

IN THE MATTER
of the Construction Contracts (Security of Payments) Act

and

IN THE MATTER
of an adjudication

BETWEEN

Applicant

and

Respondent

DECISION

Adjudication Registration No 9-09-01

Registered Adjudicator No 9

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ADJUDICATOR'S DECISION

Pursuant to the *Construction Contracts (Security of Payments) Act*

Decision

[1]. I, Glynn Logue, as the registered adjudicator appointed under Part 3 of the *Construction Contracts (Security of Payments) Act* [the "**Act**"], dismiss the application without making a determination of its merits.

[2]. I have decided that the parties are liable to pay the costs of the adjudication of the dispute in equal shares.

Appointment of Adjudicator

[3]. By letter to the applicant and to the respondent (the "**parties**") dated 7 September 2009, the Institute of Arbitrators & Mediators (the "**prescribed appointer**") appointed me adjudicator for the purpose of determining the payment dispute.

Application and Response

[4]. By its letter to the parties dated 7 September 2009, the prescribed appointer recorded that the applicant served its application on it on 4 September 2009. By its letter to the adjudicator dated 11 September 2009, the applicant has shown to my satisfaction by the attached Statutory Declaration and Office Form – Court Filing Sheet that it served its application on the respondent on 4 September 2009.

[5]. The respondent served its written response on me personally on 18 September 2009 and has provided evidence by facsimile dated 21 September 2009 of it having also served its written response on the applicant personally on 18 September 2009. Service was therefore affected some fourteen (14) days after the receipt by it of the applicant's written application. In doing so, the respondent complied with its obligations under s29(1)(a) and (b) of the Act.

Conflicts of Interest

[6]. From my review of the written application, I formed the view that I had no material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen or in any party to the contract. This absence of material personal interest was declared to the parties in my Letter No 1 dated 9 September 2009 and no objection was given by either party to such declaration.

Letter to the Parties

[7]. In my Letter No 1 to the parties dated 9 September 2009, I requested that they or their representative advise me in writing by 14 September 2009 as to whether they disagreed with or objected to, inter alia, the following relevant matters –

- (a) No separate application for adjudication had already been made in respect of the subject payment dispute.

- (b) There has been no order, judgement of other finding by an arbitrator or other person or court or other body about the dispute that is the subject of the application.

[8]. By letters dated 11 and 14 September 2009, the applicant and the respondent respectively advised me of their agreement with these matters.

Construction Contract for the Purposes of the Act

[9]. The contract under which the payment dispute has arisen is described as being Contract No [omitted] (the “**Contract**”). In Section 4 Site Special Conditions of the Contract, it is said that the specification covers the civil work for [omitted]. In Section 6 Technical Specification, the civil work is described as including winning, hauling, placing and shaping earth and rock, construction of access roads and subsoil drains, installation of precast concrete box culverts and drainage structures and similar related work.

[10]. S5(1) of the Act defines “construction contract” as 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;*

[11]. S6(1) of the Act defines “construction work” on a site in the Territory as any of the following work –

- (c) *constructing the whole or a part of any civil works, or a building or structure, that forms or will form (whether permanently or not and whether or not in the Territory), part of land or the sea bed (whether above or below it);*
- (f) *any work that is preparatory to, necessary for, an integral part of or for the completion of any work mentioned in paragraph (a), (b), (c), (d) or (e), including –*
 - (i) *site or earthworks, excavating, earthmoving, tunnelling or boring;*
 - (ii) *laying foundations;*

[12]. From these I **find** the Contract under which the payment dispute has arisen is a construction contract for the purpose of the Act. This was contended by the applicant and not disputed by the respondent.

Documents Forming Basis for Determination

[13]. The parties served the following documents on each other and on me for the purpose of having their payment dispute determined –

- (a) The applicant’s written application for adjudication dated 4 September 2009, contained in Volumes 1 - 3.
- (b) The respondent’s written response to the application dated 18 September 2009, contained in Volumes 1 – 2.

[14]. In making this determination, I have given regard to these two submissions, together with the following –

- (c) The provisions of the Act.
- (d) The provisions of the Contract under which the adjudication application has arisen.

Construction Contract

[15]. It is common ground that the applicant and the respondent entered into the Contract on 18 November 2008. From Annexure A to the General Conditions of Contract, the Date for Practical Completion was to be 22 January 2009. As background and not necessarily relevant to the payment dispute, the applicant contends that the Works did not proceed as contemplated by the Contract and, not long after the execution of the Contract, the relationship between the parties became strained. It says that attempts to resolve the differences between the parties have proven unsuccessful.

[16]. Terms in the Contract that are relevant to the determination of the subject payment dispute include –

28. Certificates and Payments

28.4 Final Payment Claim

Within twenty-eight (28) days after ..., or upon termination of the Contract by the Principal under Clause 32.1, the date of the notice of termination, the Contractor shall lodge with the Principal a written final payment claim and endorse it "Final Payment Claim".

The Contractor shall include in the final payment claim all moneys which the Contractor considers to be due from the Principal under or arising out of the Contract or any alleged breach of Contract or on any other basis whatever in connection with the work under the Contract including:

- a) detailed particulars concerning the written direction or other fact, matter or thing upon which the claim is based;
- b) the legal basis for the claim, whether based on a term of the Contract or otherwise, and if based on a term of the Contract, clearly identifying the specific term;
- c) the facts relied upon in support of the claim in sufficient detail to permit verification; and
- d) details of the amount claimed and how it has been calculated.

After the expiration of the period for lodging a final payment claim, any claim that the Contractor could have made against the Principal and that has not been made shall be barred.

28.5 Final Payment Certificate

Within fourteen (14) days after receipt of the Contractor's written final payment claim, the Principal shall issue to the Contractor a final payment certificate endorsed "Final Payment Certificate". In the Final Payment Certificate, the Principal shall certify the amount which is due from the Principal to the Contractor or from the Contractor to the Principal under or arising out of the performance of the Contract.

As a condition precedent to the release to the Contractor of security then held by the Principal and payment by the Principal to the Contractor of any monies due to the Contractor pursuant to the Final Payment Certificate, the Contractor shall:

- a) execute a release form, in favour of the Principal releasing the Principal from all claims, demands, debts, accounts, actions and proceedings arising under or by virtue of the Contract or out of its performance; and
- b) confirm in writing to the Principal that all Subcontractors and suppliers have been paid in full, supported by:
 - i) releases from each major Subcontractor and supplier associated with the work under the Contract; and
 - ii) a statement by the Contractor that the Contractor and each Subcontractor

and supplier do not have a lien or charge against the property or interest of the Principal or moneys payable under this Contract.

Within forty-five (45) days after the date of issue of the Final Payment Certificate:

- c) subject to the Contractor's execution of a certificate of release, the Principal shall:
 - i) release to the Contractor the percentage of the security then held by the Principal required to be released under Clause 5.5; and
 - ii) pay to the Contractor of all monies due to the Contractor pursuant to the Final Payment Certificate; or
- d) the Contractor shall pay to the Principal all monies due to the Principal pursuant to the Final Payment Certificate.

32. Termination for expediency

32.1 Termination

The Principal may, at the Principal's absolute discretion, terminate the Contract for its convenience in whole or in part at any time by giving the Contractor seven (7) days written notice of its intention to terminate the Contract under this Clause 32.1, whether or not the Contractor is in default pursuant to Clause 31.

Upon receipt by the Contractor of such notice, the Contractor shall:

- a) immediately cease work under the Contract and comply forthwith with any written directions given by the Principal regarding the cessation of work under the Contract; and
- b) not place any further order, nor enter into any further agreements in relation to the work under the Contract, or part of the work under the Contract, as the case may be.

32.2 Obligations upon Termination for Convenience

Upon termination under Clause 32.1, the Contractor shall, as directed by the Principal:

- b) demobilise from the Site persons, the Contractor's Constructional Plant, vehicles, equipment and other things;

32.3 Payment upon Termination for Convenience

Upon termination under Clause 32.1, the Contractor shall:

- a) waive any claims for damages, including loss of anticipated profits on account of the uncompleted portion of the work under the Contract or the expectation of entering into a further Contract for performance of the work under the Contract for the Project;
- b) not be entitled to any lost profit or any other compensation;

and as the sole right and remedy of the Contractor the Contractor shall submit a claim for payment calculated in accordance with Clause 32.4

The Principal shall assess the Contractor's claim in accordance with the procedure in Clause 28 and issue a final payment certificate in accordance with Clause 28.5.

32.4 Calculation of Termination Payment

Where the Principal terminates the Contract under Clause 32.1, the Contractor shall submit a claim according to the following:

- a) the amount due to the Contractor shown in any unpaid payment certificate;
- b) for work under the Contract executed prior to the date of the notice of termination under Clause 32.1, the amount due to the Contractor as if the Contractor had submitted a payment claim on the date of the notice of termination less any payments previously made for that work under the Contract;
- c) the actual cost of Materials reasonably held or ordered by the Contractor for the work under the Contract, which the Contractor is legally liable to accept, plus the Contractor's actual costs of transportation to Site, but only if the Materials become

- the property of the Principal upon payment;
- d) the actual cost of removal of Temporary Works and the Contractor's Constructional Plant; and
- e) the actual cost of return to their place of recruitment of the Contractor's employees engaged for the work under the Contract at the date of termination.

[17]. It is also common ground that the respondent gave the applicant seven (7) days written notice of its intention to terminate the Contract under Clause 32.1. This notice was dated 15 May 2009 and was issued to the applicant on that same day. Each party's submission shows that termination took effect on 22 May 2009.

Payment Claim

[18]. Following receipt of the respondent's notice of its intention to terminate the Contract and for the purpose of s3 of the Act, the applicant contends that it made two claims under the construction contract to the respondent for a payment of an amount in relation to the performance by it of its obligations under the Contract. The applicant submits that its first payment claim is valid and should be the 'main focus of this adjudication'. This claim is dated 9 June 2009 (the "**Payment Claim**") and is said to have been issued by facsimile on 10 June 2009. It is endorsed "Principal's Payment Certificate" and comprises a three-page spreadsheet showing the amount of \$6 528 807.75 (GST exclusive) as being claimed from the respondent. For completeness, the second claim is dated 8 July 2009 and is endorsed "Final Payment Claim". The three-page spreadsheet shows the amount of \$6 538 469.75 (GST exclusive) as being claimed from the respondent.

Adjudicator's Functions

[19]. S33(1) of the Act requires that an appointed adjudicator must, within the prescribed time or any extension of it made under s34(3)(a) –

- (a) *dismiss the application without making a determination of its merits if –*
 - (i) *the contract concerned is not a construction contract;*
 - (ii) *the application has not been prepared and served in accordance with section 28;*
 - (iii) *an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgement or other finding about the dispute that is the subject of the application; or*
 - (iv) *satisfied that it is not possible to fairly make a determination –*
 - (A) *because of the complexity of the matter; or*
 - (B) *because the prescribed time or any extension of it is not sufficient for another reason;*
- (b) *otherwise, determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment, or to return any security and, if so, determine –*
 - (i) *the amount to be paid or returned and any interest payable on it under s33; and*
 - (ii) *the date on or before which the amount is to be paid, or the security is to be returned, as the case requires.*

The Applicant's Contentions

[20]. The applicant contends that it issued the Payment Claim under Clause 32.3 on 10

June 2009 following the respondent's termination of the Contract which issue gave rise to the respondent being obliged to –

- (a) assess the claim and issue a Final Payment Certificate under Clause 32.3 within 14 days of its receipt of the claim; or
- (b) issue a notice of dispute under Clause 34.1 if it disputed the validity of the claim.

[21]. In respect of the second obligation, the applicant contends that as Clause 34.1 is silent as to the time limit for issuing a notice of dispute, the relevant implied terms in Division 5 Clause 6 of the Schedule to the Act are imported into the Contract. The applicant cited *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 in support of its contention.

[22]. In the absence of having issued a Final Payment Certificate or a notice of dispute within 14 days of its receipt of the Payment Claim, the applicant claims that the respondent is deemed to have accepted the validity and quantum of the claim and was required to pay the full amount within 28 days.

[23]. The applicant submits that in the event that I do not find that the respondent, by its conduct, accepted the validity and quantum of the claim there is nevertheless a 'payment dispute' with respect to the Payment Claim to be adjudicated under the Act.

[24]. Finally, the applicant contends that in the absence of a provision in the Contract for the payment of interest on overdue payments, the implied terms in Division 6 Clause 7 of the Schedule to the Act are imported into the Contract. With the respondent having failed to pay the full amount of the Payment Claim by 8 July 2009, the applicant claims that it is entitled to interest on that amount at 8% pursuant to Regulation 9 of the *Construction Contracts (Security of Payments) Regulations*.

The Respondent's Contentions

[25]. The respondent contends that the applicant's two payments claims are not 'payment claims' for the purposes of the Act in that the claims –

- (a) were not properly and validly made in accordance with the Contract; and
- (b) are barred by the terms of the Contract

and as a consequence there is no 'payment dispute' as required by s8 and for the purposes of s28 of the Act.

[26]. Further to that, the respondent contends that it issued a Final Payment Certificate under Clause 28.5 in response to the second payment claim on 22 July 2009 which certified an amount of \$38 944.66 (GST exclusive) as being due from the applicant to the respondent. By s37 of the Act, the respondent submits that such a certificate is conclusive evidence of the amount finally owing from the applicant to the respondent and must be given effect by the adjudicator.

[27]. The respondent also contends that its obligation to pay the applicant any money under Clause 28.5 is conditional upon the applicant providing to the respondent a certificate of release and, in the absence of such release, the applicant is not entitled to any payment in respect of either of its payment claims.

[28]. Finally, the respondent says that in the event that the adjudicator determines the applicant's written application on its merits (which the respondent submits he should not do) the applicant has failed to demonstrate an entitlement to the amounts claimed because the applicant –

- (a) has over-valued the work done under the Contract as at the date of termination;
- (b) is, on a proper construction of the Contract, not entitled to variations under the Contract as claimed or not at all;
- (c) has over-valued the amounts claimed for variations; and
- (d) has failed to account for and wrongly rejected valid variations of the Contract submitted by the respondent.

Jurisdiction

[29]. The respondent submits that the applicant's two payment claims are not 'payment claims' for the purposes of the Act in that they were not properly and validly made in accordance with the Contract. The respondent says that for a Final Payment Claim to be valid it must satisfy the following requirements of Clause 28.4 –

- (a) be endorsed "Final Payment Claim";
- (b) be delivered within 28 days after the date of the notice of termination; and
- (c) contain all the specified information.

Endorsement

[30]. The Payment Claim is endorsed "Principal's Payment Certificate" and not "Final Payment Claim". Following receipt of the respondent's notice of its intention to terminate the Contract, the applicant issued two letters dated 22 and 28 May 2009 in which it notified the respondent of its intention to lodge a final payment claim in accordance with Clause 32.4. It is my view that the respondent should have realised that the applicant had made a mistake when it endorsed its Payment Claim with the words "Principal's Payment Certificate" and should have recognised it as the applicant's final payment claim. **I find** therefore that the applicant made such a mistake and that mistake did not make its first payment claim invalid.

Delivery

[31]. The date of notice of termination is 15 May 2009. Accordingly, by Clause 28.4 the applicant was required to lodge its final written payment claim by 12 June 2009. The applicant lodged its Payment Claim by facsimile on 10 June 2009. That is not disputed by the respondent. **I find** therefore that the Payment Claim was lodged within the specified time. The applicant lodged its second payment claim on or about 8 July 2009. This is clearly later than the required time of 12 June 2009. However, in acknowledging receipt of the applicant's Payment Claim by its letter dated 2 July 2009, the respondent invited the applicant to lodge its second payment claim when it said "[the respondent] looks forward to receipt of a properly completed and valid payment claim under clause 32.3 once [the applicant] has fully demobilised from Site". In my view, it may be argued that

this invitation was an amendment or variation of the Contract which extended the time by which the applicant was required to lodge its final written payment claim. However, for the reasons which follow, I do not need to give the timeliness of the second payment claim further consideration.

Specified Information

[32]. The information that the applicant was required to include in its final payment claim is set out in Clause 28.4 (see paragraph [16] above). The applicant's Payment Claim and second payment claim, included at Appendix A3-1 and A1-49 to its written application, are each comprised of a three-page spreadsheet. The spreadsheet is described by the applicant at paragraph 3.9 of its written application as including 'line items relating to work performed by the Claimant under the Contract which remained unpaid'. The documentation supporting the line items is included in Appendix 5 of the applicant's written application but was not included with either of the applicant's payment claims. This documentation fills two large A4 lever arch files.

[33]. The respondent submits that the information that needed to be included in the final payment claim was required to detail all of the applicant's remaining claims against the respondent to enable the respondent to respond in the appropriate manner. This approach is consistent with the reasoning of Ipp JA in *Brewarrina Shire Council v Bechhaus Civil Pty Ltd* [2003] NSWCA 4 at [16] where he said this about a monthly but not final payment claim:

In some situations, the failure on the part of a contractor to support its claim for payment with evidence of the amount due and information reasonably required might make it difficult or even impossible for the superintendent to value the claim.

[34]. In *Brewarrina*, the court was required to decide whether a claim for payment comprises the formal claim document as well as the evidence and information or the claim document alone. The contract was in the AS 2124-1992 form and clause 42.1 said –

At the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor arising out of or in connection with the Contract or for any alleged breach thereof.

[35]. It was decided that the evidence and information required to support a payment claim are separate from the payment claim itself. In so deciding, the court considered the ordinary meaning of the first paragraph of clause 42.1 and concluded that "claims for payment" were distinguished from the evidence and information that is to support such claims. The court noted that the second sentence of the paragraph sets out matters that are expressly to be included in claims for payment – and evidence and information are not mentioned in this context.

[36]. The words in clause 28.4 of the Contract are quite different to those in clause 42.1 of AS 2124-1992. Clause 28.4 expressly requires the applicant to include in its final payment claim all moneys which it considers to be due from the respondent **and** the evidence and information set out in a), b), c) and d) of that clause (my emphasis).

Accordingly, it is my view that this evidence and information formed an integral part of the formal claim document.

[37]. As the applicant did not include the evidence and information set out in clause 28.4 with its Payment Claim or its second payment claim, I uphold the respondent's submission that the applicant's two payment claims are not 'payment claims' for the purposes of the Act. In the absence of any payment claim for the purpose of the Act, I **find** that there can be no payment dispute for the purposes of s8 of the Act.

[38]. In having made this finding, I do not consider that there is any need for me to address the parties' remaining contentions. In the event that I did have that need, I am satisfied that it is possible to make a fair determination within the prescribed time.

Dismissal and Reasoning

[39]. S28(2)(b) of the Act requires the applicant to state in its application details of or have attached to it –

(ii) *any payment claim that has given rise to the payment dispute;*

[40]. In the absence of any payment claim and any payment dispute as found, by s33(1)(a)(ii) of the Act the application cannot have been prepared in accordance with s28 of the Act. Accordingly, I **dismiss** the application without making a determination of its merits.

Costs of Adjudication

[41]. The respondent has submitted that the adjudicator should exercise his authority under s36(2) of the Act and direct the applicant to pay the costs of the adjudication.

[42]. In order to give such a direction I would need to be satisfied that the respondent incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, the applicant. I am not satisfied that this is the case, despite me having dismissed the application. Accordingly, I find that the parties are liable to pay the costs of the adjudication of the dispute in equal shares.

Glynn Logue
Registered Adjudicator No 9

30 September 2009