

Adjudicator's Determination

Pursuant to the Northern Territory of Australia Construction Contracts (Security of Payments) Act 2004

Adjudication 18.09.06

(Applicant)

And

(Respondent)

1. I, Brian J Gallagher, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act*, determine that the Adjudicated Amount for the Applicant in respect to the Application served 22 May 2009 is \$13,590 including GST.
2. The date payable is 1 April 2009. Interest due and payable to 10 June 2009 is \$229.38 and interest continues to accrue at the rate of \$3.28 per day until payment is made.
3. The Respondent is to bear 100% of the Adjudicator's costs.

Appointment of Adjudicator

4. The Applicant served the Adjudication Application on Contractor Accreditation Limited 22 May 2009.
5. I was appointed as Adjudicator by Contractor Accreditation Limited 22 May 2009. The appointment was confirmed with the parties via notification from the adjudicator 27 May 2009.
6. The Adjudicator has been properly appointed in accordance with the *Construction Contracts (Security of Payments) Act 2004*.

Documents Regarded in Making the Determination

7. In making the determination I have had regard to the following.
 - 7.1. The provisions of the *Construction Contracts (Security of Payments) Act 2004*.
(as in force 8 January 2008)
 - 7.2. The provisions of the *Interpretation Act*. (as in force 17 May 2007)
 - 7.3. Application from the Applicant dated 22 May 2009.

The Adjudication Application

8. The Adjudication Application was served on the Respondent on 22 May 2009 and consists of the following documents;
 - 8.1. Adjudication Application, and
 - 8.2. 4 Attachments.

The Response

9. The Respondent has failed to serve a written Response in accordance with the Act.

Jurisdiction

10. The dispute arises out of a verbal contract agreement between the parties based on a written quotation for the Applicant to construct a pool at a residence constructed by the Respondent.
11. The arrangements between the parties meet the definitions of a construction contract and construction work as defined in Section 6 of the Act. The works are on sites in the Northern Territory and the contract is therefore a construction contract according to the Act.

12. I have had no previous dealings with either the Applicant or the Respondent. The parties were advised accordingly and raised no objection to my declaration of no conflict to declare.
13. The parties have provided no advice of the dispute being “subject of any other order, judgment or other finding”.
14. On the balance of probabilities, I determine the Adjudicator has jurisdiction to adjudicate the dispute in accordance with the Act.

The Payment Claim

15. The payment claim referred to in the Application relates to a letter of demand dated 4 March 2009 and sent to the First Respondent on that date. The letter refers to Invoice 1289 (dated 9 February 2009) for payment of the remaining contract amount.
16. The summary details of the 4 March 2009 claim (GST inclusive) are:

Quotation Number 1373	\$40,000
Variation 1 for extra reinforcing and concrete	\$2,750
Variation 2 for supply of sandstone	\$1,980
Variation 3 for extra tiling	<u>\$660</u>
Sub total	\$45,390
Less Payment up to 4 March 2009	<u>\$29,000</u>
Amount claimed	\$16,390
17. In the Application the Applicant advises that since the submission of the letter of demand the Respondent provided payment of \$5,000 31 March 2009. This effectively reduces the outstanding amount to the \$11,390 nominated in the Application.

Issues to be Determined

18. The Applicant presents a final claim on the basis of the agreement between the parties.
 - 18.1. Application of the implied provisions under the Act.
 - 18.2. Status of the claim.
 - 18.3. Status of the Application
19. In the event there is a legitimate claim then quantum is to be determined.
20. The due date for the payment of any legitimate claim is to be determined along with any interest due.

Implied Provisions.

21. Since the agreement between the parties is verbal all of the provisions of Division 2 of the Act apply. In this Adjudication Sections 16-21 are of direct relevance.

Status of the "Payment Claim"

22. The "Payment Claim" is required to conform with the Implied Provisions detailed in the Division 4 of the Schedule in the Act. These requirements are tabulated below.

Claim Requirements	Letter Submitted by Applicant
5(1)(a) Be in writing	Yes – via facsimile.
5(1)(b) Addressed to party to which the claim is made.	Yes – To Respondent at facsimile number shown on Respondent letterhead.
5(1)(c) Name the Claimant	Yes – Company Fax letterhead used
5(1)(d) State date of claim	Yes
5(1)(e) State amount claimed	Yes – By reference to Invoice 1289
5(1)(f) Itemise the work in sufficient detail to enable principal to assess the claim	Yes – Respondent facsimile dated 15 March 2009 agreeing to pay by end of March indicates clear understanding of the claim.
5(1)(g) Relates to claims by principal	Not applicable.
5(1)(h) Signed by claimant	Yes
5(1)(i) Given to the party to which the claim is made.	Yes – via facsimile as noted above

23. On the balance of probabilities I determine the letter of demand presented to the Respondent 4 March 2009 is a legitimate Claim for Payment under the Act.

Status of the Application

24. The Payment claim was submitted 4 March 2009. Payment was then due within 28 days or by 1 April 2009. The Respondent paid made a payment of \$5,000 31 March 2009. A payment dispute for the unpaid amount of \$11,390 existed 1 April 2009.
25. The Application for adjudication was served 22 May 2009, 51 days after the payment dispute arose and within the 90 day period required by the Act. I therefore determine on the balance of probabilities that the Application is a legitimate Application under the conditions of the Act.

Claim Quantum

26. In the absence of any formal submission from the Respondent and no advice from the Applicant that indicates any indication of any such disparate views I have little alternative but to accept the Applicants account of events. Moreover the only Respondent correspondence provided (by the Applicant) is in fact an agreement to pay Invoice 1289 on or before the end of March 2009.
27. On the balance of probabilities I determine the amount owing to the Applicant to be \$11,390 as detailed in paragraphs 16 and 17 above.

Adjudicator's Costs

27. Clause 36 (1) of the Act requires the parties to bear their own costs.
28. 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.
29. The Respondent signed an advice to the Applicant dated 15 March 2009 stating a clear intent to honour an agreement between the parties for the Respondent to pay the account by 31 March 2009. On that date the Respondent only received \$5,000 or 30% of the amount owing.
30. In the Application the applicant provides some of the history of payment claims and payments between the parties. Suffice to say the events of March were not atypical.
31. As noted above the Respondent in failing to submit a Response has declined the opportunity to provide a reasoned defence of his actions.
32. On the balance of probabilities then, I consider the actions and inactions of the Respondent to be vexatious and I therefore determine that the Respondent is to bear 100% of the Adjudicator's costs.

Interest

33. The Applicant's claim was presented 4 March 2009. Implied provisions require payment within 28 days after receiving the payment claim.
34. Implied provisions provide for interest on payments for the period between the due date for payment and the actual date of payment at 10.5% per annum.
35. On the balance of probabilities I determine as follows;
 - 35.1. The payment was due on or before 1 April 2009.
 - 35.2. Interest is accruing at the daily rate of 10.5% of $\$11,390 / 365 = \3.28 per day

35.3. Interest due and payable up to 10 Jun 2009 is \$229.36

Adjudicator's Costs Reimbursement

35.4. Since the Respondent has failed to respond to the Adjudicator, the Applicant has elected to pay the Adjudicator's fees in order to release the report. The Adjudicator's fees of \$2200 are added to the determination for the Applicant.

Conclusion

36. As requested I have conducted the adjudication and concluded as follows:

- 36.1. For the reasons set out in the Adjudication, I determine the Adjudicated Amount for the Applicant is \$13,590 including GST and the Adjudicator's fees of \$2200 incl. GST payable by the Respondent.
- 36.2. The date payable is 1 April 2009. Interest due and payable to 10 June 2009 is \$229.38 and interest continues to accrue at the rate of \$3.28 per day until payment is made. Interest does not apply to the Adjudicator's fees.
- 36.3. The Respondent is to bear 100% of the Adjudicator's costs.

Brian J Gallagher
NT Registered Adjudicator No 18.
10 June 2009