

AN ADJUDICATION PURSUANT TO  
THE CONSTRUCTIONS CONTRACTS  
(SECURITY OF PAYMENTS) ACT

XXXXXXXXXXXXXXXXXXXX

AND

XXXXXXXXXXXXXXXXXXXX

On 22 June 2006 XXXXX ("the Contractor") gave notice of a Payment Dispute pursuant to the *Construction Contracts (Security of Payments) Act*.

I have been appointed adjudicator pursuant to the Act and am required to make a determination.

**The Circumstances**

A request for tender was issued by XXXXX ("the Principal"). The Request contained: Conditions for Tendering; Conditions of Contract; and Annexures. There was an addendum 1 being the Tender Form also attached.

On 10 August 2005 the Contractor completed a tender form and subsequently submitted it to the Principal.

On 6 September 2005 the Principal accepted the Contractor's tender at scheduled rates as submitted.

The contract was given No XXXXX and concerned [site name] - Repairs and Maintenance of Refrigeration and Air Conditioning Equipment for a period of 36 Months. The contract was to commence on 6 September 2005.

On 30 May the Contractor submitted an invoice No 35269 seeking payment of \$6688 for:

COSTS INCURRED TO PROVIDE CALL OUT SERVICE OUTSIDE OF NORMAL HOURS FROM 06 SEPTEMBER 2005 TO 26 MAY 2006.1E. 38 WEEKS X \$160.00 PER WEEK.

The invoice was returned without action on 5 June 2006.

The invoice was returned as the Contractor on 12 April 2006 had sought approval of a variation to the contract which had been denied.

The Contractor sought a variation to the contract to include an item in the Schedule of rates that allowed the Contractor to claim the call out allowance the Contractor has had to pay its staff to comply with a requirement of the contract that the Contractor provide skilled people on standby for call out 24/7 for the period of the contract. (Clause 3.6)

The request for the variation was denied on 24 April 2006.

A further request was made on 3 May 2006 which was denied on 29 May 2006.

The Contractor gave notice of a Payment Dispute pursuant to the Construction Contracts (Security of Payment) Act 2005 by letter 22 June 2006.

## **The Contract**

I have been provided with a copy of the relevant Request for Tender which contains the conditions of tendering and the conditions of contract and the Schedule of Rates and annexures.

I am allowed as adjudicator to review these documents to see where the terms and statements assists either of the parties in their submissions. (s34) I note I am to look only at the matters raised by the parties in their submissions unless I seek further submissions on matters not already raised. (s34)

The Conditions for Tendering and the Contract provide:

- The Principal requires the Contractor to lodge a tender in the form required by the conditions of tendering (1.1);
- The tenderers had to inform themselves of fully of all circumstances and conditions relating to submitting a Tender (1.2);
- the tenderers had to inform [the Principal] of any discrepancy error or omission in the RFT as early as possible but before the close of the tender;
- Tenders had to be submitted for the whole of the works (1.8);
- All rates tendered are to include for labour , materials ... and other costs as applicable (1.10);
- Any schedule of rates shall be completed and lodged. Part tenders will not be considered. If the Schedule is not fully completed the tender may be informal and rejected (1.10)
- Tenderers have to offer for the whole of the services (1.11);
- the tender is assessed by taking into account completeness, conformity with specified requirements, price, reasonableness of price (1.12);

- the Principal made an estimate of the quantities in the Schedule of Rates (2.1.2);
- The Contractor is to be paid on a Schedule of Rates Basis;
- There is provision for the adjustment of contract rates (2.1.6). The clause does not speak of the addition of rates where they are not already provided for. The clause does not allow for the retrospective adjustment of the contract rates;
- Works means the whole of the work to be executed in accordance with the contract including variations and remedial works (2.2);
- the Contractor is to carry out all work, which obviously forms part of the Contract even though not specifically listed or detailed on the technical sections or drawings. (2.17) I am not provided with technical sections or drawings so this paragraph may not be applicable;
- The superintendent is able to direct a variation to the Works (2.32);
- The Contractor agreed to provide callout labour 24/7 (3.6);
- Any variation from the extent of the work ordered has to be approved by the superintendent (4.2);
- If an item of work is ordered pursuant to a Schedule of Rates item for Scheduled Work and the Contractor considers the item to be outside the scope of the Schedule of Rates item the Contractor shall obtain the approval of the Superintendent prior to carrying out the varied works (4.2);
- Upon receipt of a request for service the Contractor shall despatch a fully qualified, equipped and experienced technician/trades person to the Hospital location to carry out all necessary works to render to an efficient serviceable condition (4.3);
- The Contractor shall maintain a twenty four (24) hour emergency repairs and maintenance service for the duration of the contract. The sum for a callout is fixed at up to \$300 (4.6);
- The Ordering Officer shall either instruct the Contractor to proceed with the additional work at the scheduled rate, or with the issue of a further work request, or request a firm quote from the Contractor to complete the work;

- This estimate or quote shall be based on the scheduled hourly rate plus materials (4.8);
- Payment for Scheduled Work will be made at the tendered rate (5.5);
- The rates tendered are deemed to represent the full value of the work. Work inclusive of labour, materials .....all incidentals to complete the work (e.g. fixings, glue, ..... and the like), attendance, supervision and for overheads and profit (5.6);
- Labour: other than labour for which a Schedule of Rates item for Scheduled Work is provided, will be paid at the tendered rate (5.8);
- Urgent Call Out Fee: This fee applies where the Contractor is called out to attend work outside of normal hours. The rates tendered are deemed to provide full reimbursement of costs associated with access requirements, establishment of work brief, measure up, material procurement and delivery to site. Only one Urgent Call Out fee per order for work will be issued (5.10);

The SCHEDULE OF RATES also includes terms of the agreement.

The terms include the following:

- The Tenderer shall complete the attached Schedule of Rates by inserting in the column headed "Rate" the rate or unit price for the items of work described. All prices are to include GST.
- Hourly rate after hours shall be calculated to cover applicable penalty rates and loadings.
- After hours emergency call out fee shall be loaded to cover applicable penalty rates and overhead costs associated with call cuts.

## **The Act**

Section 27 of the Act provides that:

If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under Part 3 of the Act.

A payment dispute is defined in section 8.

A payment dispute arises if -

- (a) when 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 partly disputed;

- (b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or
- (c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.

There is in this matter a payment claim and the claim has been rejected.

There is therefore a payment dispute and there has been an application to have the matter adjudicated. An adjudicator has been appointed.

Pursuant to section 33 the Adjudicator must determine

- whether the contract concerned is an construction contract;
- whether the application has been prepared and served in accordance with section 28;
- whether some other body has made a decision about the dispute;
- whether it is possible to fairly make a determination considering the complexity of the matter and the time given;
- determine on the balance of probabilities whether any party to the dispute is liable to make a payment or return any security and if so determine the amount and interest and the latest date for payment;

## **Construction Contract**

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: section 5.

- (a) to carry out construction work; - [as defined in s6]
- (b) ...

Construction Work includes maintaining airconditioning installed or fixed in a building. Section 6.

The Contract concerns the maintaining of airconditioning fixed to a building.

I consider this contract to be a construction contract.

## **Section 28**

There is no submission that Section 28 has not been complied with and I see no reason for me not to find that it has been complied with.

## **Other Body**

I am not aware of any other body referred to in the Act that is considering this dispute let alone having made any relevant decision relating to the dispute.

## **Time and Complexity**

The facts of the matter are not so complex as to preclude an adjudication being made in this dispute. The time provided by the extension of time does not preclude an adjudication being made.

## **The Determination**

The Principal is not liable to make any payment to the Contractor as claimed in invoice No 35269.

## **The Submissions**

### **The Contractor**

The Contractor's submissions are contained in its correspondence of 12 April 2006, 27 April 2006 and 3 May 2006. See reference 22 June 2006.

The letter of 12 April 2006 states the Contractor is seeking a variation to the contract as the Principal had omitted from the Request for Tender and in particular the Schedule of Rates ("SoR") a line item that allowed the Contractor to claim the call out allowance it was required to pay its employees as a result of clause 3.6 of the contract.

Clause 3.6 required the Contractor to have staff on call 24/7 so that they could attend to the works if the Superintendent of the Principal required the Contractors staff to attend.

The Contractor wanted the variation to be retrospective and prospective.

The content of the letter of 27 April 2006 is not relevant as it concerns who the Contractor is to direct its concerns to.

In its letter of 3 May 2006 the Contractor states:

- It is not looking to vary any tendered rate;

- The Contractor agrees with clause 5.6 and says it is not looking to vary the existing rates;
- The SoR allegedly omitted an item to allow for the Contractor to claim for the call out allowance;
- Another contract allowed the Contractor to price the call out allowance;
- The Contractor is seeking a variation to remedy the alleged defect/omission in the SoR;
- The call out allowance is necessary to ensure the Contractor has the skilled people on stand by;
- If the contract is not to be varied the Principal should delete clause 3.6 from the contract.

The Contractor's argument is that the contract does not yet make allowances for the claim the Contractor wishes to make and so there needs to be a variation to allow for that claim.

### **The Respondent**

The Respondent submits the following:

- The applicant should have been aware of the requirements of clause 3.6;
- The costs associated with the callouts should have been factored into item 1 of the Schedule of Rates;
- There was no requirement for a separate line item to be included in the SoR;
- There was no omission or error;
- The contract precludes the variation requested;
- A variation would provide the Contractor with an unfair advantage to the other tenderers who did not get the job;
- The Contractor is seeking the payment of an additional amount in respect of a service that was specified in the Request for Tender;
- The Contractor overlooked the item 3.6 in submitting its hourly rates for labour;

- The fact of there being provision of a separate line item in the SoR of other contracts is irrelevant;
- The Contractor is bound by the terms of the contract it tendered for.

## Legal Principles

I refer to some of the established principles of interpretation of contracts which are of assistance in this matter.

"It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with the other.

If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear .... unreasonable, and notwithstanding that it maybe guessed that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust, ....."

*Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] 129 CLR 99 at 109 (per Gibbs J.):-

The grammatical and ordinary sense of the words is to be adhered to, unless they lead to some absurdity or to some repugnancy or inconsistency with the rest of the instrument. The court is to ascertain what the parties mean by the words which they have used giving such words their ordinary sense and meaning except to the extent of avoiding some absurdity or inconsistency (*Watson v. Phipps* 1985 63 ALR 321 at 324).

The court will have regard to the time or commercial purpose of the transaction objectively determined (*Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales* 1982 149 CLR 337 at 348 – 351). This process does not permit the addition of a term not in fact agreed (*Codelfa* at 401).

Where there is a formal document setting out a complex contractual relationship and the contract expressly mentions some things it is often inferred that other things of the same general category which are not expressly mentioned were deliberately omitted (*Australian Broadcasting Commission v. Australian Performing Rights Association Ltd* 1973 129 CLR 99 at 114-115; *Aspdin v. Austin* 1844 QB 671).

## Consideration

The adjudicator can only determine whether a party to a dispute is liable to make a payment and if so determine the amount etc (Section 33).

The Contractor has admitted that the contract as it presently reads does not require the Principal to pay the sum claimed in the Contractor's invoice No 35269.

The Contractor says for there to be a liability there has to be a variation to the contract.

The adjudicator has no power to order a variation to the contract.

If the contract does not provide for the Principal to pay the Contractor the sum claimed then the claim has to be dismissed.

That should be the end of the matter.

The Contractor may however not be correct in his submission that the sum is not payable so I will consider the contractual terms.

- It is clear that the Contractor has to provide the call out service 24/7 (Clause 3.6);
- The Contractor is deemed to have been aware of this requirement when it tendered for the works. *Toll (FCGT) Pty Ltd*;
- If there was a defect or error in the tender the Contractor is advised to point this out before the close of the tender (1.2);
- The tender has to be for the whole of the works, (1.8) and provide for the whole of the works (1.11);
- The rates tendered are to include all costs as applicable (1.10);
- The rates tendered are deemed to represent the full value of the work including labour (5.6);
- The Urgent Call Out Fee does not include labour costs (5.10);
- The hourly rate after hours shall be calculated to cover applicable penalty rates and loadings (SoR);
- After hours emergency call out fee shall be loaded to cover applicable penalty rates and overhead costs associated with call outs (SoR);

There is no absurdity or repugnancy or inconsistency with the provisions of the contract and in my view they all support the submission by the Principal that the sums included in the SoR had to cover the whole of the works and had to be loaded accordingly. Further, there was no requirement that there be a single line item to cover the call out allowance.

The contract required the Contractor in order to recoup a proper fee to comply with clause 3.6, to load both the rates provided for in the SoR and in particular the rates for labour as provided for in the schedule.

There is nothing in the contract which assists the Contractor with its claim for an extra payment to cover the payment by the Contractor of a call out allowance to its employees.

Any attempt to imply a term that the Principal should pay an extra for the call out allowance should fail as the term would be inconsistent with the terms of the contract and the contract is effective without the implied term (*BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266 at 283*).

It is clear from a consideration of the contract as a whole the Contractor should have included in the list of rates provided a provision for the call out allowance or it should have taken its problem to the attention of the Principal prior to tendering for the works.

The Contractor is right in his submission that there is no provision in the contract as it presently reads that allows it to claim an extra sum for the payments it has made to its employees as callout allowance.

The defendant signed the contract. Having done so he is bound by the terms and it is immaterial that he has not read it and does not know its contents (*Toll (FCGT) Pty Ltd v Alphapharm Pty Ltd [2003] NSWSC 75*).

As the defendant has signed the document the court is not interested in a subjective examination of what a party understood the document to mean or of any miscarriages in a mental process that led him to sign it.

The nub of the Contractors argument is that the Principal did not include an item in the schedule of rates that allowed the Contractor to price the provision of providing a call out service. The Contractor says that the Principal was in error in the tender documents.

The Contractor appears to have noticed the alleged error after the contract was signed and the services were rendered.

The Principal argues that the cost of the provision for staff to be on call is already provided for in the sums provided by the Contractor in its tender and hence the extra claim for the provision of the callout services is not valid.

It may appear to some that it is unfair that because the SoR did not provide a single line for the claim the Contractor made a mistake in the rates it submitted it cannot now claim that sum but the adjudicator cannot rewrite the contract to

correct any such perceived unfairness. I do not consider the document to be unfair should there be any suggestion that I am of that view. The contract is clear as to what was to be included in the rates tendered. The mistake, whatever it was and which need not be determined, was on the part of the Contractor.

The Principal is not bound to include a line for a call out allowance just because it has done so on a previous occasion, if that be true, which question I do not have to decide. This is a separate contract to any other and the terms offered in the Request for Tender can be what the Principal wants them to be. There is no suggestion of a custom in the industry that a line item for a call out allowance would be included in the SoR. In any event if the line item is not included and should have been an adjudicator cannot vary the contract to comply with any such custom. The argument is therefore irrelevant to any determination made pursuant to the Act.

The Contractor has in its submissions suggested there is a mistake. If there is a mistake the remedies are rectification, declarations as to the contract being void from the beginning or refusal of specific performance and can include consideration of factors such as duress and unconscionability.

An adjudicator does not have any power to make orders that cover the remedies for mistake and so I refuse to consider the legal issue of mistake.

There is no suggestion of misrepresentation or misleading conduct in the submissions or the facts presented in the application and response and there is thus no need for me to consider the remedies available if those factors had tainted the making of the contract.

For the reasons given above I dismiss the application.

### **Not for Publication**

The parties have not indicated that any information in application and response to the dispute are of a confidential nature so as to make that information not suitable for publication and hence there is no information in the reasons that the parties have said is of a confidential nature so as to make that information not suitable for publication.

David Alderman 29 July, 2006

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