

## **Adjudicator's Determination**

Adjudicator Registration Number 17  
Determination No: 17.09.01

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

**(Applicant)**

And

**(Respondent)**

1. I, Charles H. Wright, as the appointed Adjudicator pursuant to the Construction Contracts (Security of Payments) Act 2004 (the Act), determine that the Adjudicated amount in respect of the Adjudicated Application served 27 October 2009 is \$49,035.29 inclusive of interest and GST and payable by the Respondent to the Applicant.
2. The date payable is no later than 8 December 2009.
3. No security is due to be returned.

#### **Appointment of Adjudicator**

4. I was appointed as Adjudicator to determine this dispute by the Law Society of the Northern Territory on Monday 2 November 2009, which was later confirmed by agreement with the parties.

#### **Acceptance of Adjudication Application**

5. I confirmed my acceptance as Adjudicator in a telephone conference call on Tuesday 10 November 2009 and recorded in Item 12. of the Minutes of Telephone Conference Call (item 7.10 below refers)

## **Documents Regarded in Making the Determination**

6. In making this Determination I have had regard to the following:

The provision of the *Construction Contracts (Security of Payments) Act*;

The Applicant's Application dated 27 October 2009;

Attachments 1 to 12 inclusive submitted with and forming part of the Applicant's Application dated 27 October 2009;

Payment Claim dated 11 June 2009 to which the Application relates and included;

i. Tax Invoice/Statement No. 77

ii. Tax Invoice/Statement No. 78

iii. Tax Invoice/Statement No. 79

The Respondent's Response dated 10 November 2009;

Attachments 1 to 17 inclusive submitted with and forming part of the Respondent's response dated 10 November 2009.

## **Conference with the Parties**

7. A telephone conference was held with the parties on Tuesday 10 November 2009 to deal with formal and procedural matters.

The individuals agreed that they had authority to make decisions and bind the parties they represent;

The parties agreed that the Adjudicator had jurisdiction in this payment dispute;

The parties agreed to adhere to the proposed timetable for any further responses required;

The parties agreed that two (2) prior Adjudication Applications had been sought with the first Application being dismissed and in the case of the second Application, the appointed Adjudicator issued a disqualification notice subsequent to the appointment of another Adjudicator whose appointment was a nullity;

The parties agreed that this payment dispute is not subject to an order, judgement or other finding by an arbitrator or other person or a court or other body;

The parties agreed that they were satisfied that no conflict of interest existed between the parties and the Adjudicator;

The Applicant confirmed that the Adjudication Application was correctly served on the Respondent and the Appointer on Tuesday 27 October 2009;

It was confirmed and agreed by the parties that the Respondent's Response was required to be served by the 10 November 2009 which is within ten (10) working days of 27 October 2009;

Neither party had any objections to the Adjudicator's appointment;

The Adjudicator confirmed acceptance of the appointment made on 2 November 2009;

Both parties accepted the estimate of the fee and agreed to have the fee allocated as determined by the Adjudicator.

## **Determination**

8. The Act requires (at s.33(1)) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) -*
- (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 security to be returned, and any interest payable on it under section 35; and*
- (ii) the date on or before which the amount must be paid or the security must be returned.*
9. The Respondent's Response has been received, and therefore, s.33 of the Act requires a determination to be made within the *prescribed time* in accordance with s33 (3)(a) which provides that;
- (a) if the appointed adjudicator is served with a response under section 29(1) – 10 working days after the date of the service of the response; or*
- (b) otherwise – 10 working days after the last date on which a response is required to be served under section 29(1).*

My Determination is therefore required by 24 November 2009.

## **The Adjudication Application**

10. The Adjudication Application consists of the following papers:

Application for Appointment of Adjudicator (13 pages) detailing the dispute between the Applicant and the Respondent, which includes the following;

- (a) Attachment 1 to 12 inclusive.

11. The Adjudication Application complies with section 28 of the Act, in particular;
- Application for Appointment of an Adjudicator (No. 1) dated 12 August 2009 was made within the prescribed time of section 28 of the Act and was dismissed on 2 September 2009;
- Application for Appointment of an Adjudicator (No. 2) dated 16 September 2009 was made within the prescribed time of section 39(2)(b) of the Act with the appointed Adjudicator disqualifying himself by written notice on 6 October 2009;
- Application for Appointment of an Adjudicator (No. 3) dated 27 October 2009 and which is the subject of this Determination, was made in accordance of section 31(6)(b) and is within prescribed time of section 28(1);

The Application is;

- (a) in writing;
- (b) has been served on each party to the contract;
- (c) has been served on the Adjudicator who consents to the Adjudication;
- (d) at the direction of the Adjudicator the Applicant and the Respondent were not required to lodge a deposit or security but agreed to pay the cost of the Adjudication within fourteen (14) days of the Determination being issued.

The Application;

- (a) is prepared in accordance with, and contains the information prescribed by the Regulations;
- (b) states the details of the construction contract;
- (c) provides the payment claim that has given rise to the payment dispute;
- (d) provides the information and documents upon which it relies in the adjudication.

### **The Adjudication Response**

12. The Adjudicator received the Respondent's Response within the time prescribed in the Act. The Response complies with section 29 of the Act, in particular;

The Response is;

- (a) in writing;
- (a) has been served on each party to the contract;
- (c) has been served on the Adjudicator;

The Response;

- (a) is prepared in accordance with, and contains the information prescribed by the Regulations;
- (b) states the details of the dispute to the payment claim;
- (c) provides the information and documents upon which it relies in the adjudication.

Forming part of the Respondent's Response is the Applicant's Application for Adjudication dated 12 August 2009 (Application No. 1, Attachment No. 3) and the Respondent's Response dated 27 August 2009 (Response No. 1, Attachment No. 4), the Applicant's Application for Adjudication dated 16 September 2009 (Application No. 2, Attachment No. 5) and the Respondent's Response dated 30 September 2009 (Response No. 2, Attachment No. 6).

## **The Construction Contract for the purposes of the Act**

13. The Act defines a *Construction Contract* (s.5) as:

*(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;*

14. The contract is for work on a *site in the Territory*, is a contract undertaking *construction work* as defined in s.6(1)(c) of the Act and is therefore a *construction contract* under the Act.

15. The extent of the written contract consists of the following;

15.1 The Applicant's written Quotation dated 23 July 2008 No. 93;

15.2 The Respondent's email acceptance of the Applicant's Quotation dated 28 July 2008.

### **Implied Provisions**

16. Implied Provisions:

16.1 The Applicant relies on the Implied Conditions of the Act, including;

- (i) Sections 16 of the Act and Division 1 of the Schedule;
- (ii) Section 18 of the Act and Division 3 of the Schedule;
- (iii) Section 18 of the Act and Division 5 of the Schedule;
- (iv) Section 21 of the Act and Division 6 of the Schedule.

### **Conditions for Determining the Adjudication**

17. The conditions for determining the adjudication have been met. The contract is a construction contract as defined by the Act. The site is a site in the Territory. There is a payment dispute. The Application for adjudication has been prepared and is in accordance with s.28 of the Act, within time limits, served on the parties and the Adjudicator. The Response to the Application has been prepared and served on the parties in accordance with s.29 of the Act. The Adjudicator requires no deposit to be paid in this instance. The parties have confirmed that there are no other proceedings on a matter arising from the construction Contract and being the subject of this determination.

### **The Dispute**

18. The Applicant submits;

18.1 the reduced scope of work undertaken by the Applicant is a Variation to the Contract or alternatively a New Contract;

18.2 the Payment Claim dated 11 June 2009 and being for the total GST inclusive sum of \$59,631.00 was to be paid within the implied time of 28 days;

18.3 no set off for any alleged defective work ought to be considered by the Adjudicator.

## **Variation or New Contract**

19. The Applicant's Quotation was for the erection only of structural steel supplied to them on site by others.

19.1 the scope of works was;

- (i) Supply labour, crange & associated costs;
- (ii) As per supplied drawings for buildings 1, 3 & 4, 2 & 5, 6 and 7;
- (iii) On site welding where indicated;
- (iv) Mezzanine floors;
- (v) Unload steel.

19.2 excluded items were;

- (i) Supply of materials or fixings;
- (ii) Grouting;
- (iii) Plant platforms (none indicated).

19.3 the Applicant submits that with mutual consent with the Respondent, an agreement was made that the Applicant would complete Building 1 only, leaving the Respondent to undertake the remaining works and being Buildings 2 to 7, giving rise to a Variation to the initial Contract.

19.4 alternatively, the Applicant submits that with mutual consent with the Respondent, the reduced scope of work became a New Contract.

## **The Applicant's Supporting Documentation**

20. The Applicant's supporting documents are;

20.1 Statutory Declaration by the Applicant dated 16 September 2009, in particular paragraphs 10 to 13;

20.2 summary of labour and plant times titled 'The Respondent's panel job in berrimah'.

## **Response to Variation or New Contract**

21. The Respondent submits that Applicant advised him in a conversation that he was finishing Building 1 and amongst the reasons offered was that the Applicant was over committed. The Respondent submits that they were not provided with the option by the Applicant to continue on site with the remaining works but a request for some limited temporary assistance with people and plant was agreed to by the Applicant.

21.1 The Respondent refutes the Applicant's suggestion that they agreed with the Applicant leaving the site and not completing Buildings 2 to 7 in accordance with the Applicant's Quotation.

## The Respondent's Supporting Documentation

22. The Respondent's supporting documents are;

22.1 Statutory Declaration by the Respondent dated 27 August 2009;

22.2 Statutory Declaration by the Respondent dated 30 September 2009;

### Determination on Variation or New Contract

23. The Applicant and the Respondent offer different accounts of the withdrawal of the Applicant from the site and the motivation for the Applicant to do so. However, I find this issue not central to the Payment Dispute and has no bearing on that Determination. The fact agreed by the Applicant and the Respondent is that the Applicant left the site leaving the Respondent to complete the remaining works by other means.

24. The Implied Provisions at Division 1 of the Schedule state;

#### *1 Variations must be agreed*

*The contractor is not bound to perform any variation of its obligation unless the contractor and the principal have agreed on -*

*(a) the nature and extent of the variation of the obligation; and*

*(b) the amount, or a way of calculating the amount, that the principal must pay the contractor in relation to the variation of its obligation.*

25. Section 5(1) of the Act refers to *Construction contract* and states; '*A construction contract is a contract (whether or not in writing)...*'

25.1 For a contract to exist there needs to be an 'offer' and an 'acceptance'.

26. The Act requires (at s.33(1)) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) -*

*'... determine on the balance of probabilities....'*

27. On the balance of probability, I find the following;

- 1) The Applicant not completing Buildings 2 to 7 was not a Variation to the contract as it is reasonable to expect that the Respondent would not agree to it given a choice. There is no evidence to suggest that the conditions in Division I of the Schedule were met;
- 2) The Applicant not completing Buildings 2 to 7 was not a New Contract as it is reasonable to expect that the Respondent would not agree to it given a choice. There is no evidence to suggest that the conditions of both 'offer' and 'acceptance' were met;
- 3) The Respondent had no choice but to accept a situation imposed by the Applicant.

## The Payment Claim

28. The payment claim, the subject of this Adjudication, is a number of Tax Invoices all dated 11 June 2009, collectively totalling \$59,631.00 inclusive of GST.

29. The details of the three Tax Invoices forming the payment claim are;

Invoice from: the Applicant  
ABN /ACN: of the Applicant  
Invoice to: the Respondent  
Invoice No's.: 77, 78 and 79  
Date: 11/6/(200)9

### Tax Invoice No. 77

Item 1	\$46,000.00 plus GST	
Item 2	\$4,500.00 plus GST	\$55,550.00

### Tax Invoice No. 78

Item 1	\$594.00 Incl. GST	
Item 2	\$594.00 Incl. GST	
Item 3	\$429.00 Incl. GST	
Item 4	\$1,320.00 Incl. GST	\$2,937.00

### Tax Invoice No. 79

Item 1	\$1,144.00 Incl. GST	\$1,144.00
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Total		\$59,631.00
GST		Incl.
<b>Claim Inclusive of GST</b>		<b>\$59,631.00</b>

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## The Applicant's Supporting Documentation

30. The Applicant's supporting documents are;

30.1 Adjudication Application dated 27 October 2009;

30.2 the Applicant's Quotation for the works dated 23 July 2008, Number 93;

30.3 the Respondent's email awarding the Applicant the work dated 28 July 2008;

30.4 the payment claim dated 11 June 2009 consisting of Tax Invoices, Invoice No's.: 77, 78 and 79 all dated 11 June 2009;

30.5 Statutory Declaration by the Applicant dated 16 September 2009.

30.6 summary of labour and plant times titled 'the Respondent's panel job in berrimah'.

## Response to Payment Claim

31. The Respondent's Response consists of a letter dated 18 June 2009 sent to the Applicant on that date.

## **The Respondent's Supporting Documentation**

32. The Respondent's supporting documents are;

32.1 Adjudication Response dated 10 November 2009;

32.2 the Applicant's Quotation for the works dated 23 July 2008, Number 93;

32.3 the Respondent's email awarding the Applicant the work dated 28 July 2008;

32.4 Tax Invoice No's.: 77, 78 and 79 all dated 11 June 2009;

32.5 the Respondent's letter rejecting the Applicant's payment claims dated 18 June 2009;

32.6 Statutory Declaration by the Respondent dated 27 August 2009;

32.7 Statutory Declaration by the Respondent dated 30 September 2009.

## **Payment Claim**

33. The Payment Claim consists of Tax Invoices, Invoice No's.: 77, 78 and 79 in the total sum of \$59,631.00 inclusive of GST;

34. The implied provisions of the Act for making payment claims, require at Schedule: Division 4, section 5;

### ***Content of claim for payment***

*(1) A payment claim under this contract must -*

*(a) be in writing;*

*(b) be addressed to the party to which the claim is made;*

*(c) state the name of the claimant;*

*(d) state the date of the claim;*

*(e) state the amount claimed;*

*(f) for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim;*

*(g) for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim;*

*(h) be signed by the claimant; and*

*(i) be given to the party to which the claim is made.*

35. I find that Tax Invoices, Invoice No's.: 77, 78 and 79 are valid payment claims under the Act.

36. The implied provision of the Act for responding to payment claims, require at Schedule:

Division 5, section 6;

***Responding to payment claim by notice of dispute or payment***

*(1) This clause applies if -*

*(a) a party receives a payment claim under this contract; and*

*(b) the party –*

*(i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or*

*(ii) disputes the whole or part of the claim.*

*(2) The party must –*

*(a) within 14 days after receiving the payment claim –*

*(i) give the claimant a notice of dispute; and*

*(ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or*

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

*(3) The notice of dispute must –*

*(a) be in writing;*

*(b) be addressed to the claimant;*

*(c) state the name of the party giving the notice;*

*(d) state the date of the notice;*

*(e) identify the claim to which the notice relates;*

*(f) if the claim is being rejected under subclause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract;*

*(g) if the claim is being disputed under subclause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reason for disputing it; and*

*(h) be signed by the party giving the notice.*

*(4) If under this contract the principal is entitled to retain part of an amount payable by the principal to the contractor –*

*(a) subclause (2)(b) does not affect the entitlement; and*

*(b) the principal must advise the contractor in writing (either in a notice of dispute or*

*separately) of an amount retained under the entitlement.*

37. The Applicant's Tax Invoice's 77, 78 and 79 all dated 11 June 2009 were not responded to in accordance with Division 5 of the Schedule, in particular, section 6(1)(b), section 6(2), section 6(3)(f), section 6(3)(g) and section 4.
38. The Application for Adjudication was served on the 10 November 2009 which is within the prescribed time of 90 days in section 28(1) of the Act.
39. Accordingly, I have jurisdiction to consider the payment claim.
40. The Act requires (at s.33(1)) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) -*
  - (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 security to be returned, and any interest payable on it under section 35; and*
    - (ii) the date on or before which the amount must be paid or the security must be returned.*
41. The Applicant submitted a written quotation to carry out the erection of structural steel to Buildings 1 to 7 on 23 July 2008 for the sum of \$160,000.00 plus GST.
42. The Respondent accepted the Applicant's quotation in writing on 28 July 2008.
43. The Applicant commenced on site and proceeded with the work starting on Building 1.
44. The Applicant and Respondent do not agree on the date, but at some point after commencing on site early in August 2008 with the erection of structural steel and prior to it being completed to Building 1 in early September 2008, the Applicant had a conversation with the Respondent and advised them that they intended to complete Building 1 and leave the site and gave a variety of reasons amongst them being that the Applicant was now overcommitted.
45. During the conversation in recital 44. above, the Respondent requested that the Applicant provide some labour and plant and equipment for the Respondent's use on site during the transition of the work from the Applicant to the Respondent. The Applicant agreed to this request and subsequently provided some limited assistance to the Respondent on site.
46. During this transition period, damage was sustained to the Applicant's mobile crane while being operated by the Respondent and whilst this is an insurance issue and incidental to this Adjudication, the Applicant was relying on the Respondent's cooperation in preparing and submitting an insurance claim, and the Applicant chose not to pursue payment for work completed to Building 1.
47. It appears that in May 2009 with confirmation that the damage would be repaired to the Applicant's mobile crane with the cost largely covered by the Applicant's insurance, the Applicant submitted a payment claim for Building 1 to the Respondent in June 2009 comprising Tax Invoices 77, 78 and 79.
48. The Applicant's Quotation for the work was one sum that was an amount to erect the structural steel to Buildings 1, 3 & 4, 2 & 5, 6 and 7. The Quotation did not contain a break-up for each building group or a mechanism for evaluating each building group.

49. Tax Invoice No. 77 is for the erection of the structural steel to Building 1 forming part of the overall quoted sum. There is no break-up to this invoiced amount or any indication of how this sum was calculated on the Tax invoice.
50. Attachment 9 of the Applicant's Application at paragraph 19. refers to Annexure 5 of that document that sets out the calculation for subdivision of the total quoted sum into the building groups.
51. Tax Invoice No. 78 is for the provision by the Applicant of labour to assist on Buildings 3 and 4 and is calculated on hours and at a labour rate.
52. Tax Invoice No. 79 is for the provision by the Applicant of a mobile crane and is calculated on hours and at a hire rate.
53. On the balance of probability, I find the following;
- 1) The Applicant carried out the erection of structural steel to Building 1, and by the Applicant's admission, the work was incomplete and contained defects due to missing members. This is a point both the Applicant and respondent agree;
  - 2) The Applicant did provide labour to assist the Respondent on buildings other than building 1;
  - 3) The Applicant did provide a mobile crane to assist the Respondent on buildings other than Building 1;
  - 4) The nature of 'defects' both the Applicant and Respondent refer to, are considered to be misalignment defects due to incorrectly cast in holding down bolts or incorrect set out of the structure, misaligned members due to fabrication errors or uncompleted connections due to missing members. The structural steel erector in this instance, is assembling manufactured components supplied by others with the likely contribution to 'defects' being minor in nature such as bolts not being fully tensioned or masonry anchors not being installed at right angles to members. The evidence to this is in Attachment C to the Respondent's Statutory Declaration dated 30 September 2009 and being a defects list prepared by the managing Contractor for the project.
  - 5) The Applicant is entitled to be paid for Building 1 in accordance with the Implied Provisions of the Act although the Applicant's Quotation is silent on progress or milestone claims or provides separate prices for each building group;
  - 6) The Applicant has an entitlement to be paid in accordance with section 17 and at Schedule: Division 2 of the Act;
  - 7) The Applicant has an entitlement to make claims for progress payments *at any time after the contractor has performed any of its obligations* in accordance with section 18 and at Schedule: Division 3 of the Act.
  - 8) The Applicant is entitled to be paid for labour and mobile crane hire as this was provided by the Applicant at the express direction of the Respondent and neither Tax Invoice relates to Building 1.
54. For all the reasons set out above, I determine that Tax Invoice No. 77 dated 11 June 2009, subject to adjustment for quantum, is a valid claim.
55. For all the reasons set out above, I determine that Tax Invoices No's. 78 and 79 both dated 11 June 2009 are valid claims.

**Payment for Claim**

56. In determining the amount to be paid I have regard to the following;

56.1 The Applicant’s Tax Invoice, Invoice No.: 77 dated 11 June 2009;

56.2 Paragraph 17 of the Applicant Statutory Declaration dated 16 September 2009 referring to Building 1 being ‘practically complete’;

56.3 Paragraph 7 of an employee of the Applicant’s Statutory Declaration dated 16 September 2009 referring to Building 1 being ‘practically complete’;

56.4 Paragraph 118 of the Respondent’s Response dated 10 November 2009 referring to Building 1 ‘being only 75% complete’;

56.5 On the balance of probability I accept the Quotation cost break-up referred to by the Applicant in Annexure 5 at paragraph 19. of Attachment 9 to the Applicant’s Application and the calculation producing  $3/10.5 = 28.5\%$ . From the total quoted sum, Tax Invoice No. 77 at  $\$46,000/\$160,000 = 28.75\%$ .

56.6 On the balance of probability I accept that Building 1 was 75% complete.

57. The adjudicated amount for Tax invoice No. 77 is;

Tax Invoice No. 77

Item 1	75% of \$46,000.00 plus GST	\$34,500.00 plus GST	
Item 2	Allowed in full	\$4,500.00 plus GST	\$42,900.00

58. The adjudicated amount for Tax invoice No. 78 is;

Tax Invoice No. 78

Items 1 to 4	Allowed in full	\$2,937.00 Incl. GST	\$2,937.00
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59. The adjudicated amount for Tax invoice No. 79 is;

Tax Invoice No. 79

Item 1	Allowed in full	\$1,144.00 Incl. GST	\$1,144.00
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Total			\$46,981.00
GST			Incl.
<b>Claim Inclusive of GST</b>			<b>\$46,981.00</b>

60. Interest is payable as required in Schedule: Division 6, section 7 and at the rate fixed from time to time for section 85 of the *Supreme Court Act* currently set at 10.5% per annum.

61. Interest payable is;

Interest payable on \$46,981.00 from 9 July 2009 to 8 December 2009		
\$46,981.00 at 10.5% PA / 365 x 152 days		\$2,054.29
<b>TOTAL (inclusive of GST)</b>		<b>\$2,054.29</b>

62. Interest is to be added to the amount adjudicated in recital 58. above and paid together on or before 8 December 2009.

### **Set Off Provision**

63. The Applicant raises the issue that the Respondent may raise claims for set off, abatement or deductions in the Respondent's Response.

64. The Applicant states that the Respondent had an opportunity to pursue claims against the Applicant through the Act and that these matters cannot be dealt with now in a Response to an Adjudication Application.

### **The Applicant's Supporting Documentation**

65. The Applicant states that 'There is authority that an adjudicator ought not to consider any defences or cross claims that have not been raised in valid reference of a payment disputes' and states *Northern Developments (Cumbria) Ltd v J & J Nichol* [2000] EWHC 176 (24 January 2000).

### **Response to Payment Claim**

66. The Respondent's Responses provides an itemised list of alleged 'Costs Incurred' that totals \$236,626.58.

67. At paragraph 149. of the Response, the Respondent states on the one hand, that the Respondent incurred 'extra costs' of \$236,626.58 and in the next sentence to that paragraph, states the 'extra costs' are \$76,626.58.

68. It is taken that the Respondent incurred 'extra costs' of the lesser amount of \$76,626.58 and the higher cost of \$236,626.58 is the total cost incurred.

69. The Respondent, having provided all the detail in the Response together with the cost data, at paragraph 162. of the Response states that '...the adjudicator should determine the amount for payment as \$Nil.'

### **The Respondent's Supporting Documentation**

70. Paragraph 151. to paragraph 158. of the Respondent's response details in sections the various costs incurred.

71. Cost data provided at Attachment 14 (No. 1), Attachment 14 (No. 2), Attachment 15, 16 and 17.

### **Determination of Set Off Provision**

72. The Respondent had the opportunity at any time after completion of the erection of the structural steel to Buildings 2 to 7 and finalisation of the steel work to Building 1 to commence proceedings against the Applicant to recover monies for the alleged 'extra cost' incurred had they wished.

73. Upon receipt of the Payment Claim issued by the Applicant, the Respondent had the opportunity to seek recovery of any 'extra costs' that had been alleged to be incurred with the provisions of the Act in Division 5 of the Schedule.

74. The Response to the payment claim by the Respondent suggested that the Respondent had incurred 'excessive costs' and that the Respondent was in the process of trying to recover money from the Managing Contractor on the project.

75. On the balance of probability I can accept that the Respondent, domiciled interstate, may have incurred 'excessive cost' in completing the steel erection to Buildings 2 to 7 and completion of Building 1. However, the cause of the 'excessive cost' may well lie outside the action of the Applicant completing Building 1 only leaving the Respondent to complete the remaining buildings 2 to 7. Other causes for 'excessive cost' could be delay costs due to late delivery of fabricated steel, rectification of errors and omission in the fabricated steel, frustrated working conditions on site caused by other trades, undertaking variation works and undertaking remedial work to work carried out by the Respondent.

76. For the reasons set out in paragraphs 71. to 75. above, it is unsound to take the Respondent's set off claims into consideration and therefore, I determine that the amount to be paid by the Applicant to the Respondent is \$Nil.

**Costs**

77. I determine that each party pay one half of the cost of the adjudication.

**Summary**

78. I determine that the Contract was not varied and alternatively a New Contract was not created.

79. The adjudicated amount is made up of;

79.1 Payment Claim Tax Invoice No.: 77 as amended above \$46,981.00 including GST

79.2 Interest payable \$2,054.29 including GST

79.3 Total payable \$49,035.29 including GST

80. The amount to be paid as set off is \$Nil.

**Conclusion**

81. For the reasons set out in this determination, I determine that the adjudicated amount is \$49,035.29 inclusive of GST.

82. The date payable is no later than 8 December 2009.



.....  
**Charles H. Wright**  
**Adjudicator**

**24 November 2009**