

Pursuant to the

NORTHERN TERRITORY OF AUSTRALIA

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT

As in force at 8 January 2008

find enclosed the

ADJUDICATOR'S DECISION No. 03-08-01

Issued 8 August 2008

in the matter of an Adjudication Application dated 11 July 2008 made by

(the "Applicant")

against

(the "Respondent")

as parties to a services agreement made the 15 May 2006 and known as

SA043 – PROVISION OF COMPLETIONS TEAM

for the [Project] in the Northern Territory

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PART 1 – DECISION

1. Pursuant to s.38 “*Content of determination*” and being the appointed adjudicator in the matter of this payment dispute between the applicant and the respondent, I, Michael John Charteris, decide the following;
2. The respondent is not required to pay the applicant any part of the payment claim included in the application.
3. The applicant shall bear all of my costs in this adjudication.
4. The parties shall each bear their own costs in the preparation and submission of the application and response.
5. The reasons for this decision are provided in Part 8 and Part 9.
6. Pursuant to s.38(1)(e), I have not identified any confidential information within this decision which is not suitable for publication by the Registrar under s.54 “*Publication of adjudicator’s decisions*”.
7. Pursuant to s.38(2) a copy of this decision has been forwarded to the applicant, the respondent, and the Registrar. Additionally, and in accordance with the referral made to me by the prescribed appointer, a copy of this decision shall also be forwarded to IAMA National Office in Victoria.

PART 2 – NAMES AND CONTACT DETAILS

Pursuant to s.38(1)(b) of the Act, Regulation 4 “*Contact Details*” and Regulation 8 “*Information in adjudicator’s decision*”, the following names and contact details are provided;

ADJUDICATOR Michael Charteris
8 Fleta Court
DUNCRAIG WA 6023
Telephone: 0438 940 162
Facsimile: n/a
Email: mjcharteris@bigpond.com.au
[ABN: 79 963 800 793]

APPLICANT

RESPONDENT

PART 3 – DEFINITIONS

In this decision, unless the contrary intention appears –

“Act” or **“the Act”** means the Northern Territory of Australia Construction Contracts (Security of Payments) Act as in force at 8 January 2008.

“applicant” means XXXX.

“application” means the Adjudication Application, including the annexure and supporting documents upon which it relies, made by the applicant dated 11 July 2008.

“appointer” or **“prescribed appointer”** means the National Office of the Institute of Arbitrators & Mediators of Australia located Level 1 Law Courts 190 Queen St. Melbourne, Victoria.

“construction contract” or **“contract”** means the services agreement made between the parties on the 15 May 2006 and known as “SA043 – Provision of completions team” contained within Annexure B of the application. As Section 5 – Scope of Services *“the contractor shall provide experienced and suitably qualified, management, supervision, labour personnel and facilities, equipment, tools, consumables, transport to perform completions team services as required by AGD G3 Management and as per the schedule of unit rates in Section 4 at XXXX for the XXXX Project and other locations as may be required”*.

“day” or **“days”** where not preceded by “calendar” or “working”, means a calendar day.

“enterprise bargaining agreement” or **“EBA”** means that certified written agreement contained within Annexure E Appendix 4 of the contract in force from 23 November 2004 to 4 November 2007.

“parties” means the applicant and the respondent described within this decision.

“payment claim” means the applicant’s Tax Invoice No. GOV006.038 dated 31 January 2008 contained within Annexure C of the application.

“payment dispute” has the meaning in section 8 of the Act.

“Registrar” means the Construction Contracts Registrar appointed under section 49 of the Act.

“Regulations” means the Regulations made under the Act as in force 1 July 2005.

“respondent” means XXXX.

“response” means the information in response to the application, including the annexure and supporting documents upon which it relies, made by the respondent dated 25 July 2008.

“s.” or “**section**” means that section numbered within the Act.

“**working day**” means a day other than a Saturday or Sunday or a public holiday within the meaning of the *Public Holidays Act*. It is acknowledged that whilst the adjudicator and the applicant are in WA, the appointer is in VIC and the respondent is in QLD, for the avoidance of doubt and since the site is in the NT, public holidays taken in the Territory shall be used.

PART 4 – APPOINTMENT OF ADJUDICATOR

1. I, Michael John Charteris, confirm I am registered as an Adjudicator under section 52 of the Construction Contracts (Security of Payments) Act 2004 dated at Darwin on 21 November 2005 and hold Adjudicator Registration Number 3.
2. On 18 July 2008, I was contacted by telephone by the prescribed appointer to confirm my availability to conduct this adjudication. That same day, the appointer emailed this request to me and attached parts of the Adjudication Application dated 11 July. I responded by email that evening to confirm my availability.
3. On 21 July, the appointer provided an emailed copy of letter 21 July which I signed to confirm my acceptance of the appointment and returned by facsimile on 22 July.
4. Section 30(1) requires a prescribed appointer to appoint an adjudicator within 5 working days after being served with an application for adjudication.
5. Given the application was dated 11 July (although the date of service to the appointer was not confirmed at this stage) and I accepted the appointment on 22 July, 7 working days had elapsed which fell outside of the requirements of s.30(1).
6. For the avoidance of doubt about my appointment, I wrote to the Construction Contracts Registrar on 22 July requesting he confirm my appointment which he did by email on the morning of 23 July.
7. On the morning of 23 July, I received a complete copy of the application.
8. On the afternoon of 28 July, I received a complete copy of the response.
9. Pursuant to s.31(1), I find I have no material personal interest in either the payment dispute, the construction contract or any of the parties to the contract hence do not need to disqualify myself from adjudicating this dispute.
10. Within the response, the respondent advised that;
 - a. the date on which the respondent was served with a copy of the adjudication application was 14 July, and
 - b. the date on which the appointer was served with a copy of the adjudication application was 16 July.
11. Section 33 requires me to either dismiss the application or issue my decision within 10 working days of the service of the response or within 10 working days after the last date on which the response is required to be served. To avoid any doubt between the dates on the application and the response and their dates of service, I intend to notify the parties of my decision on or before the 8 August 2008 which satisfies both these time constraints.

PART 5 – THE APPLICATION

1. The Application for Adjudication is dated 11 July 2008.
2. The date of service on the appointer and respondent has not been provided nor confirmed within the application.
3. I find the application satisfies s.28(2).
4. For the purposes of advising my availability to adjudicate on this dispute and for determining the existence of any conflict of interest with any of the parties, the appointer emailed to me pdf files of parts of the application on 18 July.
5. The complete printed copy of the application was served on me on the afternoon of 23 July.
6. Contained within 3 volumes, the 5 page application served upon me was accompanied by and relies upon the documentation within 7 annexure of varying sizes;
 1. Annexure A – Submissions
 2. Annexure B – Construction Contract (separately bound)
 3. Annexure C – Payment Claim (separately bound)
 4. Annexure D – Respondent's Assessment
 5. Annexure E – Applicant's increase in rates notification
 6. Annexure F – Applicant's email on cash flow
 7. Annexure G – Adjudication Determination dated 18 May 2008.
7. Whilst the application relies in part upon an Adjudication Determination of an earlier payment dispute between the parties under the construction contract but by another adjudicator, I have not relied upon it so as not to unduly influence my independent investigation and assessment or the provision of reasons within this decision.
8. In summary, the application states;
 - a. A payment dispute had occurred in that by the time the payment claim for \$1,488,814.48 was due for payment, no payment was made by the respondent.
 - b. A determination is sought from me for the full payment claim amount payable by the respondent including interest.

PART 6 – THE PAYMENT CLAIM

1. The payment claim under annexure C of the application is Tax Invoice No. GOV006.038 being for services provided during period ended 25-Jan-08 to the value of \$1,353,467.71 excluding GST.
2. I find that the payment claim generally satisfies the requirements of contract General Conditions clause 19.1 “*Payment Claims and Certificates*”.
3. The payment claim can be summarized as follows which has been re-calculated and checked for mathematical accuracy;

1.1	Schedule 1 costs - wages labour	\$1,072,150.81
2.1	Schedule 2 costs - unit rates for small tools, consumables, etc.	\$47,818.00
	Sub-Total	\$1,119,968.81
	Contractor's Fee @ 6%	\$67,198.13
	Contractor's Overhead @ 9%	\$100,797.19
2.3	Materials, supplies, indirect expenses, etc.	\$65,503.58
	Payment Claim (pre-GST)	\$1,353,467.71

4. **Item 1.1** wages labour has been supported in the payment claim by “*Schedule 1.1 – Labour Chargeout Schedule*” indicating hours worked and \$rates/hour. The hours worked have been further supported by spreadsheets and weekly timesheet reports for each employee.
5. Section 4 – Terms of Compensation - Schedule 1 Wages Labour Rates of the construction contract indicates rates applicable from 1 January 2006 to 31 May 2006 which when compared with a sample of those rates within the payment claim produces the following percentage increase data;

Classification		Claim	Contract	Increase
General Superintendent	normal time	\$109.28	\$99.00	10.4%
Engineer	time & half	\$111.49	\$101.00	10.4%
Supervisor	double time	\$133.56	\$121.00	10.4%
Leading Hand 1 - 9 men	double time & half	\$118.11	\$107.00	10.4%
L/H Tradesman Special Class < 10 men	normal time	\$69.46	new	
Welder tested	travel & standby	\$57.40	\$52.00	10.4%
Welder special class	meal allowance	\$12.14	\$11.00	10.4%
Tradesman boiler maker	normal time	\$66.23	\$60.00	10.4%
Tradesman fitter	time & half	\$72.85	\$66.00	10.4%
Tradesperson special class	normal time	\$68.44	new	
Welder undertaking heavy welding	double time	\$93.82	\$85.00	10.4%
Rigger & scaffolder licensed	double time & half	\$107.07	\$97.00	10.4%
Rigger & scaffolder	travel & standby	\$51.88	\$47.00	10.4%
Trades assistant, storeman & clerical	meal allowance	\$12.14	\$11.00	10.4%
HSE	normal time	\$80.87	new	

6. I note Application Annexure E “*Typical Applicants notification to the Respondent of increase in Rates*” is an emailed notification from the applicant to the respondent of an increase in rates of 2.5% applicable from 1 December 2006 to

31 May 2007. Within the application, no response from the respondent was provided to this email and no other or further notification of a rate increase was provided from the applicant applicable for the period up to 25 January 2008.

7. Application Annexure A item 1.5 states “*The Applicant agreed with the Respondent that if the contract was extended beyond 31 May 2006, the Applicant could adjust its rates for personnel supplied pursuant to the Construction Contract, to take account of any increases in the rates or other benefits provided for in the Enterprise Bargaining Agreement relating to the Site. It was agreed that the adjustment would be made every 6 months.*” The application does not include correspondence from the respondent confirming this agreement.
8. The EBA forms a part of the contract and is included as Annexure E Appendix 4 of the contract and states in part;
 - a. “*This agreement shall come into force from 23 November 2004 and shall remain in force until 4 November 2007.*”
 - b. Under Part 1.2 “*Application of Agreement*”, the EBA will not apply to management, supervisory personnel, engineers, technicians and surveyors amongst others.
 - c. Under Part 2.4 “*Remuneration*”, a table of ordinary hours wage rates payable to employees within 4 Groups A to D as well as a schedule of all-purpose allowances.
 - d. Under Appendix 3 “*Escalation of wages and allowances*” a 2.5% ordinary hours wage rate increase every 6 months up to 30 November 2007.
9. If the applicant followed the EBA’s prescribed 2.5% rate increase for every six month period following 31 May 2006, the following calculation would occur;

General Superintendent		cost per hour
From 01.01.06 to 31.05.06		\$99.00
From 01.06.06 to 30.11.06	2.50%	\$101.48
From 01.12.06 to 31.05.07	2.50%	\$104.01
From 01.06.07 to 30.11.07	2.50%	\$106.61
From 01.12.07 to 31.05.08	2.50%	\$109.28
An increase of ...		10.4%

10. The above mathematical exercise demonstrates an element of consistency may have occurred throughout the duration of the contract to achieve the wage labour rates now included within the payment claim to the satisfaction of the EBA which forms part of the contract.
11. Despite this consistency with the EBA and “*Schedule 1 Wages Labour Rates*”, Section 4 – Terms of Compensation - Schedule 1 of the construction contract defines these wages labour costs as “*Reimbursable Contractor Costs*” based on “*actual cost*” and as defined within Appendix 1 – Items Reimbursable at cost Column B, the basis of compensation shall be for;

- a. Wages labour for personnel classified under the EBA – the labour classification rate stated in the EBA all as verified by approved daily time sheets or payroll records
- b. Salaries or wages labour for personnel not classified under the EBA – the contractor will be reimbursed at actual paid costs as verified by payroll records.

12. Furthermore, 1.2 Wages Labour (contract page 6 of 21 within Section 4 - Schedules) states;

“Principal shall reimburse the Contractor its wages labour costs (in accordance with the requirements of Schedule 1 Appendix 1) actually paid which have been incurred by the Contractor in performance of the work under the Service Agreement as recorded in the Contractor’s payroll records. Subject to General Conditions Clause 15 the Principal or an agent of the Principal may audit the Contractor’s payroll records to verify the hours actually paid pursuant to this clause. The sole purpose of the following table [Schedule 1 Wages Labour Rates listed as “Contract” in my preceding Item 5] is to record the basis of the Estimated Agreement Value.”

General Conditions page 14 of 27, Clause 15 – Inspection and Audit;

“ The Principal shall have the right at all times to inspect the Services and the Contractor’s records related to the Services (excluding cost data unless payment is based on cost), but no such inspection shall be construed as acceptance of the Services nor relieve the Contractor of any obligation under the Services Agreement or at law.”

13. **Item 2.1** small tools and trade consumables has been calculated as total direct man hours worked multiplied by a charge out rate per man hour of \$2.50 and \$1.50 respectively.
14. Section 4 – Terms of Compensation - Schedule 2 Other Costs of the construction contract states \$1.50 per man hour for small tools and \$2.50 per man hour for trade consumables. The contract states these rates shall be fixed and firm for the duration of the contract. The transposition error in the allocation of these rates in the payment claim does not result in a mathematical error in the value of the payment claim since the same man hours worked is applied to each item.
15. The **Contractor’s Fee of 6%** and the **Contractor’s Overhead of 9%** within the payment claim matches that specified under contract Section 4 – Terms of Compensation - Schedule 3 Contractor’s Overhead and Fee.
16. **Item 2.3** for materials, supplies, indirect expenses, etc. is for miscellaneous items called “other approved expenses” supported by invoices with a 10% charge out cost added to the pre-GST amount. These “other approved expenses” include materials and plant hire costs which according to contract “Schedule 1 Appendix 1 – Items Reimbursable at Cost” attract a percentage mark up of 10%.

PART 7 – THE RESPONSE

1. The respondent's solicitor contacted me by telephone on the morning of the 25 July to confirm my contact details.
2. The response to the application was served on me on the afternoon of the 28 July and is dated 28 July 2008.
3. I find the response satisfies s.29(2).
4. The response served upon me comprises 4 volumes. Contained within Volume 1 is the 62 page "*Adjudication Response*" which is accompanied by and relies upon the documentation within 7 Annexure of varying sizes as follows:
 1. Letter from appointer to respondent dated 22 July 2008;
 2. Letter from respondent to applicant dated 21 July 2008;
 3. Explanatory Memorandum – Construction Contracts Bill 2004 (WA);
 4. Letter from respondent to applicant dated 2 April 2008;
 5. Summary of costs incurred by respondent in this adjudication;
 6. Relevant case law; and
 7. Statutory Declaration of Donald Grant (employee of respondent) dated 24 July 2008 with Attachments 1 – 6, wherein Volumes 2, 3 & 4 comprise Attachment 6 being the respondent's "*Final Payment Certificate*".
5. In summary, the response contends the following:
 - a. Whilst a payment dispute has occurred, it has not been served within the time prescribed by the Act hence I must dismiss it.
 - b. A Final Certificate dated 21 May 2008 was issued which must be taken to be conclusive evidence of its contents and I have no evidentiary basis on which to determine any other amount payable other than that amount in the Final Certificate.
 - c. Disputes the quantum of the payment claim and requests I determine an amount of \$1,758,384.28 (plus GST) plus interest payable by the applicant to the respondent.
 - d. Suggests the application is unfounded, frivolous and "*doomed to fail*" hence the applicant should incur all costs to prepare the response (\$37,479.31) as well as all of my costs for this adjudication.

PART 8 – THE PAYMENT DISPUTE

1. Pursuant to s33(1) and having had independent regard for the application, the payment claim and the response, I now turn my mind towards identifying what I determine to be the main issues defining the payment dispute which require adjudicating upon with reasons in order to reach either a dismissal or determination within the prescribed time or any extension of it. These main issues are as follows;
 - a. When did the payment dispute occur and hence is the application out of time under s.28(1)?
 - b. What impact, if any, does the respondent's Final Certificate have on my adjudication under the Act? Is the payment claim a final payment claim under the terms of the contract?
 - c. What is the construction of the contract in terms of remuneration to the applicant? In respect of the payment claim raised, what should be the determined value, if any. More specifically;
 - i. At scheduled rates or at actual cost?
 - ii. Impact of EBA on remuneration?
 - iii. Verification of actual cost through audit or other evidence?
 - d. The calculation of interest and costs relating to the determined amount, if any, and the parties to bear the costs of the adjudication.

When did the payment dispute occur?

2. Both parties have acknowledged that a payment dispute has occurred. Refer item 2 of the application and item 1.1.4(b) of the response. However, the applicant does not provide a payment dispute date and the respondent contends the payment dispute date is 10 April 2008 as response item 2.4.8.
3. At this point, it is worthy to note that the contract defines "days" as a calendar day but the Act only defines "working days" and does not provide a definition of "days" when it is written without a preceding descriptor such as "working" or "calendar". Given the Act states both "days" (refer s.28(1) "90 days") and "working days" (refer s.29(1) "10 working days") the absence of a descriptor to days within the Act is deemed to infer calendar days since working days has already been defined within the Act and calendar days have not.
4. Section 19.1 "Payment Claims and Certificates" of the general conditions of the contract (page 16 of 27) states "*The Contractor shall deliver to the Principal by the last day of the month a Tax Invoice ... for the Services performed during that month.*" I note the following;
 - a. The tax invoice within the payment claim is dated 31 January 2008 for "*Services provided during the period ended 25-Jan-08*".

- b. Response Annexure 7, Statutory Declaration item 31, states the applicant's payment claim tax invoice dated 31 January was received by the respondent on 11 February. This is also confirmed within Application Annexure D.
 - c. It appears as if the payment claim was delivered to the respondent 11 calendar days late however, the respondent has not objected to this and the contract appears silent on the ramifications of this occurrence hence I determine the payment claim remains valid.
5. General conditions of contract Section 19.1 also states "*The Principal shall, within fourteen (14) days of receipt of a Tax Invoice, certify the amount due to the Contractor*". I note the following;
 - a. Application Annexure D contains respondent letter ref SA043-02-04-027 headed "*January 2008 Payment Certificate*" dated 8 April 2008 and attaches a table headed "*Payment Certificate for January 2008*". Response Annexure 7 Statutory Declaration item 32 states this letter was emailed to the applicant on 10 April.
 - b. The tax invoice was received by the respondent on 11 February hence the payment certificate should have been raised by the respondent on 25 February.
 - c. It appears as if the payment certificate in response to the payment claim was delivered to the applicant 45 days late however, the applicant has not objected to this and the contract appears silent on the ramifications of this occurrence hence I determine the payment certificate remains valid.
6. General conditions of contract Section 19.1 also states "*Within forty-five (45) days after the end of the month in which the Principal received the Contractor's claim for payment, the Principal shall pay to the Contractor the amount certified to be due to the Contractor*". I note the following;
 - a. The January claim was received by the respondent on 11 February hence payment was due to the applicant within 45 days of 29 February 2008 being **14 April 2008**.
 - b. Application Annexure D contains respondent letter ref SA043-02-04-027 headed "*January 2008 Payment Certificate*" dated 8 April 2008 and attaches a table headed "*Payment Certificate for January 2008*". This letter from the respondent to the applicant states "... *no further payment will be made against the January 2008 Payment Claim.*" Response Annexure 7 Statutory Declaration item 32 states this letter was emailed to the applicant on **10 April 2008**.
7. Section 8(a) of the Act states "*A payment dispute arises if – when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed*"

(emphasis added). This section could be read to imply that when one of two events occurs, a payment dispute shall have arisen.

8. For the avoidance of doubt regarding my interpretation of s.8(a), refer to the following tables calculating payment dispute dates for each of these events in order to confirm compliance with s.28(1) wherein the adjudication application must be served upon the respondent and the appointer within 90 days;
- a. When the amount claimed is due to be paid under the contract, the amount has not been paid in full

Invoice dated	31-Jan-08		
Invoice received by respondent	11-Feb-08	11	days late
Progress Certificate due within	14		days of receipt of invoice
Progress Certificate due by	25-Feb-08		
Progress Certificate dated	08-Apr-08		advising of no further payment
Progress Certificate emailed to applicant on	10-Apr-08	45	days late
Payment due within	45		days of end of month invoice received
Invoice received 11-Feb-08 hence ...	29-Feb-08		
Payment due by	14-Apr-08		not paid hence dispute arose
Adjudication Application to be served within	90		days of payment dispute
Adjudication Application must be served by	13-Jul-08		(this is a Sunday)
Application served on Respondent	14-Jul-08	1	day late
Application served on Appointer	16-Jul-08	3	days late

- b. Or when the claim has been rejected or wholly or partly disputed;

Invoice dated	31-Jan-08		
Invoice received by respondent	11-Feb-08	11	days late
Progress Certificate due within	14		days of receipt of invoice
Progress Certificate due by	25-Feb-08		
Progress Certificate dated	08-Apr-08		advising of no further payment
Progress Certificate emailed to applicant on	10-Apr-08	45	days late
Adjudication Application to be served within	90		days of payment dispute
Adjudication Application must be served by	09-Jul-08		
Application served on Respondent	14-Jul-08	5	days late
Application served on Appointer	16-Jul-08	7	days late

9. Please note Response Annexure 1 provides a letter dated 22 July from the appointer to the respondent confirming date of receipt of the application by the appointer to be 16 July. Response item 1.1.1 states the respondent received the adjudication application on 14 July. The Application dated 11 July is silent in both regards.
10. In option 8(a) above, the fact that the 13 July is a Sunday is technically irrelevant since calendar days are employed here in the counting and this date only marks the latest day required for submission. Given the Western Australian Construction Contracts Act 2004 only allows for 28 days to submit an

application after a payment dispute has arisen, I find 90 days would be more than sufficient time to prepare and submit an adjudication application.

11. It is evident that when applying either of these events described under s.8(a) to the 90 day adjudication application time limit defined under s.28(1), I find that the adjudication application had been served late. This is clearly the case when applied to the application serving date upon the appointer which has been confirmed in writing by the appointer within Response Annexure 1 to be 16 July.
12. Accordingly, s.33(1)(a)(ii) of the Act requires me to dismiss this application without making a determination of its merits since this application has not been served in accordance with s.28(1).

PART 9 - COSTS

1. In Part 7 of the Adjudication Response, the respondent has requested under items 7.1.3, 7.1.9 and 7.1.11 that in the event that I dismiss the application that I should exercise my discretion under s.36(2) and decide that the applicant should pay part or all of the respondent's costs as well as the costs of the adjudication.
2. Whilst I acknowledge the potential to misinterpret s.8(a) and the marginal lateness of the application, given the counting of days is a relatively simple mathematical exercise, I find it unfortunate that the applicant had not complied with the generous 90 day provision of s.28(1). Accordingly, I decide that the applicant shall bear all of my costs for the adjudication.
3. The applicant has already paid the requested deposit and the balance of my costs for this adjudication. No further costs are required to be met.
4. Notwithstanding my comments under Part 9.2, the application of s.36(2) is left to the discretion of the adjudicator. In respect of the costs incurred by the respondent in the preparation of the Adjudication Response (refer Response Annexure 5), for the following reasons and pursuant to s.36(1) I decide that the respondent shall bear all of his own costs;
 - a. Given the response firstly contended correctly that the application was served out of time, much of the response was not required.
 - b. The "Final Payment Certificate", which occupied 3 volumes of the response, is a requirement of the contract under General Conditions 19.5 hence the costs to produce this document should not be considered as a cost applicable to the response.