*, of clause 12 of the contract.

39. The provisions of section 8 of the Act are also express in that:

"*A payment dispute arises if:*

....the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partially disputed".

The Respondent expressly rejected the Applicant's payment claim by letter dated 3 September 2010. In that letter the Respondent acknowledges that the claim is a payment claim and cites the notice and time bar provisions of clause 16 of the contract as its primary basis of rejection of the claim.

40. As a result of the Respondent's payment claim rejection, a payment dispute commenced on 3 September 2010. This proposition was put forward by the Applicant in their submission and is one which I accept.

41. Accordingly, I find no material grounds arising under section 28 of the Act that would direct me to exercise a dismissal of the Application under either section 33(1)(ii) or section 33(1)(iv)(A) of the Act.

42. Finally, the Respondent also submits that the Application was not validly served in that their copy:

(a) for a large part of the document was "illegible and indecipherable"; and

(b) did not contain a copy of the contract.

43. The Australian Concise Oxford Dictionary defines the word "illegible" as "*not legible*" and the word "indecipherable" as "*that cannot be deciphered*". While faint in some parts of the text, I found no such fault with the documents served in the Applicants' Application.

As to a copy of the contract not being contained within the served Application, I draw the Respondent's attention to section 28(2)(b)(i) which states:

"*The application must.....*

(b) state the details of or have attached to it:

(i) the construction contract involved or relevant extracts of it"

The Applicant has correctly "stated the details" of the contract both in its Application and the attachment coverpages of that Application.

44. I can find no grounds to dismiss the Application arising from purported illegible or indecipherable documents or a failure to attach a copy of the contract to the Application.

Summary

45. In summary of the material findings, I consider:

(a) the contract to be a lump sum contract which also contains a schedule of rates applicable to discrete portions of the works;

(b) the variation request VR15 to have been validly submitted under clause 11 of the contract;

(c) the payment claim resulting from the rejection of VR15 to have been validly submitted under clause 12 of the contract;

(d) the payment dispute to comply with the provisions of section 8 of the Act; and

(e) the payment claim to ultimately fail under the contract clause 12 due to it being outside the limits of accuracy for a claim to subsist in the contract.

46. Accordingly, I determine that the amount to be paid by the Respondent, The Respondent, to the Applicant is “nil”.

47. There is no entitlement to interest. I make no decision under section 35 of the Act.

48. While I have found the application to have failed, I do not consider the Applicant’s conduct in bringing the application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.

49. I make no decision under section 36(2) of the Act. The parties must bear their own costs.

Confidential Information

50. The following information is confidential:

(a) the identity of the parties;

(b) the identity of the principal; and

(c) the location and nature of the works.

DATED: 31 December 2010

Rod Perkins
Adjudicator No. 26