

Adjudicator's Determination

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

Adjudication 18-09-03

(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 3 April 2009 is \$30,840.26 including GST.
2. The date payable is 2 March 2009. Interest due and payable to 6 May 2009 is \$576.67 and interest continues to accrue at the rate of \$8.87 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 the Adjudication Application on the Law Society Northern Territory 3 April 2009.
5. I was appointed as Adjudicator by Law Society Northern Territory 6 April 2009. The parties were notified of the appointment the 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 from the Applicant dated 3 April 2009.
 - 7.4. Response from the Respondent dated 21 April 2009.

The Adjudication Application

8. The Adjudication Application was served on the Respondent on 3 April 2009 and consists of the following documents:
 - 8.1. Adjudication Application, and
 - 8.2. 5 Attachments.

The Response

9. The Response to the Application was served on the Adjudicator and the Applicant on 21 April 2009, within the period defined by the Act, and consists of the following documents:
 - 9.1. Response document, and
 - 9.2. 12 Attachments.

Jurisdiction

10. The dispute arises out of a letter of appointment from the Respondent to the Applicant confirming the Applicant's appointment as the Air-conditioning Installation Contractor and the Contractor for the Supply and Installation of Bathroom Mechanical Ventilation Systems. The services provided were in relation to the construction of a new development for the Respondent.

11. The works and arrangements between the parties meet the definitions of construction contract and construction work as defined in Section 6 of the Act. The work is on a site in the Northern Territory and the contract is therefore a construction contract according to the Act.
12. I have had no prior association with either party and hence and no conflicts of interest 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 is dated 29 January 2009. The amount claimed is \$119,248.45 inclusive of GST.
16. The summary details of the 29 January 2009 claim (GST inclusive) are:

Outstanding contract value as awarded	\$72,198.70
Claim for 50% release of retention	<u>\$47,049.75</u>
Net Claim	\$119,248.45

Issues to be Determined

17. The Applicant and the Respondent each present argument surrounding the events leading up to the establishment of the contract with somewhat different views as how the contract was finally constituted. The nature of the contract between the parties must be clarified in order to properly adjudicate further questions relating to status of claims, defined payment provisions and the applicability of implied terms in the Act.
18. The Application for adjudication relates to a 29 January 2009 resubmission of two invoices initially presented for payment in October 2008 but remaining unpaid. The Respondent argues that the “October Payment claim is not a valid payment claim under the contract as any dispute that arose in respect of it occurred more than 90 days from when the Application was made 3 April 2009.” So it must be determined if the January claim is a valid claim and if there is a payment dispute eligible for adjudication under the requirements of the Act.
19. The Respondent further argues that he is entitled to withhold payment to offset known and expended contra charges and to offset further anticipated charges to rectify defective work on the part of the Applicant. The Applicant asserts that the value of rectification work directly attributable to his work is a matter open to question.

20. In the event there are legitimate claims from the Applicant and legitimate contra charges from the Respondent then quantum is to be determined.
21. The due date for the payment of any legitimate net claim is to be determined along with any interest due.

The contract between the parties

22. The Applicant submitted a revised price of \$1,681,879 (GST incl.) to the Respondent dated 1 December 2006. The submission defines the scope of work and lists a series of exclusions from the price.
23. The Respondent replies 19 January 2007 to “confirm the Applicant’s appointment” as the contractor. The heading of the reply employs the term “letter of intent” but goes on to list payment terms, agrees the scope as defined by the Applicant’s quote, nominates retention treatment and says “a sub-contract agreement will be issued for signing in due course”.
24. The parties agree no subcontract agreement was ever issued and none has been signed.
25. Applicant claims that the 19 January 2007 constituted a counter offer which he did not formally acknowledge or accept. He simply proceeded with the works.
26. The Applicant now claims the contract consists only of the quotation of 1 December 2006 and the acceptance of 19 January 2007 with the exception of the reference to a subcontract agreement to be signed.
27. The Respondent rejects the claim of a counter offer but accepts the construction of the contract as defined by the Applicant in the paragraph above. The Respondent also points out, as a matter of law, the existence of implied terms relating to quality of materials and workmanship.
28. The parties therefore are in agreement as to the constitution of the contract and adjudication is conducted on the basis of that agreement.

Validity of the Application

29. The Respondent argues that the Adjudicator should dismiss the application without any further determination under Section 33(1)(a)(ii) as the application has not been prepared in accordance with Section 28 of the Act. This argument is based on the fact that the 29 January 2009 claim referred to in the Application is a duplication of an earlier claim which had been disputed and not paid.
30. As the Adjudicator of Adjudication 18-07-05 I dismissed the application under Section 33(1)(a)(ii) on the basis that the claim referred for adjudication was a resubmission of an earlier claim which had been rejected by the Respondent in that action.

31. Adjudication decision 18-07-05 was set aside on appeal by G R Cavenagh M, 10 March 2008, who issued the following orders in the Local Court at Darwin:
- 31.1. The Adjudicator's decision of the 26 November 2007 is hereby set aside.
- 31.2. The Applicant's Application for adjudication be remitted to the Adjudicator for determination under Section 33(1)(b) pursuant to Section 48(2) of the *Construction Contracts (Security of Payments) Act 2004*.
32. G R Cavenagh M commented that there was no limitation in the contract on the number of times a contractor could lodge the same claim. Hence each claim had to be considered separately on its merits.
33. The circumstances surrounding this Application are very similar to those in Adjudication 18-07-05 with the only difference being the claim referred for adjudication is an exact resubmission of two invoices previously presented but remaining unpaid.
34. The Respondent refers to invoice 14856 which appears to have been prepared on the direct request of the Respondent in email dated 29 October 2008. It further appears that this invoice was not paid however this adjudication is confined solely to the two invoices referred to in the 29 January 2009 claim. The question of whether invoice No 14734 was submitted in October or not is not relevant as the adjudication is based on the Applicants right to resubmit an unpaid invoice and the Applicant does not rely upon any submission or non payment of invoice 14856. In the circumstances I cannot agree with the Respondent's assertion that consideration of the 29 January 2009 payment claim improperly defeats the operation of section 28(1) of the Act.
35. The Application was lodged within 64 days of the claim submission. Both parties acknowledge the existence of a dispute but given the timing of the Application no further consideration on the date of commencement of the dispute is required as the dispute can only be in relation to the January 29 2009 submission and cannot have commenced prior to that date.
36. The contract between the parties requires progress claims to be issued by the 30th day of the month, addressed to the Respondent and notes that payment of approved tax invoices will be 30 days after the last day of the month. I consider these provisions sufficient to block the application of Divisions 3 and 4 of the Implied Provisions relating to progress claims and how a party is required to make a claim. However the terms of the contract do not define any way of determining the amount of a claim and hence Division 2 of the Implied Provisions is deemed to apply.
2. (1) *The contractor is entitled to be paid a reasonable amount for performing its obligations.*
2. (2) *Subclause (1) applies whether or not the contractor performs all of its obligations.*

37. The Respondent relies upon the requirements of a payment claim as defined by Justice Southwood of the Northern Territory Supreme Court. These are given as follows:
- 37.1. The payment claim must be made pursuant to a construction contract and not some other contract.
 - 37.2. The payment claim must be in writing.
 - 37.3. The payment claim must be a bona fide claim and not a fraudulent claim.
 - 37.4. The payment claim must state the amount claimed.
 - 37.5. The payment claim must identify and describe the obligations the contractor claims to have performed and to which the amount claimed relates in sufficient detail for the principal to consider if the payment claim should be paid, part paid or disputed.
38. The Respondent purports to rely upon the last of Southwood's requirements claiming there is insufficient detail in the Applicants claim to enable proper consideration. Elsewhere the Respondent claims that the invoices were not approved "because of defects and omissions remaining in the Applicant's works". That position implies there is in fact sufficient detail in the claim to enable the Respondent to make a decision since that is what he did and then went on to declare the rationale for that decision. The Respondent has not claimed he could not determine a value for the claim. He has in fact determined a value of zero.
39. I therefore determine on the balance of probabilities the claim dated 29 January 2009 is a legitimate claim under the requirements of the Act and that the payment dispute between the parties meets the eligibility requirements required by the Act to enable the Adjudication to proceed.

Contra Charges

40. The Respondent claims an entitlement to costs incurred as a result of having to rectify defective workmanship on the part of the Applicant. As a fundamental principal of construction contracts I support this view. However prior to arranging rectification work by others the applicant must be advised of the defect and given the opportunity to rectify himself. The Applicant alleges the Respondent failed to give such notice and provide a reasonable time to the Applicant to repair the defects. The sworn statement from the Respondent's construction manager provides a detailed chronology of communication between the parties on these matters indicating such notification and opportunity were provided to the Applicant. In response the Applicant is alleged to have advised a preference for the warranty contractor performing the repairs in order that liability (warranty, installation defect, damage by others) could be identified as the repairs were conducted. The Respondent further alleges in sworn statement that at no stage has the Applicant attended the site for a joint inspection of the defects.

41. In these circumstances, I have no alternative but to accept all of the evidence presented by the Respondent to support the valuation of the rectification costs now claimed as contra charges on the contract. These charges are detailed on invoices attached to notices sent to the applicant at various times from October 2008 to February 2009. In addition the sworn statement of the Respondent's construction manager identifies a further \$11,000 since the last notice sent to the Applicant. That statement also declares all of the contra charge notices sent to the Applicant are included at Attachment 5 of the Response. However the statement refers to a notice dated 13 October 2008. I was not able to locate that notice in Attachment 5. The following lists all of the contra charges notices which I accept as legitimately deductible from the contract between the parties:

41.1. 28 October 2008	\$26,714.49
41.2. 28 November 2008	\$14,070.65
41.3. 31 January 2009	\$20,090.95
41.4. 23 February 2009	\$2,938.10
41.5. 23 February 2009	\$13,127.62
41.6. 21 April 2009 (Stat. Dec.)	\$11,000.00

42. The amounts listed above are GST inclusive and total \$87,941.81. This is \$79,947.10 exclusive of GST. On the balance of probabilities then I determine the value of contra charges to be \$79,947.10.

Contract Reconciliation

43. By Respondent's e-mail dated 29 October 2008 and the Applicant's Claim dated 29 January 2009 the parties appear to agree that the GST exclusive total value of the contract as varied is \$1,727,863.00

44. The Respondent's e-mail dated 29 October 2008 refers to a gross value of previous payments to the Applicant of \$1,643,191.00. The Applicant nominates a gross value of previous payments of \$1,734,351.00. The Respondent's Construction Manager's sworn statement at Attachment 5 of the Response claims to include all of the Applicant's invoices presented for payment. However, it is not clear precisely what amount was paid against each invoice and I am not able to reconcile either of the gross amounts above with the invoices presented. For the purposes of any calculation of any monies owing I would adopt the Applicant's figure as it minimizes any such calculation without any detriment to the Applicant's claimed position.

Retention

45. The contract requires the release of 2.5% retention at the time of practical completion of the head contract and allows the Respondent to hold 2.5% of the contract value until the expiry of the 12 months defects liability period. It follows then that notification of the date of practical completion of the head contract is an implied term. The Respondent's reconciliation of payments and contract value dated 29 October 2008 alludes to a release of all retention. Whilst this would appear to be an error under the terms of the contract it does lend credence to the Applicant's presumption that practical completion of the head contract had been achieved by that date. The Respondent provides no definitive comment on this question and hence I conclude on the balance of probabilities that practical completion of the head contract had been achieved at least by the date of the disputed January claim and the Respondent is only entitled to hold 2.5% of the contract value, beyond that date, as security during the defects liability period.

Valuation of the claim for payment

46. The Respondent states he is entitled to withhold all outstanding monies as security for known and unknown defects.
47. At paragraph 36 above, I determined that since the contract does not provide terms as to how claims under the contract are to be valued then Schedule 2 of the implied provisions within the Act applies. That is; the applicant is entitled to a reasonable amount for performing his obligations even if he has failed to perform all of his obligations.
48. On the balance of probabilities I determine as follows;
- 48.1. In the absence of any estimate to justify the position it is not reasonable for the Respondent to hold and to continue to hold all outstanding monies on the contract to cover a contingent liability. The contract is already structured to provide such contingent cover at a level of 2.5% of the contract value.
- 48.2. The Respondent has established reasonable claim to contra charges as determined above.
- 48.3. The Respondent has not established a contractual entitlement to continue to hold security in excess of 2.5% of the contract value.
- 48.4. The value of the contract owing to the Applicant is calculated as follows.

Contract Value as Varied	\$1,727,863.00
Less 2.5% Security	-\$43,196.57
Less Contra Charges	<u>-\$79,947.10</u>
Total Value authorised for payment (excl GST)	\$1,604,719.33
Plus 10% GST	<u>\$160,471.93</u>
Total Value authorised for payment (incl GST)	\$1,765,191.26
Less Previous Payments	<u>-\$1,734,351.00</u>
Value for Payment	\$30,840.26

Adjudicator's Costs

49. Clause 36 (1) of the Act requires the parties to bear their own costs.
50. 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.
51. The submissions from the parties have merit on both sides and are neither frivolous nor vexatious
52. I therefore determine that adjudicator's costs are to be shared equally by the parties.

Interest

53. The Applicant's claim was presented 29 January 2008. The contract requires payment 30 days after the last day of the month.
54. Section 7 of the Implied Provisions Schedule requires interest on payments for the period between the due date for payment and the actual date of payment. Interest rate is prescribed as that fixed for Rule 35.8 of the Federal Court Rules. This rate is presently 10.5% per annum.
55. On the balance of probabilities I determine as follows;
 - 55.1. The payment was due on or before 2 March 2009.
 - 55.2. Interest is accruing at the daily rate of 10.5% of $\$30,840.26 / 365 = \8.87 per day
 - 55.3. Interest due and payable up to 6 May 2009 is \$576.67

Conclusion

56. As requested I have conducted the adjudication and concluded as follows:
 - 56.1. For the reasons set out in the Adjudication, I determine the Adjudicated Amount for the Applicant is \$30,840.26 including GST.
 - 56.2. The date payable is 2 March 2009. Interest due and payable to 6 May 2009 is \$576.67 and interest continues to accrue at the rate of \$8.87 per day until payment is made.
 - 56.3. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

Brian J Gallagher
NT Registered Adjudicator No 18.
6 May 2009