

## Adjudicator's Determination

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

#### Adjudication 18.09.08

**(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 of the Applications served 17 and 18 September 2009 is \$4,089,619.68 including GST.
2. The date payable for the May claim is 30 June 2009 and for the June claim is 30 July 2009. Total interest due and payable to 23 October 2009 is \$41,335.49 and interest continues to accrue at the rate of \$355.18 per day until payment is made.
3. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

### **Appointment of Adjudicator**

4. The Applicant served two Adjudication Applications on the Law Society of the Northern Territory. The Application in relation to a May progress claim was served 17 September 2009 and a second Application in relation to a June progress claim on the same project was served 18 September 2009.
5. I was appointed as Adjudicator by the Law Society of the Northern Territory 21 September 2009. The parties were notified of the appointment by the Law Society that same day.
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 (May Claim) from the Applicant dated 17 September 2009.
  - 7.4. Application (June Claim) from the Applicant dated 18 September 2009.
  - 7.5. Response (May Claim) from the Respondent dated 1 October 2009.
  - 7.6. Response (June Claim) from the Respondent dated 2 October 2009.
  - 7.7. Applicant's reply, to Adjudicator's first request, dated 7 October 2009.
  - 7.8. Respondent's reply, to Adjudicator's first request, dated 7 October 2009.
  - 7.9. Respondent's letter to the Adjudicator dated 8 October 2009.
  - 7.10. Applicant's reply, to Adjudicator's second request, dated 12 October 2009.
  - 7.11. Respondent's reply, to Adjudicator's second request, dated 11 October 2009.

### **Simultaneous Adjudication**

8. The Applicant and the Respondent have agreed to simultaneous adjudication of the separate applications for the May and June claims. As both parties provided similar arguments, in each of their submissions, supporting their respective positions I have effectively considered these matters as a single adjudication in relation to the two progress claims.

### **The Adjudication Applications**

9. The Adjudication Application for the May claim was served on the Respondent 17 September 2009 and consists of the following documents;
  - 9.1. Adjudication Application, and
  - 9.2. 25 Attachments with supporting documentation.

10. The Adjudication Application for the June claim was served on the Respondent 18 September 2009 and consists of the following documents;
  - 10.1. Adjudication Applications, and
  - 10.2. 24 Attachments with supporting documentation.

## The Responses

11. The Adjudication Response for the May claim was served on the Applicant and the Adjudicator 1 October 2009 and consists of the following documents;
  - 11.1. Respondent's reply to the Application, and
  - 11.2. 4 Annexures with supporting documentation, and
  - 11.3. Annexure 2 is a Statutory Declaration with 48 attachments
12. The Adjudication Response for the June claim was served on the Applicant and the Adjudicator 2 October 2009 and consists of the following documents;
  - 12.1. Respondent's reply to the Application, and
  - 12.2. 4 Annexures with supporting documentation, and
  - 12.3. Annexure 2 is a Statutory Declaration with 48 attachments

## Jurisdiction

13. The dispute arises out of a contract between the parties for the Applicant to construct infrastructure in the Northern Territory for the Respondent.
14. The parties agree the following;
  - 14.1. The contract is subject to the *Construction Contracts (Security of Payments) Act 2004*.
  - 14.2. There are payment disputes in relation to the May and June progress claims submitted by the Applicant to the Respondent.
  - 14.3. Applications for adjudication of the two payment disputes have been served within the time prescribed by the Act
  - 14.4. The contract has written provisions in relation to payments and therefore none of the implied terms in the Act apply.
15. The parties raised no objection to my declaration of no conflict to declare.
16. The parties have provided no advice of the dispute being "subject of any other order, judgment or other finding".
17. In relation to these requirements, I determine on the balance of probabilities the Adjudicator has jurisdiction to adjudicate the dispute in accordance with the Act.

### The May Payment Claim

18. The May payment claim referred to in the Application relates to an Invoice No 108409 dated 29 May 2009 and sent to the Respondent on or around that date. The Invoice was provided with a summary sheet, a schedule of rates for contract items, and supporting information and invoices.
19. The Invoice No 108409 presented to the Respondent on or around 1 May 2009 summarises the claim as follows:

Payment claim	\$2,762,919.00
Add GST	<u>\$276,291.90</u>
<b>Amount claimed</b>	<b>\$3,039,210.90</b>

### The June Payment Claim

20. The June payment claim referred to in the Application relates to an Invoice No 109596 dated 29 June 2009 and sent to the Respondent on or around that date. The Invoice was provided with a summary sheet, a schedule of rates for contract items, and supporting information and invoices.
21. The Invoice No 109596 presented to the Respondent on or around 1 May 2009 summarises the claim as follows:

Payment claim	\$3,239,182.66
Add GST	<u>\$323,918.27</u>
<b>Amount claimed</b>	<b>\$3,563,100.93</b>

### Issues to be Determined

22. The Respondent disputes the Applicant's entitlement to make the claims for payment as set out in the progress claims in relation to the following;
- 22.1. Delay costs associated with inclement weather
  - 22.2. Delay costs associated with the issue of work permits
  - 22.3. Other delay costs
  - 22.4. Time related charges in relation to management costs under provisional sum items.
23. The Respondent argues the terms and conditions of the contract deny any such entitlement.
24. The Applicant argues the Superintendent has failed to properly administer the contract and that these failures constitute a breach of the contract. The Respondent argues the alleged breaches relate to authority specifically provided to the Principal

by amendments to the conditions of contract and to the exercise of discretionary powers on extensions of time.

25. It is apparent that any consideration of the issues arising in this dispute centre on the various authorities and functions assigned to the Principal and the Superintendent. Once that is clarified it is then important to seek evidence of proper execution of those authorities in order to determine merit in the arguments presented by the parties.
26. If it is established that legitimate claims exists then quantum must be determined.
27. The due date for the payment of any legitimate claims is to be determined along with any interest due.

### **The contract between the parties**

28. The contract between the parties arose from a selected tender process where a number of entities including the Applicant were invited to submit a tender for the works based on documentation prepared by the Respondent.
  - 28.1. The tender documents referred to [omitted] General Conditions of Contract and provided various amendments to those conditions, in particular the payment provisions.
  - 28.2. In the schedule of rates to be priced by tenderers the Principal included 3 Provisional Sums with values assigned. The supporting documentation required a more detailed breakdown of the Provisional Sum Amounts.
  - 28.3. The Applicant lodged a tender dated 15 September 2008.
  - 28.4. Various communications between the two parties ensued culminating in a letter of acceptance referring to various post tender clarifications and agreements and issued 17 October 2008.
  - 28.5. The contract agreement was formally executed 26 March 2009.

### **Principal and Superintendent**

29. The Annexure to the General Conditions of Contract nominates the Superintendent on the contract as “the person who is for the time being performing the duties of [specific job title]”.
30. The person who signed the letter of acceptance of the Applicant’s tender was in fact the person nominated in the annexure as the Superintendent. That person then appoints a Representative who is also referred to in the letter of acceptance as being party to the post tender negotiations between the parties.
31. The conditions of contract are clear in terms of the authorities and functions to be exercised by the Principal and those assigned to the Superintendent. Also it is not uncommon for the appointed Superintendent to be an employee of the Principal. However, it is generally accepted that the Superintendent whilst acting as the Principal’s certifier has a duty of care to both parties to the contract and as such must fairly represent the interests of both parties.

32. It is therefore important that there is a demonstrable separation in the Principal's organization as to those individuals identified as fulfilling Superintendent functions and those exercising the authority of the Principal. Such clarity is not evident in the various documents provided by the parties in relation to the administration of this contract.

### **Schedule of Rates Items**

33. The submitted tender did not provide rates for the various scheduled items only amounts in the column headed "Extended Amounts". The conditions of contract provide that the tendered rates and lump sums form part of the tender and that the extended amounts do not. The adjudicator sought further submissions from the parties in relation to this apparent irregularity.
34. In essence the parties responded similarly saying there was no dispute in relation to the payments made under the Schedule of Rates items and that the parties had effectively ascribed the rates by reference to nominated quantities and the sums submitted by the tenderer.
35. The Applicant also cites various references to case law in relation to the intent of the parties when entering into the contract.
36. There is no doubt that the parties can vary the terms of the contract by agreement and this particular contract specifically provides at Clause 47 that the special conditions of contract can be varied by prior written consent of the Principal.
37. In the arguments presented by the Applicant in relation to progress claims the Applicant asserts that the Superintendent in failing to issue progress certificates has breached the terms of the contract. The Respondent points out that under the amended conditions of the contract it is the Principal who certifies the payment and that hence the Superintendent is not in breach.
38. The only certainty is that the administrative functions nominated in the contract have not been properly executed and that the fault lies in the Principal's organization at either the Principal's level or the Superintendent's level or both. As noted above it is also not always clear which of these contractual parties individuals are representing at any given time.
39. Only the Applicant's progress claim summaries in the May and June claims provide evidence of the total amount of work completed under the schedule of rates. On close inspection it appears the "Total Complete" for May has not been carried forward as "Total Last Claim" for June, as the "Total Complete" in June should be the sum of "Total last Claim" and "Total This Claim". At least that is the evident logic of the May claim.
40. Correcting the above error and based on the adjusted "Total Complete" quantities of the Schedule of Rates Summary provided by the Applicant for the June Claim the

completed value of work under schedule of rates items is calculated as \$5,720,964.08 or \$1,036,762.58 more than the amount for these items as provided in the tender. The Respondent states that there is no dispute with the amount claimed by the Applicant in relation to Schedule of Rates items in the June claim. The terms of the contract at Clause 41 require the Superintendent to measure the works, provide the contractor with reasonable notice of such measurements and can require the contractor to assist. The Superintendent is to keep a record of such measurements which are binding on the contractor.

41. Notwithstanding a 22% increase in the scheduled work under the contract there is no evidence of the Superintendent taking the required measurements, simply a comment in relation to no dispute on the claimed amounts. Again this is an example of inadequate contract administration within the Respondent's organisation.
42. On the balance of probabilities then I determine that the Applicant is entitled to payment in full for the Schedule of Rates amounts claimed in both the May and June claims.

### **Provisional Sum Items**

43. As noted above the amounts provided for provisional sums in the contract as awarded were amounts nominated by the Principal.
44. Clause 11.1 specifically refers to the adjustment of provisional sums to be taken into account in the determination of the final contract sum. The adjustments occur if the provisional sum is not expended or if the provisional sum is greater or less than "the amount directed in writing by the Principal to be expended by the Contractor". I interpret this to mean that the Principal has made provision in the contract for certain things that it was not possible to accurately evaluate the pricing risks and in so doing accepted all risks in association with pricing these items. The implied corollary as indicated in Clause 11.1 is that the contractor would not proceed with provisional sum works until the Principal had provided written approval in relation to both scope and price.
45. The Applicant presents the view that the above interpretation of the contract requiring the Principal to approve Provisional Sums does not necessarily follow. It is further argued that the parties' intent to pay for provisional amounts based on costs incurred and quantities completed is clear by their conduct. Be that as it may it does not help resolution of a dispute in relation to applicable costs incurred.
46. As a matter of course I would expect a Principal to issue clear instruction in relation to Provisional Sums and I consider the lack of such direction to be further evidence of inadequate contract administration within the Respondent's organisation.
47. The Respondent argues that the Applicant is not entitled to claim time related costs for the management team as this is equivalent to compensating the contractor for his own default. Assuming that is true it should have been a foreseeable risk on the part of the Principal and either allowed for in the pre-estimates for liquidated damages or

specifically nominated as expenditure to be excluded from the provisional sum allowances. Again this all points to the need for prior approval of costs and scope of provisional sum expenditure. In any event the argument is presented retrospectively and its efficacy hinges on the validity of the Applicant's claims of the Respondent's breach in relation to contract time.

### Total Value of the Works

48. Based on the information provided by the parties and deduction in lieu of clear evidence because neither the Applicant nor the Respondent has provided a full reconciliation of claims and payments I have concluded the following reconciliation (GST incl).

<b>Period</b>	<b>Applicant Claim</b>	<b>Respondent Payment</b>
Contract Award	\$250,000.00	\$250,000.00
November 08	\$83,517.29	\$83,517.29
December 08	\$574,689.31	\$574,689.31
January 09	\$1,052,081.07	\$1,052,081.07
February 09	\$1,032,750.60	\$1,032,750.60
March 09	\$1,544,163.32	\$1,544,163.32
April 09	\$2,651,917.64	\$2,651,917.64
May 09	\$3,039,210.90	\$2,485,909.45
June 09	\$3,563,100.93	(Valuation) \$2,885,020.26
<b>Varied Totals</b>	<b>\$13,791,431.06</b>	<b>\$12,560,048.94</b>
Contract as Awarded	\$5,417,201.50	\$5,417,201.50
<b>Variance</b>	<b>\$8,374,229.56</b>	<b>\$7,142,847.44</b>

49. The above figures indicate the Applicant is seeking an increase in the contract value of \$8.4M. Irrespective of the items in dispute the Respondent values the contract as substantively complete at \$12,560,048.94 or \$7,142,847.44 in excess of the value as let. That constitutes a tacit approval to increase the contract value by 132%.
50. The Respondent acknowledges that none of this increase in contract value has been accompanied with any direct authorisation from either the Principal or the Superintendent other than an executed payment upon presentation of an invoice by the Applicant. At the very least this is an abdication of the Superintendent's duty of care to the Principal to provide accurate forecasts of the financial demands of the project. Again it is another example of inadequate contract administration within the Respondent's organisation.

### Delay Claims

51. The original contract period was 18 weeks. The actual time taken to complete the works was 38 or a further twenty weeks beyond the scheduled time. The Respondent now argues that notwithstanding the Applicant's failure to properly notify and lodge claims for extensions of time it has concluded on the basis of records that a period of 4 weeks could be allowed for wet weather, permit delays and drawing/free issue delays. It is then argued that the remaining 16 weeks of

additional time “cannot be attributed to matters for which the Respondent is responsible....Rather, it was due to the poor performance, management and inefficiencies of the Applicant.” To support this position the Applicant refers directly to the statutory declaration of the Superintendent’s Representative.

52. The Applicant vehemently rejects the Respondent’s assertions, particularly in relation to the claims about incompetent management. It is acknowledged that there were changes of the Project Manager position but that above and below this level the project team was quite stable providing solid continuity to the management of the works. There are also examples of the Respondent’s team acknowledging the efforts of the project managers.
53. In its first reply to queries raised by the Adjudicator, the Applicant provided a statutory declaration from a senior member of the project team. That statement differs markedly from the Superintendent’s Representative’s version of events. In fact the variance is such any determination on the balance of probabilities requires one of those statements to be set aside.
54. There are however two important aspects of the Applicants arguments in relation to time where the Respondent presents convincing argument. Despite the parlous position on contract time and the potential exposure to liquidated damages the Applicant failed to lodge a single extension of time notice with the Superintendent. This leaves the Applicant dependent upon the Superintendent to exercise his discretion under Clause 35.4. As such the Superintendent is quite entitled to award extensions for concurrent delays on the basis of the delay not subject to delay costs.
55. The Applicant has claimed for delays and delay costs associated with inclement weather on the basis of a qualification in the tender which states “No allowance has been made in this tender for .... lost time or any delays caused by wet weather”. The Respondent rejects the claim saying there is no basis in the contract to support it and the tender qualification does not directly seek to amend the conditions of the contract in order to achieve that outcome. I believe the Applicant’s intention was to condition the bid such that the full risk of wet weather including delay costs transferred from the Applicant to the Respondent. However, the Applicant’s claim is diminished by the wording employed in the same tender letter to qualify the Applicant’s position in relation to lost time for dimension clarification on drawings, lost time due to operational requirements, and lost time beyond 30 minutes for permits which are all nominated to be charged at schedule of rates. The Applicant has failed to be specific on delay cost recovery for inclement weather when it had the opportunity to be clear. Hence, on the balance of probabilities I determine the Applicant has failed to transfer the risk, as likely intended, and is only entitled to extensions of time without costs in relation to inclement weather.
56. This still leaves the question in relation to entitlements for all other delays open. Primarily the Respondent argues that the Applicant should not be permitted to seek cost reimbursement for time related costs that are a direct result of the Applicant’s failure to complete the works within the contract period as reasonably extended. This is in essence a philosophical view as the contract is not explicit on the issue.

The Applicant asserts that failing such explicit denial in the contract the entitlement exists irrespective of the position on contract time.

57. I have reviewed the Respondent's argument in relation to this question and consider there remains one fundamental flaw. I consider the declared position of the Respondent in relation to contract financial entitlements to be the complete opposite of his declared position on contract time. I cannot understand how the Respondent is prepared to accept a total contract cost increase of 132% (Para. 38) whilst arguing that total time increase of 111% was "due to the poor performance, management and inefficiencies of the Applicant". Moreover, the acceptance of 4 weeks delay by the Respondent only magnifies the disparity of the position to 132% cost increase over a 90% time increase.
58. It does appear the Respondent has not considered the increased workload from variations, increases quantities in the schedule of rates, and work related increases covered by provisional sums as having any influence on contract time. The Respondent has acknowledged that the Applicant experienced difficulty in securing skilled resources to meet the demands of the project. Clearly any increase in workload on finite resource levels must have increased the duration of the works. In short the time and cost numbers do not support the position presented by the Superintendent's Representative.
59. It is apparent from the evidence presented above that the Principal and the Superintendent have not properly administered provisional sums or variations. It also appears the administration of contract time is remiss. Until a thorough evaluation of the contract period, covering all types of delays and allowances for all the additional works is conducted, I do not believe the Superintendent can legitimately claim to have fairly represented the interests of both parties to the contract and is therefore not in a position to reasonably apply liquidated damages for alleged late completion of the works. This also obviates any requirement to determine accountability for time related delay costs which can be attributed to the Applicant.
60. On the balance of probabilities I determine as follows.
- 60.1. The Applicant is entitled to claim for delay charges as presented except for claims specifically relating to wet weather.
  - 60.2. The Applicant is entitled to claim for provisional sum costs as presented.
  - 60.3. The Respondent is not entitled, on the evidence presented, to apply liquidated damages to outstanding payments.

### **Claims Quantum**

61. The May Progress Claim was presented 29 May 2009 and was due for payment 30 June 2009. The Invoice totals \$3,039,210.90. I am disallowing claims for rain delays FV090, FV093, and FV096. These total \$4,591.95. The Respondent made a payment of \$2,485,909.45 towards this claim 14 August 2009. The determination on quantum on the May claim (GST incl.) is then;

Amount Claimed:	\$3,039,210.90
Deduct Rain Delay Charges	\$4,591.95
Deduct Amount Paid	<u>\$2,485,909.45</u>
Amount Outstanding	<b>\$548,709.50</b>

62. The June Progress Claim was presented 26 June 2009 and was due for payment 30 July 2009. The Invoice totals \$3,563,100.93. I am disallowing claims for rain delays listed as Variation Nos. 8, 18, 38, 45, 46, 49, 54, 55, 57, 70, 88 and 90. These total \$22,190.75. The Respondent made a valuation of \$2,885,020.26 towards this claim but no payments have been advised. The determination on quantum on the June claim (GST incl.) is then;

Amount Claimed:	\$3,563,100.93
Deduct Rain Delay Charges	\$22,190.75
Deduct Amount Paid	<u>\$0.00</u>
Amount Outstanding	<b>\$3,540,910.18</b>

63. On the balance of probabilities I determine the amount outstanding from the May and June progress claims at \$4,089,619.68

### Interest on Outstanding Amounts.

64. The amendments to the General Conditions of Contract provides payment of claims within 30 days and for interest on late payments at the 1 June 90 day bill rate each year. The Reserve Bank Web site indicates the applicable rate for 1 June 2009 is 3.17%. Interest is calculated as follows.

Period	Outstanding Amount	Interest Amount
1 July – 14 August	\$3,034,618.95	\$11,859.96
15 August - 23 October	\$548,709.50	\$3,335.85
31 July – 23 October	\$3,540,910.18	\$26,139.68
<b>Total</b>		<b>\$41,335.49</b>

65. Interest continues to accrue at a rate of \$355.18 per day until the outstanding amount is paid.

### Adjudicator's Costs

66. Clause 36 (1) of the Act requires the parties to bear their own costs.
67. 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.
68. I am satisfied that the submissions from both parties have merit and are neither frivolous nor vexatious.

69. I therefore determine that adjudicator's costs are to be shared equally by the parties.

### **Conclusion**

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

- 70.1. For the reasons set out in the Adjudication, I determine the Adjudicated Amount for the Applicant is \$4,089,619.68 including GST.
- 70.2. The date payable for the May claim is 30 June 2009 and for the June claim is 30 July 2009. Total interest due and payable to 23 October 2009 is \$41,335.49 and interest continues to accrue at the rate of \$355.18 per day until payment is made.
- 70.3. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

Brian J Gallagher  
**NT Registered Adjudicator No 18.**  
**23 October 2009**