

**ADJUDICATOR'S DETERMINATION**

**PURSUANT TO**

*Construction Contracts (Security of Payments) Act*

**NORTHERN TERRITORY OF AUSTRALIA**

**APPLICANT (A):**

**DIRECTORS (D):**

**NOMINATED**

**CONTACT PERSON:** Melisa Compain (Minter Ellison, lawyers)

**RESPONDENT (R):**

**DIRECTORS (D):**

**NOMINATED**

**CONTACT PERSON:** [BC]

**Adjudication Number 19.11.01**

**Date 1 /5/ 2011**

I, John Brears, as the appointed Adjudicator, pursuant to the *Construction Contracts (Security of Payments) Act* (the Act) determine that:

1. (R) is liable to pay to the (A) \$9,504.00 plus interest of \$227.00, on or before 9 May 2011.
2. My fees are to be paid equally by both parties.

## **1. APPOINTMENT OF ADJUDICATOR**

I was appointed as Adjudicator by Master Builders Northern Territory (MBNT) to determine this dispute on 6 April 2011.

## **2. NOTIFICATION OF APPOINTMENT OF ADJUDICATOR**

MBNT notified both parties by letter dated 6 April 2011 that they had appointed me as Adjudicator for this dispute.

## **3. I HELD A PRE ADJUDICATION CONFERENCE IN TWO PARTS ON 8 APRIL 2011.**

My record of these two parts is as follows.

### **PART 1** at 2.30 pm

Present:

Adjudicator – John Brears

Applicant's Representative – Melisa Compain (Minter Ellison) – by telephone

### **PART 2** at 3.30 pm

Present:

Adjudicator – John Brears

Respondents Representatives – AB and BC – in person

The adjudicator advised that he needed, before starting work on the adjudication, to raise a number of issues and seek responses from both parties.

### **Issue 1**

The Adjudicator advised that from the "Notice of Dispute" and attached documentation it appeared that (A) and (R) had entered into a "Construction Contract" as defined under the (*Act*) section 6 (1).

(A) agreed but (R) disagreed. The Adjudicator advised that he would await the (R)'s submission before deciding on this issue

### **Issue 2**

The Adjudicator advised that it appeared that the "construction work" was carried out in the Northern Territory as defined in the Act Section 6(1).

Both parties agreed.

**Issue 3**

The Adjudicator advised that it appeared that a payment dispute had arisen as defined in the Act Section 8 (a).

Both parties agreed.

**Issue 4**

The Adjudicator advised both parties about his current employment and previous involvement with both parties and their legal advisers.

Neither party raised any suggestions that the Adjudicator had a “conflict of interest”.

**Issue 5**

The Adjudicator requested that each party nominated a point of contact.

(A) Nominated Melisa Compain of Minter Ellison lawyers as their point of contact.

(R) Nominated BC as their point of contact.

**Issue 6**

The Adjudicator noted that the application was served on the (MBNT) on 6 April 2011, and received by the Adjudicator on 7 April 2011. (R) received its copy of the application on 6 April 2011.

The Adjudicator determined that the (R) had until the “close of business” on 20 April 2011 to serve their response.

The Adjudicator would then hand down his decision by 4 May 2011.

**Issue 7**

The adjudicator asked both parties to deposit \$2,000.00 each into the (MBNT) trust fund. This money would be held in trust until the Adjudicator had made a determination and directed how these monies were to be dispersed.

**4. DOCUMENTS REGARDED IN MAKING THE DETERMINATION.**

In making the Determination, I have had regard to the following:

4.1 The provisions of the *Construction Contracts (Security of Payments) Act*.

4.2 The Adjudication Application dated 6 April 2011, which consists of:

(1) Adjudication Application (10 pages)

(2) Appendix 1 (30 pages)

(3) Appendix 2 (13 pages)

- (4) Appendix 3 (1 page)
- (5) Appendix 4 (5 pages)
- (6) Appendix 5 (52 pages)
- (7) Appendix 6 (5 pages)
- (8) Appendix 7 (1 page)
- (9) Appendix 8 (8 pages)
- (10) Appendix MM -1 (2 pages)
- (11) Appendix MM – 2 (2 pages)
- (12) Appendix MM – 3 (1 page)
- (13) Appendix MM – 4 (2 pages)
- (14) Appendix MM – 5 (3 pages)
- (15) Appendix MM – 6 (0 pages)
- (16) Authorities
  - 1. AB Contractors v Flaherty Brothers (7 pages)
  - 2. Adjudicator’s Determination No.16.06.01 (16 pages)
  - 3. Adjudicator’s Determination No. 16.08.04 (11 pages)
  - 4. Algons Engineering v Abigroup Contractors (17 pages)
  - 5. Anglian Building Products v W & C French (7 pages)
  - 6. Boutique Venues v JACQ (17 pages)
  - 7. K & J Burns v GRD Group (40 pages)
  - 8. Trans Australian Constructions v Nilsen (16 pages)

4.3 The Response to the Adjudication Application dated 14<sup>th</sup> of April 2011, which consists of:

- (1) Response (9 pages)
- (2) Appendix 1 (30 pages)
- (3) Appendix 2 (13 pages)
- (4) Appendix 3 (1 page)
- (5) Appendix 4 (2 pages)
- (3) Appendix 5 (32 pages)
- (4) Appendix 6 - Part A (5 pages)

- Part B (2 pages)
- Part C (5 pages)
- Part D (1 page)
- Part E (1 page)
- Part F (6 pages)
- Part G (5 pages)
- (8) Appendix 7 - Part 1 (4 pages)
- Part 2 (15 pages)
- Part 3 (1 page)
- Part 4 (2 pages)
- Part 5 (9 pages)

## 5. DETERMINATION

### 5.1 THE CONSTRUCTION CONTRACT

From the responses given at the pre adjudication conference (see above 3. Issue 1), (A) considered that a construction contract had been entered into by the parties but (R) disagreed. Considering this matter first:

Under the (*Act*) Part 1, Division 2, point 5, says:

#### **5 Construction contract**

(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;*
- (b) *to supply to the site where construction work is being carried out any goods that are related to construction work;*
- (c) *to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work;*
- (d) *to provide, on the site where construction work is being carried out, on-site services that are related to the construction work.*

(2) *In Part 3, a construction contract includes:*

- (a) *a contract modified under section 13; and*
- (b) *a contract in which a provision is implied under Part 2, Division 2.*

and in Part 1 Division 3 part 9, says:

#### **Division 3 Operation of Act**

##### **9 Construction contracts to which this Act applies**

(1) *This Act applies to a construction contract entered into after the commencement of this section.*

- (2) *This Act applies to a construction contract:*
- (a) *irrespective of whether it is written or oral or partly written and partly oral;*
  - (b) *irrespective of where it is entered into;*

From the submissions provided by (A) and (R), I have noted that:

- (a) On the 25/8/2010 – (R) requested (A) provide a “fee submission to complete the hydraulic scope of works”. A list of specific items was detailed that the fee submission should include. A set of the latest drawings were provided in PDF format.
- (b) On the 26/8/2010 (A) sent a fee submission to (R) (reference 210D312). The fee submission was 4 pages, which included a page detailing terms and conditions relating to the quotation.
- (c) DE, a Project Manager with (R), signed the fee submission, returned it to (A), and confirmed it by an email dated the 9/9/2010.

I have therefore determined that, because we have an offer by (A), and an acceptance by (R), a contract between (A) and (R) does exist, and it consists of the 4 page fee submission by (A), referred to in (b) above signed by a representative from (R), together with any implied provisions of the construction contracts as detailed, (see below) in Part 2 of the Act.

## **Part 2 Prohibited and implied provisions of construction contracts**

### **Division 2 Implied provisions**

#### **16 Variations of contractual obligations**

*The provisions in the Schedule, Division 1 are implied in a construction contract that does not have a written provision about variations of the contractor's obligations under the contract.*

#### **17 Contractor's entitlement to be paid**

*The provisions in the Schedule, Division 2 are implied in a construction contract that does not have a written provision about the amount, or a way of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs.*

#### **18 Contractor's entitlement to claim progress payments**

*The provisions in the Schedule, Division 3 are implied in a construction contract that does not have a written provision about whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations under the contract the contractor has performed.*

#### **19 Making payment claims**

*The provisions in the Schedule, Division 4 are implied in a construction contract that does not have a written provision about how a party must make a claim to another party for payment.*

#### **20 Responding to payment claims and time for payment**

*The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:*

- (a) when and how a party must respond to a payment claim made by another party;
- (b) by when a payment must be made.

## 21 Interest on overdue payments

*The provisions in the Schedule, Division 6 are implied in a construction contract that does not have a written provision about interest to be paid on any payment that is not made at the time required by the contract.*

## 5.2 THE PAYMENT CLAIM

(A) has claimed and (R) has agreed that there is a payment dispute.

Under the (Act) Part 1, Division 2, Clause 8 Payment Dispute says:

*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*

(A) advises that a progress payment claim invoice number 280 12325 dated 10/11/2010, was sent by post on the 19/11/2010 to (R). The claim totalled \$9,504.00.

(A) also advises that on the 25/11/2010 a second copy of the progress payment claim, invoice number 280 12325, was sent by email to (R).

(R) claims not to have received either of the above.

(A) further advises that on the 18/1/2011 a third copy of the progress payment claim, invoice number 28012325 was sent by email to (R), and that an email in reply confirmed that it had been received by (R).

The conditions of the contract, specify how (A) will claim payment for work done and when (R) shall make payment as follows:

***“Invoices and Payment:*** *Each fortnight during the term of this contract [(A)] will send the Client a tax invoice for the Design Fee and the accrued Inspection Rate (Fees) for the Services performed to the date of that invoice and Client will pay each invoice within seven (7) days of the date of the invoice.”*

*“[(A)] may to the extent permitted under the Construction Contracts (Security of Payments) Act 2009 (NT) make any claim for a progress payment after it has performed any of its obligations under this contract and nothing in this contract limits or restricts that right.”*

The terms and conditions detailed in the fee submission, and forming part of the conditions of contract do not specify how (R) shall reply if they dispute the payment claim, so I have referred to the “Implied Provisions” as detailed in the (Act), and noted previously in this decision.

First, having due regard to the submissions by (A) and (R), I have determined that for the purposes of the schedule of implied provisions, division 5, clause 6(2), the date that (R) received the progress claim was the 18/1/2011.

Secondly, if (R) “*disputes the whole or part of the claim*” they should have “*within 14 days after receiving the payment claim, given the claimant (A) a notice of dispute*”.

Details of what should be included in the notice of dispute are listed in sub clause (3), (a) to (h) of the above schedule.

(R) did not comply with this requirement, and therefore must:

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

The claimant did not make this payment within the 28 day period.

(R) has claimed in its submission that the design work carried out by (A) does not comply with statutory requirements in a number of areas, and contains several errors. However under the Act, it is not the role of the adjudicator to assess technical documents and make determinations accordingly.

In summary (R) did not respond to (A)’s progress payment claim by giving a “Notice of Dispute” within 14 days of receiving the claim, so I have found in favour of (A)

## **SUMMARY**

I determine that (R) shall pay to (A):

(a) \$9,504.00 (which includes GST); plus

(b) Interest of \$227.00,

on or before the 9<sup>th</sup> day of May 2011.