

**Adjudicator's Determination**

**pursuant to the**

**Construction Contracts (Security of Payments) Act 2004 (NT)**

**Applicant**

**and**

**Respondent**

I, Cameron Ford, determine on 10 July 2008 in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act 2004* (NT) that the amount to be paid by the respondent to the applicant is \$177,309.56 plus GST. There is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the *Construction Contracts (Security of Payments) Act 2004* (NT).

**Appointment as adjudicator**

1. On 19 June 2008 I was appointed adjudicator by the Law Society of the Northern Territory to determine this application under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act). The Society is a prescribed appointed under reg 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act.

**Documents received by adjudicator**

2. I received and have considered the application supported by the contract, an email of 27 March 2008 said to be Progress Claim No 8 with supporting documentation, Progress Payment No. 008 dated 18 April 2008, the authorities referred to by the applicant, and the response.

3. The response was delivered on the 26 June 2008 making my determination due today.

## **JURISDICTION**

4. On the documentation provided and in the absence of objection from the respondent, I find that:
  - (a) there was a construction contract – s 27;
  - (b) the site of the work or provision of materials was in the Territory – ss 5(1)(a), s 6(1) and s 4;
  - (c) the dispute was not the subject of an order, judgment or other finding.
5. The respondent takes two points only, saying that there was no payment claim as required by the Act (rendering the application invalid and leading to a dismissal of this application without making a determination on the merits), and that there was no payment dispute under the Act.
6. The applicant seeks \$347,246.68 plus GST based on a “payment claim” comprised of the email of 27 March 2008 and its supporting documents. the respondent says that no-where in those documents is that figure mentioned or claimed.
7. The document which appears to set out the “payment claim” (I use quotation marks not in any pejorative sense but to indicate I am using the applicant’s words and not mine at this stage) is a two-page spreadsheet headed “Superintendent’s Progress Certificate 008”. That document has a number of columns, one of which is headed “Monthly Claim #08” which appears to be how the amount claimed in the progress claim is calculated. The two pages are obviously part of the one document, and the columns on the second page are obviously a continuation of the columns on the first page.
8. At the foot of the column headed “Monthly Claim #08” on p 2 there appears the total figure for that column of \$174,321.59. That figure is in red ink, as is the total for that column at the foot of p 1. No other figure in the spreadsheet is in red ink.

9. The total for that column at the foot of p 1 is \$172,925.09; the only figure in that column on p 2 is \$1,396.50. The total of those figures is \$174,321.59, the final figure at the foot of the column on p 2.
10. Two important matters are clear from that analysis. First, the figure of \$174,321.59 is the total of all items claimed in the column headed “Monthly Claim #08”. Second and flowing therefrom, progress claim no. 8 was for the sum of \$174,321.59, not the total of that figure and \$172,925.09, the figure appearing at the foot of that column on p 1. There is no other figure claimed in an obvious or less than obvious way.
11. The amount claimed in this application of \$347,246.68 plus GST is the total of those two figures. I cannot see any justification on the documents for the addition of those two figures to arrive at the total amount owing by the respondent. I tend to agree with the respondent that it appears the figures were mistakenly added to arrive at the amount of \$347,246.68. I also agree with the respondent that “none of the documents annexed to the adjudication application support this amount”.
12. On 18 April 2008 the respondent issued a payment certificate under the contract in respect of that progress claim for \$173,760.56. The difference between the amount claimed of \$174,321.59 and that certified is \$561.03, the amount claimed for item 2.01 & 3.01 SAM17C-1 in the progress claim. Clearly the respondent has disallowed this amount in its certificate.
13. The result is that at best the applicant lodged a payment claim (as defined by the Act) for \$174,321.59 on 27 March 2008 which was allowed in the sum of \$173,760.56 on 18 April 2008. There remains only the sum of \$561.03 in dispute.
14. I say at best there was a payment claim under the Act on 27 March 2008, since the respondent points to the requirement of cl 28.1 of the contract that “Claims for payment shall be submitted on the last day of each Calendar month ...”. Clearly the progress claim of 27 March was not on the last day of the month, nor was it received on the last day, as agreed by the applicant (Application, par 4).

15. The respondent says that authorities relied on by the applicant to the effect that there must be strict compliance with such contractual terms, relating to progress claims and where the word “shall” is used, should be applied also to the applicant’s obligation regarding delivery of progress claims.
16. I do not have to decide this point because, in responding to the progress claim and issuing the progress certificate, the respondent has waived strict compliance with that requirement. Having accepted the document as a progress claim and responded to it accordingly, the respondent cannot now say it was not a progress claim.
17. If I had to decide the point, I would draw assistance from another part of cl 28.1 which requires the respondent to pay the applicant the amount due “within thirty days after the end of the month in which the Principal received the Contractor’s claim for payment or, in any event, *not more than thirty-five days after the payment is claimed*” (my emphasis). It is difficult to see the purpose of the emphasised words if it was not contemplated that the contractor might submit a progress claim before the last day of the month. The words “in any event” in the context have a similar effect as would the familiar phrase “which ever occurs first” if it occurred at the end of that quoted portion of cl 28.1. If the requirement to submit a progress claim on the last day of each month was absolute and had to be strictly complied with, the shorter period would always be within thirty days after the end of the month in which the progress claim was submitted.
18. Had I been required to make a finding, I would hold that it is not necessary for there to be strict compliance with the contractor’s obligation in cl 28.1 to submit a progress claim *on* the last day of each month.
19. I find, then, that the applicant submitted a progress claim as defined in s 4 of the Act on 27 March 2008 for the sum of \$174,321.59 plus GST. The respondent allowed this claim in the reduced sum of \$173,760.56 on 18 April 2008. That amount has not been paid despite the contractual obligation to pay as set out above. At the latest, payment was due on 30 April 2008 (being 30 days after the end of the month in which the claim was submitted). There was therefore a payment dispute within the meaning of s 8 of the Act as of that date.

20. There remains the difference of \$561.03. That amount was included in the claim as I have set out, however I agree with the respondent that there is insufficient material on which I could make a determination of the applicant's entitlement to that sum. The only documentation supporting the claim, rather indirectly, is a Progress Summary dated 20 November 2007 which includes a statement to the effect that SAM17C-1 had 1.1 cubic metres and was 15% complete on that date. That is insufficient material on which to make an adjudication. I have not been directed to any other support for that amount. I cannot allow that sum in the determination.
21. The amount due under the contract of \$173,760.56, an amount agreed by the respondent in its progress certificate, remains unpaid after it fell due. The applicant is therefore entitled to that amount together with interest.
22. Interest on that sum from 1 May to today is:
- $$\$173,760.56 \times 10.5\% \times 71 \text{ days} = \$3,549.$$
23. Interest accrues at the rate of \$49.98 per day from today.

#### **DETERMINATION**

24. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is \$177,309.56 plus GST being the amount owing of \$173,760.56 plus interest of \$3,549 to today. Interest accrues on the sum of \$173,760.56 at the rate of \$49.98 per day from today.
25. The sum of \$177,309.56 plus GST is payable immediately.
26. I draw the parties' attention to the slip rule in s 43(2) if I have made a miscalculation or some other correctible error.

Dated: 10 July 2008

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CAMERON FORD  
Registered Adjudicator