

Adjudicator's Determination

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

Adjudication 18-10-02

(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 Application dated 24 March 2010 is \$73,922.75 including GST.
2. The date payable is 22 February 2010. Total interest due and payable to 23 April 2010 is \$1,254.66 and interest continues to accrue at the rate of \$21.77 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 24 March 2010.
5. I was appointed as Adjudicator by the Law Society Northern Territory 31 March 2010. The Society notified the parties of the appointment 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 24 June 2009)*
 - 7.2. Application from the Applicant dated 23 March 2010.
 - 7.3. Submission from the Respondent dated 8 April 2010.
 - 7.4. Submission from the Applicant dated 9 April 2010.
 - 7.5. Response from the Respondent dated 9 April 2010.

Documents Set Aside in Making the Determination

8. In making the determination I have set aside an unsolicited submission from the Applicant dated 16 April 2010.

The Adjudication Application

9. The Adjudication Application was served on the Respondent 24 March 2010. The Application consists of the following documents;
 - 9.1. Adjudication Application, and
 - 9.2. 7 Attachments of supporting documentation.

The Response

10. The Adjudication Response was served on the Applicant and the Adjudicator 9 April 2010 and consists of the following documents;
 - 10.1. Respondent's reply to the Application, and
 - 10.2. 3 Annexures of supporting documentation.

Jurisdiction

11. The dispute arises out of a contract between the parties for the Applicant to provide electrical works on a building project in the Northern Territory for the Respondent.

12. The parties are satisfied that the Adjudicator's statements of no conflict to declare are reasonable within the meaning of the Act.
13. The parties agree the payment dispute is not the "subject of any other order, judgment or other finding".
14. The Respondent contests the Adjudicator's jurisdiction on the basis that "the Applicant's application has not been made or served within the time prescribed by Section 28(1) of the Act", and contends that in accordance with Section 33(1)(a)(ii) of the Act the Adjudicator should dismiss the Application without making a determination of its merits.

Contested Jurisdiction – Payment Claim under the Act

15. Throughout the course of the contract to the end of October 2009 the Applicant submitted invoices to the Respondent and the Respondent made payments to the Applicant as per the following schedule.

Date	Invoice No	Invoice Amt (GST Incl)	Payment Made
25/02/2009	ST3728	\$4,562.78	\$4,106.47
25/03/2009	ST3778	\$25,137.42	\$22,623.68
23/04/2009	ST3821	\$41,243.09	\$37,118.79
25/05/2009	ST3863	\$69,238.70	\$62,314.82
25/06/2009	ST3884	\$125,237.61	\$121,512.81
23/07/2009	ST3928	\$50,182.90	\$50,182.90
25/08/2009	ST3996	\$12,100.00	\$12,100.00
11/09/2009	ST4016	\$16,170.00	\$0.00
23/09/2009	ST4043	\$15,977.94	\$0.00
25/09/2009	ST4044	\$6,266.56	\$0.00
25/09/2009	ST4045	\$24,156.00	\$0.00
23/10/2009	ST4075	\$2,480.48	\$0.00
30/10/2009	ST4099	<u>\$521.03</u>	<u>\$0.00</u>
Sub Totals		\$393,274.51	\$309,959.47

16. On 8 February 2010, the Applicant submitted Invoice No ST4289 dated 25 January 2010. This invoice carries the label "Payment Claim in Accordance with Clause 12.2 of the Contract – The payment claim is for all electrical works performed on the site as requested". The Respondent replied with a "Contract Reconciliation" dated 2 March 2010 listing its calculations of contract value, approved variations, back charges, damages and retention and concluding that Applicant owed the Respondent \$3,200.40.
17. The Respondent argues that Invoice ST4289 is simply a restatement of invoices previously submitted and as such is not a payment claim for the purposes of the Act. The Respondent makes reference to *A J Lucas Operations Pty v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA 4. In that case Southwood J states;

“[45] As to the first finding , the relevant payment claims were each of the original tax invoices rendered by the first respondent from time to time during the hire of the earth moving equipment and either rejected , partly disputed, disputed, partly unpaid or unpaid by the appellant. The original invoices were payment claims made under the construction contract and they are the payment claims which gave rise to the payment disputes. They are the payment claims to which s 8 of the Act refers. The document described as Tax Invoice 1461 which was attached to the application did not describe those payment claims. Instead, that document reformulated the first respondent’s payment claim for the total amount outstanding under all previously rendered invoices. It made a repeat claim for payment for the performance of obligations under the construction contract which had already invoiced . The application did not comply with the requirements of s 28(2)(b)(ii) of the Act”

And “[49] As to the fifth finding, the construction contract did not enable the first respondent to make repeat claims in respect of the performance of the same obligations under the construction contract. Clause 13 of the appellant’s standard hire agreement provides for the rendering of accounts at monthly intervals and for the payment of accounts within 30 days from the end of the month in which a valid Tax Invoice is received. The clause contains no express provision for the making of repeat claims and there is no basis for implying such a provision in the standard hire agreement.”

18. The Act defines a “payment claim” as “a claim made under a construction contract”
19. At Clause 12.2 the contract defines Payment Claims thus;

The subcontractor must give (the Respondent) claims for payment of the subcontract price:

- (a) at the times stated in the subcontract particulars,*
- (b) in the format (the Respondent) requires,*
- (c) which include evidence reasonably required by (the Respondent) of the value of work completed in accordance with the subcontract and the amount claimed,*
- (d) which sets out the total value of work completed in accordance with the subcontract to the date of the claim, the amount previously paid to the subcontractor and the amount then claimed,*
- (e) which are based on the schedule of rates and prices to the extent it is relevant, and*
- (f) which includes such documentary evidence that (the Respondent) may require that all persons engaged or employed by the subcontractor in connection with the works have been paid all moneys due and payable to them in connection with their work , as at the date of the payment claim.*

20. With respect to subcontract clause 12.2 (a) the subcontract particulars require payment claims to be received by the 25th of each month. With respect to subcontract clause 12.2 (b) there is no evidence presented by either party of any particular format required by the Respondent. The subcontract is for a lump sum amount with no schedule of prices so clause 12.2 (e) does not apply. In relation to

clause 12.2 (f) there is no evidence provided by either party of any requests by the Respondent for any documentary evidence.

21. The invoices presented in the period 25 February 2009 to 30 October 2009 and numbered 3728, 3778, 3821, 3863, 3884, 3928, 3996, 4045, 4075, and 4099 are progressively labeled as “Progress Payment Invoice 1 to 10”. Each invoice has attached a daily log of work on the site from the start date to the claim date. A breakdown of costs is provided for the billing period since the previous invoice. This is then totaled with the GST amount added to list the total billing amount of that invoice. This invoice format and presentation of supplementary information was sufficient for the Respondent to make payments up to and including invoice 3996.
22. Invoice numbers 4016, 4043, and 4044 presented in September 2009 are each labeled “For Work”. A work description is provided and covers 3 items of work that the Applicant claims are variations in correspondence between the parties. Each of these invoices has an amount shown for parts and labour. GST is added to yield total amount invoiced. The invoices also include a note saying that reports for when the work occurred on site are provided with the progress payment invoices previously provided but the work has only been invoiced once.
23. The thirteen invoices submitted up to 30 October 2009 are assessed for compliance with the subcontract requirements as follows;
 - 12.2 (a) – all compliant. The clause simply requires invoices to be received by the 25th of each month. In effect this means they can be received any time but time for payment as specified in the contract commences on the 25th of the month.
 - 12.2 (b) – all compliant. This is the default assessment as no format was specified by the Respondent.
 - 12.2 (c) – all compliant. This is a presumption based on the fact that the information provided was sufficient for the Respondent to determine the amount to be paid and make the payment.
 - 12.2 (d) – all non compliant. None of the invoices listed provides a total value of work completed in accordance with the contract or nominates the amount previously paid to then yield the amount claimed. Each of the invoices is a stand alone document relating solely to the work as listed or nominated for the relevant period.
 - 12.2 (e) – all compliant. This is the default assessment as the provision is not applicable.
 - 12.2 (f) – all compliant. This is the default assessment as the Respondent made no requirements.

24. The application for adjudication relates to Invoice No ST4289. This Invoice labeled "Payment claim in accordance with clause 12.2 of the contract" lists all the invoices presented in the period 25/2/09 to 30/10/09. It lists the payments received in relation to each presented invoice. The invoice then provides a table in the format as required by clause 12.2 (d) showing the total value of work completed under the contract, deducts the total value of payments to date to yield "Amount owing on overall contract". A summation of applicable retention is provided. Also included is a statement that all moneys due and payable in relation to the subcontract have been paid. A parts and labour sub total is given with GST added to show the amount which is earlier shown as the "amount owing on the overall contract".
25. Invoice ST 4289 is therefore assessed as the sole clause 12.2 fully compliant payment claim presented by the Applicant to the Respondent.
26. The jurisdiction questions arising out of the Mac-Attack case and relevant here are listed as:
- 26.1. Do the invoices presented in the period 25/2/09 to 30/10/09 constitute payment claims under the contract and hence payment claims under the Act which give rise to payment disputes under the Act?

The Applicants case is based primarily on this point claiming the invoices are not valid claims and hence no payment dispute under the Act can arise from these claims. The Respondent argues conversely that these are the only valid claims under the contract which could give rise payment disputes under the contract.

The Mac-Attack decisions are based on literal interpretation of the Act and the contract and do not permit any flexibility in the interpretation of the Act in relation to threshold questions which go to establishing jurisdiction. Therefore on the basis of non compliance with clause 12.2 (d) of the contract I determine each of the ten invoices nominated as non compliant claims under the Act and hence unable to give rise to a payment dispute under the Act.

- 26.2. Do the specific provisions of clause 12.2 (d) constitute an express provision in the contract for the making of repeat claims?

Each claim is required to describe and value the total sum of works claimed as completed at the date of the claim. The value of the individual claim is then deduced by deducting the sum of all previous payments. So if the contractor assesses the value of the work at less than that claimed in one claim then the total payments listed in the subsequent claim will be less than the total value previously claimed. In the normal course of events this difference could give rise to a payment dispute which could be the subject of an application for adjudication. Presuming the claimant wishes to persist with the claim the payment clause in the contract requires this value to be included again in the total value of works completed to date for the

subsequent claim or claims. The timing of any application for adjudication is at the discretion of the claimant and can be related to a valid payment claim submitted within the permissible 90 day time period.

I interpret the wording of clause 12.2 (d) as not only permitting the submission of repeat claims but expressly requiring such submission prior to payment and after payment is made. The claims would only be discontinued if the claimant eventually agreed that portion of the claim was no longer valid.

Therefore even if my interpretation at 25.1 is incorrect and the earlier invoices are in fact valid claims, the contract expressly requires all claims to be repeated in each payment claim. Hence, the Applicant's referral to non payment of the January invoice as a valid payment dispute under the contract is correct and the Adjudicator has jurisdiction on the matter.

27. Contract Clause 12.4 aims to define the time period within which payment should be made to the subcontractor. The particular wording is "...the CONTRACTOR must within the time stated in the subcontract particulars of receiving payment from the Principal in respect of the works specified in the payment statement pay the contractor the amount then set out in the payment statement." Aside from the fact that the payment statements are listed as N/A at clause 12.3 the remainder of 12.4 is tantamount to a pay when paid provision which is expressly prohibited by Section 12 of the Act. Accordingly the time for payment under the contract becomes 28 days after the payment claim is submitted.

In relation to the 25 January 2010 invoice a payment dispute existed not earlier than 25 February 2010 and the time for submission of applications expires 26 June 2010. I therefore determine that the Application for Adjudication complies with Section 28 of the Act and confirm the adjudicator's jurisdiction.

Additional submissions

28. The Respondent provided an unsolicited early submission, 8 April 2010, in relation to the Jurisdictional questions considered above. In so doing the Respondent advised its intent to formally submit the Response within the required deadline.
29. The Applicant requested a right of reply to this early submission and in the interests of natural justice I acceded to that request. The Applicant's subsequent submission was received within the notified timeframe.
30. The Respondent has queried the authority of the Adjudicator to allow the Applicants subsequent submission. Sections 34 (1) and 34 (2) allow the adjudicator considerable latitude as to how he informs himself. Moreover, the sequence of supplementary submissions was initiated by the Respondent and the principles of natural justice would afford the Applicant an equal opportunity. Accordingly both submissions were allowed.

Payment Claim 25 January 2010

31. The Invoice ST4289 presented to the Respondent on or around 25 January 2010 summarises the overall contract totals (GST incl.) and subsequent claim as follows:

Original Quoted Contracted Works	\$354,860.00
Extras and Variations	<u>\$38,414.50</u>
Total Contracted Works	\$393,274.50
Payments allocated to site	<u>\$309,959.47</u>
Amount Owing on Overall Contract	\$83,315.04

Respondent's Contract Reconciliation

32. The Respondent provided the Applicant on or around 2 March 2010 with the following contract reconciliation summary. The amounts have been adjusted to include GST and enable direct comparison with the Applicant's Claim above.

Original Contract Value	\$354,860.00
Approved Variations and Back Charges	<u>-\$70,408.92</u>
Adjusted Contract Value	\$284,451.08
Less Paid to Date	<u>\$309,959.47</u>
	-\$25,508.42
Plus Adjusted Retention Held	<u>\$3,520.44</u>
Outstanding Amount	-\$21,987.98

Approved Variations

33. The Respondent includes the following as approved variations (GST incl) in his reconciliation.

Unit 13 additional external services.	\$450.86
Install Pay TV Outlets	\$15,977.94
Dimmer Switch Replacements	<u>\$6,266.56</u>
Sub Total	<u>\$22,695.36</u>

34. The items for Pay TV and Dimmer Switches were included in the Applicant's January claim as invoices 4043 and 4044 respectively. The Variation for unit 13 was not included. This is presumed to be an oversight and the value of \$22,695.36 is taken as undisputed.

Contested Variations

35. The Applicant claims \$16,170 for security cables as a variation to the contract. It is clear from the contract correspondence that the Respondent required these works to be done. It is also clear that the Respondent consistently held the view that these works were included in the contract scope of works and is on the record claiming to have signed minutes of meeting with a deceased director of the Applicant indicating that the Applicant had allowed for the security installation in his quote. The Applicant details out the scope of work covered by the contract and provides all relevant references to support her position. Additionally reference is made to Clause

17.5 of the contract which states;

This Subcontract constitutes the entire agreement and understanding between the parties and will take effect according to its tenor despite:

*(a) any prior agreement in conflict or at variance with the Subcontract; or
(b) any correspondence or other documents relating to the subject matter of the subcontract which may have passed between the parties prior to the execution of the subcontract and which are not included in the subcontract.*

36. The Respondent provides no supporting documentation or argument to support his position that security cables are included in the scope of work. Therefore on the balance of probabilities I determine the \$16,170 to be a variation to the contract which is due and payable.
37. The Respondent nominates Applicant Invoice ST4311 for Hire of Life Guard Power Boxes in the amount \$31,284.00 as a variation not approved. Since this invoice is not listed in the Applicant's January Claim I have not considered it as part of the payment dispute referred for adjudication.

Respondent's Back Charge Claims

38. In the contract reconciliation dated 2 March the Respondent nominates the following as back charges to be offset against the contract.

IV023 Intercomms	\$25,985.30
IV027 Fire and evacuation system	\$6,050.00
IV026 Installation of intercomms	\$7,744.00
IV030 Replace hire cable	\$770.00
IV031 Replace fittings	\$496.32
IV032 Excavate electrical trenches	\$12,012.00
IV033 Hire drill and drill holes	\$825.00
IV034 Painting to repair damage	\$550.00
IV035 Plasterers to repair damage	<u>\$440.00</u>
Sub Total	\$54,872.62

39. The contract at clause 9.6 requires the subcontractor to correct all defects and implies a duty of care on the contractor to notify and nominate a time period within which such rectification should be done. The contract at clause 17.3 allows the contractor to perform obligations under the contract which the subcontractor was obliged to perform but has failed to perform in the time frame specified in the contract. Clause 12.6 of the contract allows the contractor to deduct any costs incurred from moneys owed to the subcontractor.
40. The conditions of contract indicate that where the contractor believes defective work is evident and or other intervening action is required then the contractor is entitled to take corrective action and offset the costs incurred against monies owed to the subcontractor. However it is equally evident that in each instance the subcontractor should be provided with a written direction detailing the action

required and the reason why, along with a reasonable time frame to undertake such necessary action. The respondent has claimed that the supporting evidence for the back charges claimed is provided in the appendices submitted with the Response. There are in fact some references to some of these charges but there is no clear documented audit trail of direction to rectify, subcontractor response and action taken on each applied charge. On the balance of probabilities then I find that none of the charges listed in paragraph 37 are applicable.

41. The Respondent has also sought to apply 17 days of liquidated damages of \$19,550 for delays from 15 October 2009 to 3 November 2009 being 17 days at \$1,150 per day. In addition the Respondent seeks to apply 6% administration fee and 15% margin to all back charges.
42. The Respondent has failed to issue a Certificate of Practical completion to the subcontractor and failed to respond to the subcontractor's request dated 8 February 2010 for such certification. The Respondent has also failed to issue any extension of time notices that would indicate a date for completion revised from 30 June 2009 to 15 October 2009. In the absence of any evidence to indicate proper and due administration of contract time I find on the balance of probabilities that liquidated damages are not applicable.
43. In relation to the application of administration fees and margin applied to back charges, clause 17.3 only entitles the contractor to actual costs and expenses incurred and not the application of broad based fees or margins. Also liquidated damages if applicable are supposed to be a genuine pre-estimate of the loss incurred for late completion. Again fees and margins are not applicable. In any event, as I have determined that neither back charges nor liquidated damages are applicable the fees and margin do not apply.

Security

44. Under Clause 4 of the contract the contractor is entitled to retain up to a maximum of 5% of the subcontract price in the form of retention from progress payments. At practical completion the security is to reduce to 2.5% of the subcontract price.

Valuation of Applicant's Claim of 25 January 2010.

45. For the reasons as set out above I find on the balance of probabilities the GST inclusive value of the Applicant's Claim to be:

Original Contract Price	\$354,860.00
Variations	<u>\$38,865.36</u>
Revised Subcontract Price	\$393,725.36
Less Payments to date	<u>\$309,959.47</u>
Total Claim Value	\$83,765.89
Less Retention (2.5% of \$393,725.36)	<u>\$9,843.13</u>
Amount Outstanding.	\$73,922.75

Interest on Outstanding Amounts.

46. Section 21 of the Act provides for interest on late payments at the rate of 10.5%. Interest is calculated as follows.

Payment due 22 February 2010. Interest accrued up to 23 April 2010 is \$1,254.66 and continues to accrue at \$21.27 per day until paid.

Adjudicator's Costs

47. Clause 36 (1) of the Act requires the parties to bear their own costs.
48. 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.
49. I am satisfied that the submissions from both parties have merit and are neither frivolous nor vexatious.
50. I therefore determine that adjudicator's costs are to be shared equally by the parties.

Conclusions

51. For the reasons set out in the Adjudication, I determine as follows;
- 51.1. The Adjudicated Amount for the Applicant is \$73,922.75 including GST.
- 51.2. The date payable is 22 February 2010. Total interest due and payable to 23 April is \$1,254.66 and interest continues to accrue at the rate of \$21.27 per day until payment is made.
- 51.3. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

Brian J Gallagher
NT Registered Adjudicator No 18.
23 April 2010