

Adjudicator's Determination

Adjudicator Registration Number 17
Identification No: 17.10.01

Pursuant to the Construction Contracts (Security of Payments) Act 2004 (NT)

(Applicant)

And

(Respondent)

1. I, Charles H. Wright, as the appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act* (the Act), determine that the Adjudicated amount in respect of the Adjudicated Application served 22 March 2010 is \$73,514.29 inclusive of interest and GST and payable by the Respondent to the Applicant.
2. The date payable is no later than 30 May 2010.
3. There is no security to be returned.

Appointment of Adjudicator

4. I was appointed as Adjudicator to determine this dispute by the Northern Territory Construction Contracts Registrar on the 1 April 2010 and recorded in my email to both the Applicant and Respondent dated 6 April 2010.

Acceptance of Adjudication Application

5. No objection was raised by either the Applicant or Respondent to my appointment when advised by my email dated 6 April 2010.

Documents Regarded in Making the Determination

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

- 6.1. The provision of the *Construction Contracts (Security of Payments) Act*;
- 6.2. The Applicant's Application dated 19 March 2010;
- 6.3. Attachments submitted with a and forming part of the Applicant's Application including, a) the Respondents Application for Credit, b) the Applicants Terms and Condition of Sale executed by the Respondent, c) Quotation Number 09-4391 Rev prepared by the Applicant, d) eight (8) copies of Tax Invoices noted in item 6.4 below, and e) Receivables Reconciliation prepared by the Applicant
- 6.4. Payment Claims which the Application relates and include the following;
 - (a) Tax Invoice 00005819 dated 10/11/2009 for the sum of \$46,300.49 Date Due 30/12/2009
 - (b) Tax Invoice 00005820 dated 10/11/2009 for the sum of \$15,113.19 Date Due 30/12/2009
 - (c) Tax invoice 00005821 dated 10/11/2009 for the sum of \$6,791.40 Date Due 30/12/2009
 - (d) Tax Invoice 00005822 dated 10/11/2009 for the sum of \$39,729.70 Date Due 30/12/2009
 - (e) Tax Invoice 00005823 dated 10/11/2009 for the sum of \$2,937.17 Date Due 30/12/2009
 - (f) Tax Invoice 00005940 dated 21/12/2009 for the sum of \$38,604.73 Date Due 30/01/2010
 - (g) Tax Invoice 00005941 dated 21/12/2009 for the sum of \$2,910.60 Date Due 30/01/2010
 - (h) Tax Invoice 00005943 dated 22/12/2009 for the sum of \$19,618.83 Date Due 30/01/2010
- 6.5. The Applicant's reply dated 7 April 2010 in response to my email dated 6 April 2010.
- 6.6. The Respondent's reply dated 14 April 2010 to my email dated 8 April in so much as the Respondent's reply related to the one question put to the Respondent.

Conference with the Parties

7. Due to the timing of my appointment as Adjudicator, a teleconference was not held and in lieu, an email was sent to both the Applicant and Respondent on 6 April 2010 with instruction on how the Adjudication would proceed and seeking confirmation of certain items as noted below

- 7.1. That no prior application for Adjudication had been made, the subject of this dispute;
- 7.2. That the dispute is not the subject of any order, judgment or other finding by an arbitrator or court or other body;
- 7.3. Confirmation that no conflict of interest would prevent me from acting as Adjudicator in this matter;
- 7.4. Confirmation of the date the Application for Adjudication was served as being 22 March 2010 with the Respondent required to provide a Response by 7 April 2010;
- 7.5. Any party to raise an objection to my appointment as the Arbitrator.

The Applicant's response to 7.1, 7.2, 7.3 and 7.5 above allowed me to proceed with the Application for Adjudication. Silence on 7.4 was taken as an acceptance of the date.

The Respondent did not provide a reply.

By reference to the Applicant's Application for Credit;

- 7.6. Clause (15)(b) instructs services of notices may be posted by prepaid post to the address set out at the start of the deed;
- 7.7. The postal address given at the start of the deed is given as a post office box which is the address on the Application of Adjudication served on the Respondent;
- 7.8. Clause (15)(c) states that notice sent by prepaid post 'is taken to be received by the addressee: i. (in the case of prepaid post sent to an address in the same country) on the third day after the date of posting.

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 failed to provide a Response, and therefore, s.33 of the Act requires a determination to be made within the *prescribed time* in accordance with s.33(3) 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 21 April 2010.

The Adjudication Application

10. The Adjudication Application consists of the following papers;

- 10.1. Application for Appointment of Adjudicator (2 pages) detailing the dispute between the Applicant and the Respondent, which includes the following;
 - (a) Application for Credit executed by the Respondent;
 - (b) Terms and Conditions of Sale of the Applicant signed by the Respondent;
 - (c) the Applicant's quotation number 09-4391 Rev. to the Respondent;
 - (d) eight Tax Invoices totaling \$172,006.11 including GST;
 - (e) Receivables Reconciliation prepared by the Respondent.

11. The Adjudication Application complies with Section 28 of the Act, in particular;

- 11.1. Application for Appointment of an Adjudicator dated 19 March 2010 and served on 22 March 2010 was made within the prescribed time of section 28 of the Act;
- 11.2. 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 have not lodged a deposit or security
- 11.3. 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 claims 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 did not receive a Response from the Respondent.

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;

(b) to supply to the site where construction work is being carried out any goods that are related to construction work;

14. The contract is for supply of goods to a *site in the Territory*, for the purpose of 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;

(a) the Applicant's Quotation Number 09-4391 Rev dated 16 September 2009;

(b) the Respondent's acceptance of the Applicant's Quotation dated 18 September 2009;

(c) the Applicant's Application for Credit executed by the Respondent;

(d) the Applicant's Terms and Condition of Sale.

Implied Provisions

16. Implied Provisions:

16.1. The Applicant does not rely on the implied condition of the Act.

Conditions for Determining the Adjudications

17. The conditions for determining the adjudications have been met. The contract is for the supply of goods that are related to construction to a site where construction work is being carried out, 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 served and is in accordance with s.28 of the Act, within time limits, deemed to be served on the parties and served on the Appointer. The Adjudicator requires no deposit to be paid. The Applicant has confirmed that there are no other proceedings on a matter arising from the construction contract and being the subject of this determination.

The Payment Claim

18. The Payment Claim, the subject of this Adjudication, is for eight (8) Tax Invoices with a total value of \$172,006.11 including GST, less amounts paid to date of serving the Application for Adjudication totaling \$45,000.00 including GST.

19. The details of the Payment Claims are;

Payment Claims made;

19.1. Tax Invoice 00005819 dated 10/11/2009 \$46,300.49 including GST

19.2. Tax Invoice 00005820 dated 10/11/2009 \$15,113.19 including GST

19.3. Tax Invoice 00005821 dated 10/11/2009 \$6,791.40 including GST

19.4. Tax Invoice 00005822 dated 10/11/2009 \$39,729.70 including GST

19.5. Tax Invoice 00005823 dated 10/11/2009 \$2,937.17 including GST

November Total \$110,871.95 including GST

19.6. Tax Invoice 00005940 dated 21/12/2009 \$38,604.73 including GST

19.7. Tax Invoice 00005941 dated 21/12/2009 \$2,910.60 including GST

19.8. Tax Invoice 00005943 dated 22/12/2009 \$19,618.83 including GST

December Total \$61,134.16 including GST

Total Tax Invoice value	\$172,006.11 including GST
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Less Total Payments made to 19 March 2010

19.9. 24/02/2010 \$25,000.00 including GST

19.10. 05/03/2010 \$20,000.00 including GST

Total payments made	\$45,000.00 including GST
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Total	\$127,006.11
GST	Included
Total Claim Inclusive of GST	\$127,006.11

The Applications Supporting Documentation

20. The Applicant's supporting documents are;

Tax Invoices in recital 19.1 to 19.8 inclusive above.

Response to Payment Claim

21. As mentioned in recital 12 (above) the Respondent did not provide a Response.

Supplementary Information from the Applicant

22. The Applicant's reply dated 7 April 2010 in response to my email dated 6 April 2010, as well as providing the information contained in recital 7. above, contained information that I find to be material to the outcome of this Application for Adjudication and in making an assessment for the Determination, and that being on the 31 March 2010, the Respondent made payment of a further sum of \$65,880.00 including GST.

23. The Respondent was requested by the Adjudicator by email on 8 April 2010 to confirm by the 14 April 2010 that the Respondent had paid \$65,880.00 on 31 March 2010 and to confirm if such payment included or excluded GST.

24. By email dated 14 April 2010, the Respondent confirmed that \$65,880.00 was paid on 31 March 2010 and all payments made included GST.

25. By deducting the confirmed payment of \$65,880.00 including GST made by the Respondent after the services of the Application for Adjudication from the Payment Claim the subject of this Adjudication of \$127,006.11 including GST, the amount calculated to be adjudicated on becomes \$61,126.11 including GST.

Payment Claim

26. The individual Tax Invoices making up the Payment Claim, less the amounts agreed between the parties as being paid, reduces the Payment Claim to \$61,126.11, inclusive of GST;

27. The implied provisions of the Act for making Payment Claims do not apply as the Applicant's Terms and Conditions of Sale deal with Invoicing at section 10. and Payment Terms and Default at section 11.

28. The Applicant's invoice are not disputed by the Respondent.

29. In material provided by the Applicant appended to the Receivables Reconciliation prepared by the Applicant, the Respondent acknowledges the debt and provides an explanation for late payment.

30. Accordingly, I have jurisdiction to consider the payment claim.

31. 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) –*

- (a) *otherwise determine on the balance on 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.*
32. The Applicant submitted a written quotation to provide certain goods to the Respondent on a rate per square metre.
33. The Respondent accepted the Applicant's quotation by signing and dating the Acceptance contained as part of the quotation.
34. The Applicant supplied goods to the Respondent.
35. The Respondent has made payments and has not denied the debt.
36. On the balance of probability, I find the following;
- 36.1. The Applicant has supplied certain goods to the Respondent at an agreed rate;
- 36.2. The Respondent has made certain payments;
- 36.3. The Respondent has been served with the Application for Adjudication and has had the opportunity to provide a Response but in fact did not do so;
- 36.4. The Applicant is owed the balance of outstanding Tax Invoices, namely \$61,126.11 including GST;
- 36.5. The Applicant is entitled to interest on outstanding payments in accordance with section 11. clause 11.3 of the Applicant's Terms and Conditions of Sale.

Payment for Claim

37. In determining the amount to be paid I have regard to the following;
- 37.1. The total value of the Applicant's Tax Invoice in recital 19 above, namely 19.1 to 19.8 inclusive and being \$172,006.11 including GST
- 37.2. The total value of payments made by the Respondent to the Applicants in recital 19 above, namely 19.9 and 19.10 being \$45,000.00 including GST and the amount in recital 22 above being \$65,880.00 including GST, a total of all payments being \$110,880.00 including GST
- 37.3. Subtracting total amounts paid from the total of all Tax Invoices leaves a balance of \$61,126.11 including GST.
38. The Adjudicated amount is;

TOTAL (Inclusive of GST) \$61,126.11

39. Interest is payable as required in section 11. clause 11.3 of the Applicant's Terms and Conditions at the rate of 1.5% per calendar month, $1.5\% \times 12 = 18\%$ per annum.

40. Interest is calculated as follows;

(a) Period 31/12/2009 to 24/02/2010 $\$110,871.95 \times 18\% / 365 \times 56 =$
 $\$3,061.89$

(b) Period 31/12/2009 to 05/03/2010 $(\$110,871.95 - \$25,000.00) \$85,871.95 \times$
 $18\% / 365 \times 65 = \$2,752.61$

(c) Period 31/12/2009 to 31/03/2010 $(\$85,871.95 - \$20,000.00) \$65,871.95 \times$
 $18\% / 365 \times 91 = \$2,956.12$

(d) Period 31/01/2010 to 31/03/2010 $\$61,134.16 \times 18\% / 365 \times 60 =$
 $\$1,808.90$

(e) Period 01/04/2010 to 30/05/2010 $(\$61,134.16 - [\$65,880.00 - \$65,871.95])$
 $\$61,126.11 \times 18\% / 365 \times 60 = \$1,808.66$

TOTAL INTEREST (Inclusive of GST) \$12,388.18

41. Interest is to be added to the amount adjudicated in recital 38 (above) and paid together on or before 30 May 2010.

Costs

42. I determine that each party pays one half of the cost of the adjudication.

Summary

43. The adjudicated amount is made up of;

43.1. Balance of outstanding Tax Invoices \$61,126.11 inclusive of GST;

43.2. Interest payable \$12,388.18 inclusive of GST;

43.3. Total payable \$73,514.29 inclusive of GST.

Conclusion

44. For the reasons set out in this determination, I determine that the adjudicated amount is \$73,514.29 inclusive of GST.

45. The date payable is no later than 30 May 2010.

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Charles H. Wright
Adjudicator

21 April 2010