

ADJUDICATOR'S DETERMINATION

PURSUANT TO

Construction Contracts (Security of Payments) Act 2004

NORTHERN TERRITORY OF AUSTRALIA

APPLICANT:

PRINCIPAL:

RESPONDENT:

DIRECTORS:

**Adjudication Number 19-08-01
Date 16 June 2008**

I, John Brears, as the appointed Adjudicator pursuant to the (*Act*), determine that:

1. The Respondent is liable to pay to the Applicant \$2,505.00 plus \$73.24 interest before 20 July 2008.
2. My fees are to be paid equally by Applicant and Respondent.

1. Appointment of Adjudicator

I was appointed as Adjudicator by the Territory Construction Association (TCA) to determine this dispute on Friday 2 May 2008.

2. Notification of the Appointment of Adjudicator and Teleconference.

I notified both parties by email on 7 May 2008 that I intended to hold a teleconference at 2.00 pm on 12 May 2008.

3. Teleconference

The teleconference was held at 2.00 on 12 May 2008.

3.1 At the (TCA) offices in Darwin, NT, were

John Brears	Adjudicator
Krystel Tilley	Finance Manager for the TCA

3.2 At the Applicant's offices in Alice Springs was ...

3.3 At the Respondent's offices in Alice Springs were ...

3.4 I advised that from the "Notice of Dispute" and attached documentation, I had concluded that the Applicant and the Respondent had entered into a "Construction Contract" as defined under the (*Act*) Section 5(1)

Neither party disagreed.

3.5 I also concluded that the "construction work" was carried out in the Northern Territory as defined in the (*Act*) Section 6(1).

Neither party disagreed.

3.6 I further concluded that a payment dispute had arisen as defined in the (*Act*) Section 8(a)
Neither party disagreed.

3.7 I advised both parties about my current employment and that I had never had any previous involvement with either party before.

Neither party raised any suggestions that I had a "conflict of interest".

3.8 I requested that both parties nominated one person to be the point of contact for each party.

The Applicant nominated ...

The Respondent nominated

3.9 I noted that the Applicant had requested the appointment of an Adjudicator on 2 May 2008, and the Respondent and the Adjudicator had received the Applicant's submission on 6 May 2008.

I determined that the Respondent had till the Close of Business on 19 May 2008 (10 working days) to respond.

The Adjudicator would then hand down his decision on or before 2 June 2008.

This period was subsequently extended until 16 June 2008 with the approval of the Registrar.

- 3.10 I asked both parties to deposit \$1,000 each with the Financial Manager of the (TCA) within 48 hours. This money would be held in the (TCA) Trust Account until the Adjudicator had made a determination and directed how these monies were to be dispersed.

DOCUMENTS REGARDED IN MAKING THE DETERMINATION

4. In making the Determination I have had regard to the following
- 4.1 The provisions of the *Construction Contracts (Security of Payments) Act 2004*
- 4.2 The Adjudication Application dated 25 April 2008 (and 28 April 2008) and additional correspondence which consists of:
- (1) Covering letter (8 pages)
 - (2) Appendix 1 (7 pages)
 - (3) Appendix 2 (26 pages)
 - (4) Letter to (TCA) applying for an Adjudicator to be appointed (2 May 2008) (1 page)
 - (5) Email from the Applicant to the Adjudicator dated 12 May 2008 giving more detail about the "Statement of Claim"
 - (6) Email from the Applicant to the Adjudicator dated 21 May 2008 commenting on the response from the Respondent
 - (7) Email from the Applicant to the Adjudicator dated 26 May 2008 with letter attached (26 May 2008) giving further comments on the response from the Respondent
 - (8) Email from the Applicant to the Adjudicator dated 4 June 2008 with a response to the Respondent's response dated 15 May 2008
 - (9) Email from the Applicant to the Adjudicator confirming that further payments had been received by the Applicant.
- 4.3 The Response from the Respondent and additional correspondence which consists of:
- (1) Covering letter dated 15 May 2008 (3 pages)
 - (2) Attachment A (3 pages)
 - (3) Attachment B (2 pages)
 - (4) Attachment C (1 page)
 - (5) Attachment D (1 page)
 - (6) Attachment E (2 pages)
 - (7) Attachment F (1 page)
 - (8) Attachment G (1 page)
 - (9) Attachment H (1 page)
 - (10) Attachment I (22 pages)
 - (11) Attachment J (1 page)
 - (12) Attachment K (1 page)
 - (13) Attachment L (1 page)
 - (14) Attachment M (1 page)
 - (15) Attachment N (1 page)
 - (16) Attachment O (1 page)

- (17) Attachment P (5 pages)
- (18) Attachment Q (1 page)
- (19) Attachment R (2 pages)
- (20) Attachment S (10 pages)
- (21) Attachment T (2 pages)
- (22) Attachment U (6 pages)
- (23) Attachment W (58 pages)
- (24) Email from the Respondent to the Adjudicator dated 16 May 2008 confirming details of when response sent
- (25) Letter from the Respondent to the Adjudicator dated 29 May 2008 responding to correspondence from the Applicant
- (26) Letter from the Respondent to the Adjudicator confirming that invoice 166 had been paid, dated 3 June 2008
- (27) Email from the Respondent to the Adjudicator dated 10 June 2008 confirming details of payments made to the Applicant.

5. DETERMINATION

The *Act* requires in Section 33 (1) (b) that the Adjudicator must

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

- (1) The amount to be paid, or security to be returned, and any interest payable on it under Section 35; and*
- (2) The date on or before which the amount must be paid or the security must be returned”.*

The “Notice of Application for Adjudication of a Payment Dispute” (25 April 2008) relates to four invoices submitted by the Applicant for payment by the Respondent as follows:

I consider that these invoices comply with the requirements of the *Act*.

Invoice Number	Date	Amount
162	6 March 2008	\$4,873.00
163	11 March 2008	\$5,632.00
164	17 March 2008	\$3,388.00
166	26 April 2008	<u>\$4,602.40</u>
	Total amount invoiced	\$18,495.40

Both parties now agree that the following payments have been made by the Respondent to the Applicant

Date	Amount
20 March 2008	\$3,000.00
8 April 2008	\$5,000.00
29 April 2008	\$3,388.00
3 June 2008	<u>\$4,602.40</u>
Total amount paid	\$15,990.40
Amount still unpaid	\$2,505.00

The Respondent advises that they are holding this \$2,505.00 as retention on the Applicant due to “unsatisfactory reporting”.

To consider if this “holding of retention” is legitimate, it is necessary to consider the terms of the agreement between the Applicant and the Respondent for the work that Applicant did.

The only copy of the “letter of offer” is in point 5 of the Applicant covering letter (25 April 2008). It is unsigned but the Respondent has not disputed its existence, so I have taken it to be the form of agreement between the Applicant and the Respondent) for the work that the Applicant was engaged to do for the Respondent.

One paragraph in this “Letter of Offer” says

“Sub-Contractors verified invoices would be paid same day as receive progress payments from No exception”.

Under the *Act*,

Part 2 – Prohibited and Implied Provisions of Construction Contracts,

Division 1 – Prohibited Provisions

12. Pay if paid and pay when paid provisions.

The inclusion of “pay when paid” clauses, has no effect, because they are deemed to be a prohibited provision.

The Respondent has in their response (15 May 2008) point 7 now accepted this principal.

The invoices submitted by the Applicant were based on timesheets for work carried out by the Applicant and checked by the Respondent, (attachment 5 to Respondent response) and I assume approved by the Respondent, to represent the time spent by Applicant working for Respondent.

I consider that when one party such as the Respondent engages another party to work for them on an hourly basis, and the hours worked are not in dispute, then the Respondent should pay the other party for all of the agreed hours, even if the work produced is unsatisfactory. That is the nature of engaging a party to work on an hourly rate, the party doing the engaging takes all of the risk involved if the other party being engaged produces work that is not acceptable to the first party.

I consider that if the Respondent found the reports prepared by the Applicant to be unsatisfactory, then the Applicant should have been asked to amend them to produce what the Respondent required and also paid for this additional time.

It appears that the relationship deteriorated and then broke down, over the dispute about what form the reports should be in, and the fact that the Respondent had not paid the Applicant’s invoices in full. The reports were not amended and the Applicant’s engagement by the Respondent was terminated.

It is not the Adjudicator’s role to assess if the reports were to an acceptable standard or not. This should, in my opinion, have been determined by discussion and agreement between the Applicant and the Respondent and possibly the Client.

The “Letter of Offer” does not specify how many days after agreement of hours worked (on timesheets) and submission of invoices, that payment would be made, when the clause about “pay when paid” is discounted.

I consider that normal commercial terms would be payment to be made not more than 28 days after the invoice is submitted. I will use this period in making my calculations of any interest that might be due.

In summary, I consider that the Respondent should pay the Applicant the total amount of money invoiced on the four invoices submitted. Therefore allowing for previous payments, the sum of \$2,505.00 is still outstanding and should be paid within 28 days of the date of this decision.

Calculation of any Interest Due

The clause in the *Act* relating to the calculation of any interest due is Clause 21, and the provisions in the Schedule Implied Provisions Division 6.7.

The interest due is calculated, considering the date when payments should have been made, based on 28 days maximum after submission of invoice, and the actual date that they were paid.

Interest rate used is the 90 day Bank Bill Rate on 13 June 2008.

I calculate that the total interest due is \$73.24.