

Determination No 24.10.01

ADJUDICATOR'S DETERMINATION

UNDER THE

**CONSTRUCTION CONTRACTS (SECURITY OF PAYMENT)
ACT (NT)**

IN THE MATTER BETWEEN:

(Applicant)

AND

(Respondent)

BY

Paul W Baxter (Adjudicator)

ISSUED

10 February 2010

ADJUDICATOR REF. 09/024/NT

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1. DETAILS OF PARTIES

Contract To Which Payment Dispute Relates

Assemble and construct a transportable office unit (site detail omitted).

Applicant

Applicant's Solicitor

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Adjudicator

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2. ADJUDICATOR'S DETERMINATION

I, Paul William Baxter, the appointed Registered Adjudicator in the matter between the Applicant and the Respondent of the dispute over payment between the Applicant and the Respondent determine on 10 February 2010 in accordance with section 38(1) of the *Construction Contracts (Security of Payments) Act* (NT) ("the Act") that the amount to be paid by the Respondent to the Applicant is \$108,497.53(incl GST).

3. BACKGROUND

1. The Respondent is a Darwin based company and sole distributor of patented, easily re-locatable "transportable homes".
2. The Sole Director and Shareholder of the Respondent is Mr [AB]
3. The Applicant is Mr [BC], trading as [omitted].

The Prison Contract

4. In or about June 2009 The Respondent was awarded the [head] contract to supply, assemble and construct a transportable office for the [site address omitted], ("**the Project**").
5. Before being awarded the Project the Respondent approached the Applicant as the Respondent's preferred builder and retained him to, assemble, fold out and construct the transportable office at the [project site omitted] ("**the Contract**") if the Respondent's tender was successful. There was no written agreement in connection with the Contract nor was there any agreement as to the amount to be paid by the Respondent for work undertaken by the Applicant.
6. Before entering into the Contract the Respondent had informed the Applicant that they would '*sort out*' the amount the Applicant was to be paid at the end of the Project. Based on the ongoing business relationship between the Respondent and himself, the Applicant was content with this arrangement and accepted the Respondent's representation at face value and relied upon that representation in becoming involved in the Project.
7. During the course of the Project the Respondent then directed the Applicant to carry out a number of additional works ("**the Variations**"). The Variations the Respondent directed the Applicant to carry out were:
 - a) To install a veranda and deck area around the office in accordance with the Floor Plan;
 - b) To install a ramp and hand rail for disabled access in accordance with the Floor Plans; and

- c) To construct a 20 metre long and 1.2 metre wide concrete pathway [location omitted].
8. At the completion of the Project, the Applicant rendered a tax invoice to the Respondent on 16 November 2009 (“**the Tax Invoice**”). The Tax Invoice had attached to it a Costing Sheet that set out the costs incurred in connection with the Project, which totalled \$79,002.00.
9. On 17 November 2009, the Applicant received a telephone call from the Respondent in relation to the Tax Invoice. The Respondent informed the Applicant that the Respondent would not pay the Tax Invoice and that the Applicant would have to take him to Court.
10. On 1 December 2009, the Applicant received an email from the Respondent disputing the Tax Invoice.
11. On 2 December 2009, the Applicant prepared a Payment Claim in accordance with the Construction Contract and the Act and:
 - a) Delivered a copy to the Respondent’s business address [address omitted];
 - b) Faxed a copy to the Respondent [Fax No omitted];
 - c) Sent a copy to the Respondent’s postal address [Box No omitted]; and
 - d) Had a copy emailed to the Respondent at [email address omitted]

4. APPOINTMENT OF THE ADJUDICATOR

The applicant applied 8 January 2010 for an adjudication under the *Construction Contracts (Security of Payments) Act* (NT) (the Act), consequent upon which I was appointed adjudicator on 11 January 2010 by the Master Builder's Association of the Northern Territory to determine this application. The Master Builder's Association NT is a prescribed appointer under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1) (c) (iii) of the Act.

5. CONFLICT OF INTEREST

I have had no dealings with either the Applicant or the Respondent. I have known the Applicant's solicitor David De Silva over the last ten years. I consider there to be no conflict of interest in this matter.

6. JURISDICTION

Jurisdiction is determined by the following factors:

1. That the adjudicator be appointed by either the Registrar or by a prescribed Appointer (refer s28 (1) of the Act).
2. That the contract for the works was formed after the date of proclamation of the Act being 1st January 2005 (refer Part 1 s.2 (1)).
3. That the works be a "site in the Territory" (refer Part 1 s.6 (1)).
4. That there is a payment dispute, as given in Part 1 s.8 of the Act.
5. That the applicant applying for adjudication be a party to the contract as defined in Part 3 s 27 of the Act, noting the exceptions under sub clauses (a) and (b).
6. That the application for adjudication be made within 90 days after the dispute arises, as defined under Part 3 s. 28 (1) of the Act.
7. That the matter relates to "construction work", as given in the definition of this term, Part 1s.6 of the Act.

With respect to the specific facts of this case, I deal below with each of the issues in points 1 to 7 above:

1. The manner of appointment has been dealt with above. The Application has been satisfactorily served in accordance with the requirements of S28.
2. The Contract for the works was dated June 2009, which is after the commencement of the Act.
3. The site is within the Northern Territory.
4. There is a payment dispute within the meaning of the Act. The dispute arose 1 December 2009 when the Respondent rejected and refused a request for funds based on the Tax Invoice dated 17 November 2009 from the Applicant.

5. The Applicant is a Party to the contract.
6. The application for adjudication was made on 8 January 2010, which was within 90 days after the time for the payment of the claim arose.

20) As there is no written contract, no written provision has been made about those matters in relation to a claim by the subcontractor against the builder. The provisions of Division 5 of the Schedule therefore implies:

- i. **Division 5 Responding to payment claims**
- ii. **6 Responding to payment claim by notice of dispute or payment**
 1. This clause applies if –
 2. a party receives a payment claim under this contract; and
 3. the party –
 - a. believes the claim should be rejected because the claim has not been made in accordance with this contract; or
 - b. disputes the whole or part of the claim.
 4. The party must –
 - a. give the claimant a notice of dispute; and
 - b. if the party disputes part of the claim – pay the amount of the claim that is not disputed; or
- b. within 14 days after receiving the payment claim –
 - a. give the claimant a notice of dispute; and
 - b. if the party disputes part of the claim – pay the amount of the claim that is not disputed; or
- c. within 28 days after receiving the payment claim, pay the whole of the amount of the claim.
 - i. (3) The notice of dispute must –
 - ii. be in writing;
- d. be addressed to the claimant;
- e. state the name of the party giving the notice;
- f. state the date of the notice;
- g. identify the claim to which the notice relates;
- h. if the claim is being rejected under sub clause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract;
- i. if the claim is being disputed under sub clause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reasons for disputing it; and
- j. be signed by the party giving the notice.

B. 21) By sub clause (2), the respondent had 14 days from receipt of the notices to dispute them, failing which it had 28 days from receipt to pay them. Remembering that Division 5 is implied as a contractual term, the amounts claimed were “due to be paid under the contract” (s 8) 28 days after receipt by the respondent.

C. 22) That brings the notice 8 January 2010 to within the 90 day period for an application.

D. 23) I find that the application is in time in respect of the payment claim 17 November 2009

- a. The Payment Claim complied with the implied terms of the Act, in that it:

- i. was in writing;
- ii. was addressed to the contractor (‘the Respondent’) as the party to which the claim is made;
- iii. stated the Applicant as the claimant;

- iv. stated the date of the claim;
- v. stated the amount claimed;
- vi. described the basis for the claim in sufficient details for the contractor to assess the claim;
- vii. was signed by the claimant ('the Applicant'); and
- viii. was given to the Respondent, being the party to which the claim is made.

7. The matter related to the supply of labour and supervision for the site and the work clearly falls under the definition of "construction work"

Finally neither party has raised any suggestion that there exists any judgment or other finding about the dispute that is the subject of the application.

I am therefore satisfied that I have jurisdiction in this matter.

7. DOCUMENTS RECEIVED BY ADJUDICATOR

The Applicant submitted the following documents for consideration by the Adjudicator:

- One (1) bound copy of the Application with sections numbered 1-197 prepared by the Applicant's solicitors.
- Further to the Adjudicator's email asking for submissions in regards to Clause 36 '**Costs of parties to payment disputes**' of the *Construction Contracts (Security of Payments) Act*, the Adjudicator received
 - o Application for Adjudication of Payment Dispute pursuant to the Construction Contracts (Security of Payments) Act, submitted by the Applicant's solicitors on behalf of the Applicant on 3 February 2010

Items not considered in the Determination

Pursuant to Section 29 of the Act, it was mandatory for the Respondent to reply in writing to the Applicant's Application for Adjudication within 10 working days of services of same.

Section 29 of the Act states the following:

29 Responding to application for adjudication

- (1) Within 10 working days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on –
 - a) the applicant and on any other party that has been served with the application; and
 - b) the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointer on which the application was served under section 28(1)(c).
- (2) The response must –
 - (a) be prepared in accordance with, and contain the information prescribed by, the Regulations;
 - (b) state the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute; and

- (c) state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.

As well as these documents issued to the Adjudicator by the Applicant and the Respondent, I have also taken into consideration the *Construction Contracts (Security of Payments) Act* (NT) for the determination of this Adjudication.

8. COMPLIANCE ISSUES

Compliance with Section 33(1) (a)

1. I find that the application has been prepared and served in accordance with section 28 of the Act.
2. I find there is no order, judgment or the finding about the dispute that is the subject of the application.
3. I am not satisfied as to the matters contained in Section 33(1) (a) (iv).
4. Given that the Application is not dismissed the adjudicator has to move to the second stage of the determination.

Determination - Section 33(1) (b)

5. The Act provides that if the application is not dismissed because of the matters provided for in section 33(1) (a) then the adjudicator has to determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment. Section 33(1)(b)

9. THE NOTICE OF DISPUTE

The Dispute

1. The Applicant contends that the Respondent:
 - a) did not within 14 days of receiving the Payment Claim give the Applicant a Notice of Dispute in accordance with the Construction Contract and the Act;
 - b) has not within 28 days of receiving the Payment Claim paid the Applicant the amount claimed (i.e. \$95,592.00) or any amount in connection with the Project; and
 - c) has therefore failed to give the Applicant a Notice of Dispute or pay the Payment Claim.
2. For the purposes of this Adjudication, we must first consider whether the Applicant has made a Payment Claim in accordance with the Act. The Act states:

A Valid Payment Claim

- i. The essential requirements of a valid payment claim are as follows:
 1. The payment claim must be made pursuant to a construction contract and not some other contract;
 2. The payment claim must be in writing;
 3. The payment claim must be a bona fide claim and not a fraudulent claim;
 4. The payment claim must state the amount claimed;
 5. The payment claim must identify and describe the obligations the contractor claims to have performed and to which the amount claimed relates in sufficient detail for the principal to consider if the payment claim should be paid, part paid or disputed.
3. The Payment Claim was delivered to the Respondent 2 December 2009. Refer Statutory Declaration EJ, 7 January 2010, page 176 of Application.
4. I now find that the Payment Claim 2 December 2009:
 - i. was in writing;
 - ii. was addressed to the contractor ('the Respondent') as the party to which the claim is made;
 - iii. stated the Applicant as the claimant;
 - iv. stated the date of the claim;
 - v. stated the amount claimed;
 - vi. described the basis for the claim in sufficient details for the contractor to assess the claim;
 - vii. was signed by the claimant ('the Applicant'); and
 - viii. was given to the Respondent, being the party to which the claim is made.
5. I find that the Payment Claim is a valid Payment Claim in accordance with the Act.

6. As there is no [written] contract, no written provision has been made about those matters in relation to a claim by the subcontractor against the builder. The provisions of Division 5 of the Schedule therefore implies:

- i. **Division 5 Responding to payment claims**
- ii. **6 Responding to payment claim by notice of dispute or payment**
 1. This clause applies if –
 2. a party receives a payment claim under this contract; and
 3. the party –
 - a. believes the claim should be rejected because the claim has not been made in accordance with this contract; or
 - b. disputes the whole or part of the claim.
 4. The party must –
 - b) within 14 days after receiving the payment claim –
 - a. give the claimant a notice of dispute; and
 - b. if the party disputes part of the claim – pay the amount of the claim that is not disputed; or
 - c) within 28 days after receiving the payment claim, pay the whole of the amount of the claim.
 - i. (3) The notice of dispute must –
 - ii. be in writing;
 - d) be addressed to the claimant;
 - e) state the name of the party giving the notice;
 - f) state the date of the notice;
 - g) identify the claim to which the notice relates;
 - h) if the claim is being rejected under sub clause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract;
 - i) if the claim is being disputed under sub clause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reasons for disputing it; and
 - j) be signed by the party giving the notice.

7. I must now take into consideration the Response to the Application for Adjudication from the Respondent.

8. I understand that the Payment Claim was preceded by a Tax Invoice on the 16 November 2009. The Respondent did reply to this Tax Invoice.

9. By letter 1 December 2009, the Respondent refers to his contract with the [principal] and a debt by the Applicant on a previous contract. These are matters not related to this Payment Claim and consequently I am not permitted to deal with them. He also stated he would not pay the Tax Invoice.

10. The Act requires the Respondent to identify each item of the Claim that is disputed and state for each of the items the reason for the dispute. The Respondent does not address any of the 17 pages of detailed invoices.

11. The Respondent has not

- a) within 14 days after receiving the payment claim –

- a. given the claimant a notice of dispute; and
 - b. if the party disputed part of the claim – paid the amount of the claim that is not disputed; or
- b) within 28 days after receiving the payment claim, paid the whole of the amount of the claim.
12. No response has been received from the Respondent in regards to this Application.
13. Pursuant to Section 29 of the Act, it was mandatory for the Respondent to reply in writing to the Applicant's Application for Adjudication within 10 working days of services of same. Section 29 of the Act states the following:

29 Responding to application for adjudication

- (1) Within 10 working days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on –
- a) the applicant and on any other party that has been served with the application; and
 - b) the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointer on which the application was served under section 28(1)(c).
- (2) The response must –
- c) be prepared in accordance with, and contain the information prescribed by, the Regulations;
 - d) state the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute; and
 - e) state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.
14. I find the Respondent has not lodged a Notice of Dispute and has not responded to the Application pursuant to the Act in connection to the Applicant's Payment Claim dated 2 December 2009. Accordingly, the Applicant should be awarded the sum of \$95,592.00 and interest.
15. In accordance with Clause 36 (2), an Adjudicator may order that a party pay some or all of the other party's costs of the Adjudication if the Adjudicator is satisfied that a party to a payment dispute incurred costs of the Adjudication because of frivolous or vexatious conduct on the part of the other party.
16. The Applicant contends that the Respondent's conduct has been frivolous and vexatious for the following reasons:
- a) The Respondent was served with a copy of the Payment Claim on 2 December 2009 and did not within 14 days of receiving the Payment Claim issue the

Applicant with a Notice of Dispute in accordance with the Act. Refer Division 5 in the Schedule of the Act, Responding to Payment Claims, clause 6(2)(a).

- b) As a consequence of not issuing the Applicant with a Notice of Dispute, the Respondent was obliged pursuant to the Act to pay the Payment Claim within 28 days. Refer Division 5 in the Schedule of the Act, Responding to Payment Claims, clause 6(2)(b).
- c) The failure to pay the Payment Claim made it necessary for the Applicant to incur the legal costs of preparing an application for Adjudication and participating in this Adjudication.
- d) The Respondent has not lodged a Response to the Application for Adjudication in accordance with the Act.
- e) The total amount of costs incurred by the Applicant in relation to this Adjudication is \$11,800.09 (incl GST).

17. The Applicant seeks a determination that he is entitled to payment of the sum of \$95,592.00 and interest on the aforesaid amount at the rate of 10.05%.

18. The Applicant has claimed that his Overhead recovery and project management costs \$7,900.00(excl GST). The actual job costs are \$79,002.00(excl GST). The cost of engaging a solicitor and preparing the Application for Adjudication is \$11,800.09 (incl GST). If the Applicant were not to recover the costs of the solicitor preparing this application then he would actually lose money on this project.

19. I believe the Applicant is entitled to make a profit on this project. He has performed the works to the satisfaction of the Respondent and to the Respondent's client.

20. In consideration of the above, I believe the Applicant is entitled to be paid for the solicitor's costs of the Adjudication in order for him to not lose money for performing the works.

21. I determine that the Applicant should be entitled to recover his solicitor's costs for the preparation of this Application for Adjudication in the amount of \$11,800.09(incl GST).

10. SUMMARY OF ADJUDICATION

Conclusion

As stated above, the Respondent has not lodged a Notice of Dispute or a response to the Application for Adjudication pursuant to the Act in connection to the Applicant's payment claim and the Applicant's Adjudication Application. Accordingly, the Applicant is awarded the sum of \$95,592.00(incl GST) plus interest.

Costs

Clause 36(1) of the Act requires the parties to bear their own costs.

Clause 36(2) of the Act empowers the adjudicator to award costs if he is satisfied that the submissions of a party are unfounded or that the conduct of a party is frivolous or vexatious.

For the reasons stated above in clauses 15 and 16 of this determination, the Applicant is awarded his solicitor's cost of \$11,800.09(incl GST) for preparation of the Adjudication Application. I find, however, that both parties should bear the costs of the Adjudicator's fees.

Determination

In accordance with s 38(1) of the Act I determine that the amount to be paid by the Respondent to the Applicant is

- a) \$96,697.44(incl GST) being the amount owing of \$95,592.00(incl GST) plus interest to 10 February 2010 of \$1,105.44(incl GST). Interest accrues on the sum of \$95,592.00 at the rate of \$26.32(incl GST) per day from 10 February 2010.
- b) \$11,800.09(incl GST) being the amount owing for the costs incurred by the Applicant for the solicitor's costs in preparation of the Adjudication Application. Interest accrues at the rate of \$3.39(incl GST) per day from 10 March 2010.

I determine there is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the Act.

Dated: 10th February 2010



Paul Baxter
Registered Adjudicator