

ADJUDICATION

PURSUANT TO

THE CONSTRUCTION CONTRACTS (SECURITY OF PAYMENT) ACT 2004

IN THE MATTER OF A PAYMENT DISPUTE

BETWEEN

APPLICANT

AND

RESPONDENT

COMPLETION DATE : 24 SEPTEMBER 2010
RELEASED DATE : 27 SEPTEMBER 2010
ADJUDICATOR : MR D V COURT
WHEREAS:

1. The construction contract from which the Adjudication Application arose is for supply and installation of a 250KL stainless steel diesel fuel storage tank and related fuel pipe system works as part of the [project description] at the [project site], Darwin, Northern Territory (“the Project”).
2. Contract No. C703/3010 in this regard was executed as an Agreement by the Applicant and the Respondent (“the Parties”) on 28 July 2009.
3. A payment dispute arose between the Parties in relation to payment of the Applicant’s May 2010 Payment Claim whereby the Applicant contends it is due under this adjudication the sum of \$978,680 (excl GST) being made up of \$960,376 (excl GST) in relation to variation claim UE-04 and \$18,304 (excl GST) for half release of retention.
4. **Attached** in Appendix A is a summary comparison of the Applicant’s Payment Claim for 25 May 2010 and the Respondent’s Certificate dated 22 June 2010.

Appointment of Adjudicator

5. The Applicant applied on 24 August 2010 to the Institute of Arbitrators and Mediators Australia, (“IAMA”) being a prescribed appointor, to appoint an Adjudicator to adjudicate the payment dispute which has arisen.
6. IAMA appointed me on 27 August 2010 as the Registered Adjudicator to adjudicate the said payment dispute.
7. Having regard to the provisions of the *Construction Contracts (Security of Payments) Act* (“Act”), and after satisfying myself that I had no material interest in the Parties, the payment dispute concerned or in the construction contract under which the dispute has arisen, I confirmed my acceptance of the Adjudication Application, by way of letter ref. 20-10-01/002 dated 31 August 2010, which was sent to the Parties on that same day.

Evidence Regarded in this Adjudication

8. In arriving at my decision under this Adjudication I have taken into consideration the following:
 - 8.1. The provisions of the Act, associated Regulations and Guidelines.
 - 8.2. The provisions of the construction contract from which the Adjudication Application arose.
 - 8.3. The Applicant's Application for Adjudication ("Application") dated 24 August 2010 (received 27 August 2010) and all attached documents.
 - 8.4. The Respondent's Adjudication Response ("Response") dated 7 September 2010 (received 7 September 2010) and all attached documents.
 - 8.5. All matters agreed and/or clarified with the Parties since my appointment as Adjudicator for this dispute, including the written submissions requested of the Parties 16 September 2010 (provided 17 September 2010) and the Registrar's acceptance of my request to extend the time for making my decision under section 33(1) of the Act (Section 34(3)(a) refers) to Friday 24 September 2010.

Clarification of Formal and Procedural Matters

9. In coming to my decision on this matter I note the following formal and procedural matters:
 - 9.1. Neither Party contended that the adjudication should not be dealt with in accordance with the Act, associated Regulations and Guidelines;
 - 9.2. Neither Party had any objection to the Adjudicator;

- 9.3. Neither Party rejected my request for the Parties to reimburse my fees, on the basis that the fee is \$220 per hour (not GST registered) for all time spent by me in relation to the adjudication, commencing upon receipt of the Application from IAMA; and,
- 9.4. Neither Party rejected my request for the Parties to reimburse me for all out of pocket expenses incurred in connection with the adjudication.
- 9.5. The Applicant and the Respondent each paid \$3,750.00 as security for my fees on 3 September 2010 and then each made a further payment of \$2,850.00 as security for the balance of my fees on 27 September 2010.
- 9.6. Neither Party contended that the payment dispute had been dismissed or determined with an order, judgement or other finding by an arbitrator or a court or other body dealing with a matter which is the subject of the application.

THE PAYMENT DISPUTE

10. The Applicant's May 2010 Payment Claim is made up of 9 items under the Variation section. Whilst there appears to be differences on more than one of the variations claimed, the Applicant has claimed a payment dispute has arisen in relation to just one item of the variation section under this adjudication.
11. The Applicant contends it is due under this adjudication the sum of \$978,680 (excl GST) being made up of \$960,376 (excl GST) in relation to variation claim UE-04 and \$18,304 (excl GST) for half release of retention.

BACKGROUND

12. The Applicant states under the opening paragraph of its Adjudication Application, (paragraph 1(i)) '*...the Applicant was engaged by the Respondent to supply and install a 250KL Stainless Steel Diesel Fuel Storage Tank and related fuel pipe system works...*' The Respondent concurs with this description of the scope of works for the Project.

13. 25 May 2009 the Respondent issued an Invitation to Tender to the Applicant which included amongst other things ‘Tender Issue’ drawings.
14. Between 4 and 22 June 2009 the Applicant issued three complimentary quotations that cumulatively were accepted on 28 July 2009 when, ‘...*the Applicant and the Respondent entered into a Subcontract for the Applicant to supply and install a 250kl Stainless Steel fuel tank and related system pipe works...*’ (Applicant’s paragraph 4(i) refers)
15. The Applicant contends its understanding at tender was, ‘...*that the fuel tank design had been 100% engineered and designed, so that the Applicant’s role as fabricator/constructor...was to engage a company to provide...fabrication drawings...to allow fabrication and installation of the fuel tank...*’ (Applicant’s paragraph 1(ii) refers). The Respondent disagrees with this contention and makes reference to various contract documents and express wording within specific contract clauses in support of its position.
16. The Applicant engaged Worley Parson’s (WP) as its design consultant to generate its fabrication drawings.
17. During construction the Applicant alleges major design changes were made. In support of this contention the Applicant makes express reference to ‘...*the period from August 2009 to December 2009, [where] the Applicant issued 69 requests for information (RFI’s) to the Respondent in connection with the original tank design provided at tender...*’ (Applicant’s paragraph 8(i) refers).
18. To follow is a list of the major design changes the Applicant claims under this Adjudication as variations to the contract:
 - 18.1. Increased length of the tank and increased number of components;
 - 18.2. Inclination of the tank shell;
 - 18.3. The pressurization of the tank;
 - 18.4. The requirement for stainless steel saddles which were offset;

19. A large portion of this adjudication is dedicated to dealing with the effect the Applicant claims these purported major design changes have had on its works in terms of their purported impact on the Applicant by way of design, fabrication and the programme impacts. For the avoidance of duplication I do not propose to repeat all the contentions made by the Applicant in this regard, suffice to say I have read and taken note of such. I will however make reference to certain aspects of the Applicant's contentions as I consider necessary when coming to my decision on this matter.
20. The Applicant's variation claim UE-04 entitled 'out of scope design and construct work' captures the financial impacts it claims arise from, '*...the additional design, preparation, fabrication, installation and commissioning costs incurred... implementing the major design changes...*' (Applicant's paragraph 18(i) refers)
21. On 26 January 2010 the Respondent asserts that, '*...the fuel tank was delivered to the [Respondent's] site and it was installed and connected on 4 February 2010...*' (Respondent's paragraph 23 refers)
22. On 25 May 2010 the Applicant issued a payment claim to the Respondent which the Applicant claims, '*...was issued in accordance with Clause 12.6 of the Contract...*' (Applicant's paragraph 16(i) refers)
23. With the exception of its contention concerning release of half retention, payment in relation to the Applicant's variation claim UE-04 included within its 25 May 2010 payment claim is the only item the Applicant has raised to dispute under this adjudication.
24. The Respondent asserts in relation to claim UE-04 that, '*...the first [the Respondent] was aware of this claim was approximately three months after the completion of the Works, when [the Applicant] submitted its Payment Claim on 25 May 2010...*' (Respondent's paragraph 24 refers)
25. On 26 May 2010 the Respondent wrote to the Applicant rejecting the payment claim of 25 May 2010.
26. The Applicant contends, '*...the Respondent's 26 May 2010 letter did not purport to constitute a Payment Statement under the Contract...*' because it '*...was not an*

assessment of the Payment Claim as contemplated by clause 12.7 of the Contract... (Applicant's paragraph 21(i) refers). Conversely, the Respondent contends the Applicant, *'...failed to submit a valid payment claim in accordance with the Contract...'* (Respondent's paragraph 6(a) refers)

27. 22 June 2010 the Respondent issued a Subcontract Payment Advice/Certificate assessing the Payment Claim in the amount of \$7,099 (excl GST).
28. The Applicant contends that the payment dispute arose for the purpose of the Act on 22 June 2010 when the Respondent issued its Payment Advice, or otherwise on 29 June 2010 because, *'...the Respondent failed to make payment in full within 34 days after receiving the Payment Claim...'* (Applicant's paragraph 20(i) refers). The Respondent contends that, *'...no payment dispute has arisen for the purpose of the Payments Act, therefore the adjudicator has no jurisdiction to determine the Application...'* (Respondent's paragraph 6(b) refers)
29. In closing and in support of its position, the Applicant contends:
 - 29.1. in relation to certain clauses of the Contract, that, *'...the parties have, by their conduct, waived their rights to rely on the procedural requirements of clause 12.6, and equally clause 16 of the Contract...'*, (Applicant's paragraph 21(viii) refers); and,
 - 29.2. in relation to the implied provisions under the Act outlined in Division 2, that, *'...a contractor is entitled to be paid a reasonable amount for performing its obligations under a contract...'* (Applicant's paragraph 21(vii) refers)
30. In Response to the Applicant's assertions, the Respondent contends:
 - 30.1. The Applicant has generally, *'...failed to comply with the procedural requirements of the Contract...'*, and as a result is precluded from claiming the sums it does within the May 2010 Payment Claim (Respondent's paragraph 6(c)(ii) refers); and/or,
 - 30.2. The 'changes' the Applicant refers to under UE-04 are in any event either explained away by reference to annotations on drawings and within the

specification, and/or by reference to Contract terms and correspondence and as such are the responsibility of the Applicant and its design consultant.

31. The Applicant submitted an Application for Adjudication dated 24 August 2010 seeking payment in full of the disputed sums claimed above plus interest, plus costs in connection with the adjudication.
32. The Respondent rejected the Applicant's contentions within its Response dated 7 September 2010 and provided details it claims support its assertions in this regard.

FINDINGS AND REASONS

33. Section 26 of the Act outlines the object of the adjudication process being to *'...determine the dispute fairly and as rapidly, informally and inexpensively as possible...'*
34. Sections 28(2) & 29(2) of the Act defines how an Application and Response for adjudication *'must'* be prepared and what details *'must'* be included and attached to them, including *'...all the information, documents and submissions on which the party making it relies in the adjudication...'*
35. Both Parties have provided extensive details in support of their contentions.
36. I have approached this adjudication and my decision in line with the fundamental objectives of the adjudication process, mindful of the requirements of sections 28(2) and 29(2) of the Act, and have made a weighted judgement as to the merits of the dispute in question based on the facts as presented.
37. Having read, considered and taken due note of the submissions of the Parties or representatives as appropriate under this Adjudication, I find as follows:

Jurisdiction

38. The Respondent has raised issue over whether a payment dispute has arisen for the purpose of the Act. In summary, the Respondent's contention is that for a

payment dispute to arise under the Act there has to be a valid payment claim and that since the Respondent's further contention is that the Payment Claim is invalid, it follows (according to the Respondent) that a Payment Dispute has not arisen, meaning the Applicant cannot satisfy the requirements of section 28 of the Act and therefore raise the matter to Adjudication.

39. If this contention has merit then it is the Respondent's position that I have no jurisdiction to determine the Application and that I must dismiss the Application without making a determination of its merits (section 33(1) of the Act refers). I will therefore deal with this issue first.

40. Section 5 of the Act provides the following definition of a 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:

(a) To carry out construction work;...' [Emphasis added].

41. This is a broad and quite simple definition.

42. The Applicant is performing construction work under a construction contract and accordingly has satisfied at least one of the obligations under Section 5 of the Act, (item 5(a)).

43. I am therefore satisfied that there is a construction contract in place for the purpose of the Act.

44. Section 4 of the Act defines a payment claim as meaning '*...a claim made under a construction contract...*' [Emphasis added].

45. Using the same rationale for defining a construction contract under the Act, I find that the definition of a payment claim is also a broad and quite simple definition.

46. Notably Section 4 of the Act does not make reference to 'the' construction contract but simply 'a' construction contract, which I have taken to mean that the Act intentionally expands the scope and definition of a construction contract to

include both the contract executed by the Parties, and a construction contract as defined in the widest terms by the Act.

47. The Respondent's contentions in this regard are expressed as, '*...the Payment Claim is not a valid Payment Claim under **the** Contract...*' [Emphasis added]. Whilst this may be true in relation to the contract executed by the Parties, I find it does not necessarily follow automatically in relation to requirements of the Act.
48. Since I have already established that there is a construction contract in place for the purpose of the Act I am satisfied that the details provided on the Applicant's submission of 25 May 2010, (its alleged Payment Claim), fulfil the requirements of the Act for the definition of a payment claim under the Act.
49. Accordingly and contrary to the Respondent's contention, I find that the Applicant's submission of 25 May 2010 is indeed a payment claim for the purpose of the Act. I am satisfied that the definition under the Act does not make it a pre-requisition that the validity of a Payment Claim is dependent on it satisfying all the requirements of the express terms of the contract executed by the Parties.
50. Having decided that there is a valid payment claim for the purpose of the Act I now turn to the definition of a payment dispute.
51. Section 8 of the Act provides the following definition of a payment dispute:

'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**;...*' [Emphasis added]

52. The Respondent's letter of 26 May 2010 is written in relation to 'the amount claimed in a payment claim' and contains express wording to demonstrate that 'the claim has been rejected or wholly or partly disputed'.

53. In conclusion therefore on the point of jurisdiction I find, for the purpose of the Act, that the Applicant's payment claim is valid, that a payment dispute has indeed arisen and therefore the Applicant has satisfied the requirements of section 28 of the Act. As such I determine that the Applicant was entitled to raise the matter to Adjudication and that I have jurisdiction to decide on this Application.

Issues in Dispute

54. As stated above, whilst the Parties have both provided extensive details in relation to this adjudication, I find that there are actually only two items that have been raised as payment disputes under this adjudication, being:

54.1. The merits of the payment claim for the Applicant's variation UE-04; and,

54.2. The merits of the payment claim for release of half retention.

55. I will now address the merits of these two issues accordingly.

UE-04 – Out of Scope “Design & Construct” Works

56. The Applicant's variation claim UE-04 entitled 'out of scope design and construct work' captures the financial impacts it claims arise from, '*...the additional design, preparation, fabrication, installation and commissioning costs incurred... implementing the major design changes...*' (Applicant's paragraph 18(i) refers)

57. To follow is a list of the major design changes the Applicant claims under this Adjudication as variations to the contract:

57.1. Increased length of the tank and increased number of components;

57.2. Inclination of the tank shell;

57.3. The pressurization of the tank;

57.4. The requirement for stainless steel saddles which were offset;

58. I am satisfied that all of the above design change issues revolve around the requirements of the Contract in terms of what was deemed included within the contract sum, what was identified or not as the case may be within the contract documents and what mechanisms if any had the Parties agreed to for dealing with design changes and variations generally.
59. With regard to the dimensions, the Applicant's contentions in summary are that the tank shell length/dimensions depicted on the tender drawings was not sufficient to generate a usable volume of 250kl.
60. With regard to the inclination of the tank shell, the Applicant's contentions in summary are that '*...it was not clear from the Tender Drawings how the inclination of the tank was to be achieved...*' (Applicant's paragraph 2(i) refers).
61. With regard to pressurization of the tank, the Applicant contends that the increase in useable volume created a need to comply with AS1210 which was also required by the Respondent.
62. With regard to the requirement for stainless steel saddles, the Applicant's contention is that '*...at the time of tender, the tank did not specify whether the saddles were to be carbon or stainless steel...*' (Applicant's paragraph 4(a) refers).
63. By the Applicant's own acknowledgment within the opening paragraph of its Adjudication Application, (paragraph 1(i)) '*...the Applicant was engaged by the Respondent to supply and install a 250KL Stainless Steel Diesel Fuel Storage Tank...*' [Emphasis added]. I also note under paragraph 8(iii)(1)(a) of the Application the Applicant's further acknowledgement that, '*...the Contract and Specification expressly required a tank with a useable volume of 250KL...*' [Emphasis added].
64. The above alone would appear to dispel any argument that the Applicant was not aware of the requirements from Tender through to Contract to ensure the useable volume of the tank was to be 250kl.

65. I note the Applicant's understanding, '*...that the fuel tank design had been 100% engineered and designed...*' (Applicant's paragraph 1(ii) refers); however I find no express evidence put forward by the Applicant to support this contention.

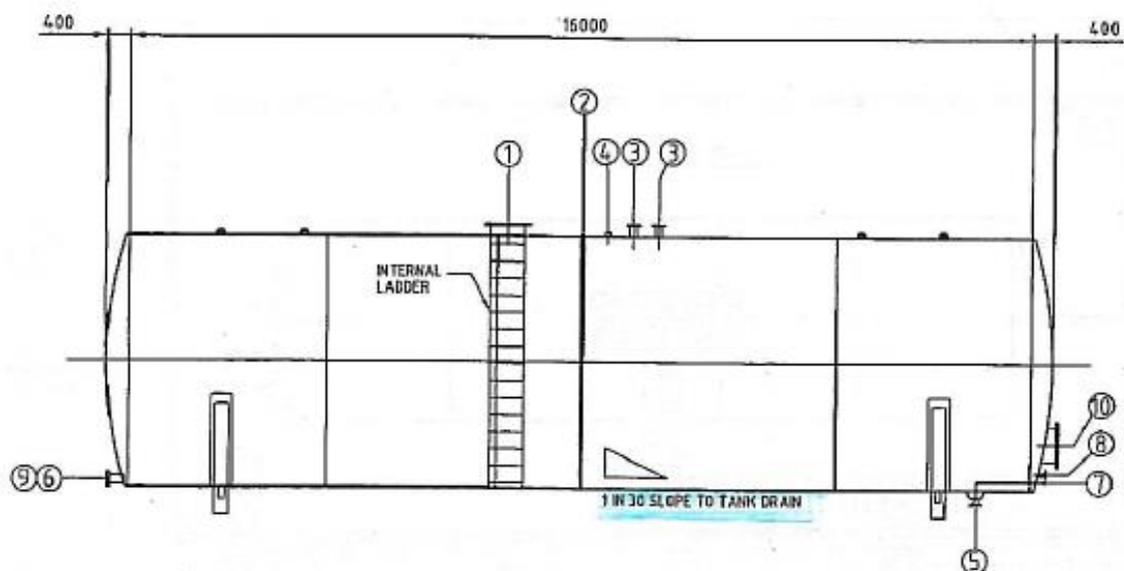
66. I do however find upon review of the tender drawings referred to and provided by the Applicant evidence such as the following:

66.1. Drawing No. LAY-FUL-003:

Notes:

1. *Vessel to be manufactured to AS1692.*
2. *Useable volume: 250kl (Approx).*
5. *Tank dimensions by manufacturer.*
7. *Materials of construction to be stainless steel 316L.*
15. *Tank support nominal dimension supplied. Final dimension to suit tank slope.*

66.2. On the side elevation drawing which only shows steel work trade requirements, (i.e. no slab details), there is express annotation to demonstrate a requirement for a fall which because no other trade works are depicted on the drawings, I consider it would be reasonable to assume this fall reference was for incorporation within the tank design and fabrication:



67. Whilst I am persuaded that the above alone puts forward a strong argument to challenge the Applicant's contentions that:
- 67.1. it was not aware of the requirements to fabricate a tank with sufficient usable volume of 250kl; or,
 - 67.2. it was not clear from the Tender Drawings how the inclination of the tank was to be achieved; or
 - 67.3. what AS standard the tank needed to be manufactured to; or,
 - 67.4. what material the saddles needed to be made out of;
68. The Respondent has also drawn my attention to the contract requirements in relation to:
- 68.1. The Work Description, set out in Schedule H to the Contract;
 - 68.2. Clause 1.2(i) in relation to how to deal with ambiguities if encountered;
 - 68.3. Clauses 6.4 and 9.1 concerning the fit for purpose obligations placed on the Applicant;
 - 68.4. Clause 10 concerning extension of time claim requirements;
 - 68.5. Clause 11 concerning variation claim procedure requirements;
 - 68.6. Section 9 of the Specification concerning 'Buildability' liabilities;
 - 68.7. The Respondent's response to RFI No. 28;
 - 68.8. Clause 15 concerning the procedure for dealing with disputes;
 - 68.9. Clause 16 concerning notification of claims;
 - 68.10. Clause 17.2 concerning the procedural requirements for waiver;

69. All of which I must assume the Applicant has consciously agreed to be bound by when it executed the Contract 28 July 2009.
70. I do not propose to repeat the arguments put forward by the Respondent in relation to the above, suffice to say I have read and taken note of the evidence provided and in doing so I am persuaded that the Applicant's claim must fail for the numerous reasons cited by the Respondent.
71. Based on the evidence provided, I find in favour of the Respondent and determine that Nil payment is due from the Respondent to the Applicant in relation to variation UE-04 under this Adjudication.

Return of retention

72. The Applicant claimed return of 100% of its retention monies under its May Payment Claim but then reduced this claimed sum by 50% within its Adjudication Application.
73. Neither the Payment Claim nor the Application contains supporting submissions to explain and/or justify the Applicant's contentions in relation to return of said retention sums.
74. The Respondent has noted the same and has provided reasons by way of reference to express contractual provisions, namely Clauses 4.2(a) and (b), to demonstrate why it believes it is entitled to continue to withhold the retention monies.
75. Given the submission of the Respondent by way of reference to express terms of the contract, and in the absence of any evidence to the contrary, I find in favour of the Respondent and determine that Nil payment is due from the Respondent to the Applicant in relation to return of retention.

Conclusion

76. In closing on this matter I consider the following comment expressed by the Respondent best sums up the situation, being that, *'...while this is unfortunate for Universal, it is typical of the risks that a contractor accepts in entering into a*

lump sum contract. It is not a basis for Universal to now seek additional compensation of greater value than the original Subcontract Sum to carry out the works which were specified by the Contract...'

DETERMINATION

77. For reasons set out in this Adjudication I determine that the adjudicated amount in relation to the payment disputes is found in favour of the Respondent and that the **Applicant is due Nil payment from the Respondent** in relation to the payment claims as detailed above.
78. The default position in relation to costs for adjudication is that the Parties are liable to pay the costs of this adjudication in equal shares (Sections 46(4) and 46(5) of the Act refer).
79. The Respondent contends it has incurred fees unnecessarily as a result of the Applicant's actions.
80. In light of the above and the fact that the Respondent would not have been exposed to costs of the adjudication but for the Applicant's decision to proceed to adjudication when as I have determined, the weight of facts would strongly suggest otherwise, I decide to apply the discretions afforded to me by way of Section 36(2) of the Act to find that the Applicant is liable to pay all the costs of the adjudication.
81. The Respondent considers that cost of the adjudication includes for costs of legal practitioners engaged in this regard. However I find that the Act restricts the definition of the 'costs of adjudication' under Section 46(12) to those relating to the adjudicator's time and that of an expert (if one has been engaged).
82. The total **cost of this adjudication is \$13,200.00 (not GST registered).**
83. The Applicant and Respondent have each paid \$6,600.00 (not GST registered) as security for costs of this adjudication, therefore pursuant to Section 36(2) of the Act I determine that the **Applicant must pay the Respondent the sum of \$6,600.00 (not GST registered).**

84. I determine that all payments ordered under this adjudication should be made within 7 calendar days from the date of release of this adjudication.
85. Should payment not be made by 4 October 2010, interest at the rate prescribed under the *Supreme Court Act 1935* section 142 is to be paid on such of the amount as is unpaid after this date, until the date of payment or entry of this adjudication and determination as a judgement of the Supreme Court.
86. This determination is full and final settlement of all matters in consideration under the adjudication.



ADJUDICATOR: MR D V COURT

27 September 2010

RELEASE DATE