

## **Adjudicator's Determination**

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

#### **Adjudication 18-08-01**

Court Order on Adjudication 18-07-05 remitted on Appeal

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 31 October 2007 is \$99,228.54 including GST.

1. The date payable is 28 October 2007. Interest due and payable to 26 March 2008 is \$4,281.78 and interest continues to accrue at the rate of \$28.55 per day until payment is made.
2. The parties legal and preparation costs are not awarded.
3. The Applicant and Respondent shall each bear 50% of the Adjudicator's costs.
4. The Adjudicated Amount in favour of the Applicant is supplemented with, \$1,930.00 for Adjudicator's fees owed by the Respondent and paid by the Applicant.

### **Appointment of Adjudicator**

5. I was invited to adjudicate this matter by the Territory Construction Association 1 November 2007.
6. I accepted the invitation and was appointed as Adjudicator by the Territory Construction Association 1 November 2007. The parties were notified of the appointment the following day.
7. The Adjudicator has been properly appointed in accordance with the *Construction Contracts (Security of Payments) Act 2004*.

### **Decision 18-07-05 Set Aside on Appeal**

8. By decision number 18-07-5, dated 26 November 2007, I dismissed the application for adjudication under Section 33(1)(a) of the Act, without making a determination of its merits, on the basis that the Application had not been prepared and served in accordance with Section 28 of the Act.
9. On 10 March 2008, G R Cavenagh M issued the following orders in the Local Court at Darwin.
  - 9.1. The Adjudicator's decision of the 26 November 2007 is hereby set aside.
  - 9.2. 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*.

### **Documents Regarded in Making the Determination**

10. In making the determination I have had regard to the following.
  - 10.1. Court Order of G R Cavenagh M dated 10 March 2008
  - 10.2. The provisions of the *Construction Contracts (Security of Payments) Act 2004*. (*as in force 1 August 2006*)
  - 10.3. Application from the Applicant dated 31 October 2007.
  - 10.4. Payment Claim dated 8 October 2007.

10.5. Response from the Respondent dated 14 November 2007.

### **The Adjudication Application**

11. The Adjudication Application was served on the Respondent and the Prescribed Appointer on 31 October 2007 and consists of the following documents;
  - 11.1. Adjudication Application document complete with 8 attachments bound into one document;
  - 11.2. Payment Claim dated 8 October 2007 with 4 Annexures bound into one document;
  - 11.3. Five volumes 1A, 1B, 2, 3, and 4, which seek to support and clarify the claims.

### **The Response**

12. The Response to the Application was served on the Adjudicator and the Applicant on 14 November 2007, within the period defined by the Act, and consists of the following documents;
  - 12.1. Response document;
  - 12.2. Four statutory declarations from employees of the Respondent providing sworn statements to support the Respondent's position,
  - 12.3. A statutory declaration from the Respondent with 13 supporting annexures detailing various events on the project.

### **Jurisdiction**

13. The contract is for work on a site in the Northern Territory and is a contract undertaking construction work as defined in Section 6 of the Act. The contract was entered into not earlier than 17 January 2006, after the commencement date of the Act and is therefore a construction contract according to the Act.
14. At a preliminary conference, 8 November 2007, I advised the parties that I had no prior association with them and hence and no conflicts of interest to declare. The parties have not contested that declaration.
15. The parties have provided no advice of the dispute being "subject of any other order, judgment or other finding".

### **The Payment Claim**

16. The payment claim referred to in the Application is dated 8 October 2007. The amount claimed is \$1,026,801.26 inclusive of GST.

17.	The summary details of the 8 October 2007 claim (GST inclusive) are:	
	Tiling completion costs	\$271,465.70
	Tiling rectification costs	\$183,817.69
	Tile Re-supply	\$20,320.85
	Kitchen repair and install	\$230,814.58
	Light Shelves	\$32,980.84
	Granite and associated costs	\$11,724.66
	Bathroom furniture installation cost	\$8,675.70
	Re-supply of vanities and feature glass	\$12,225.40
	Mirrors	\$10,040.65
	Shower Screens	\$30,072.89
	Miscellaneous labour costs	\$403,432.94
	Miscellaneous external costs	\$60,190.10
	Defective design costs	\$6,760.27
	Bank fee costs	\$27,877.94
	Miscellaneous transport costs	<u>\$2,326.46</u>
	<b>Sub Total (Applicant Claims)</b>	<b>\$1,312,726.67</b>
	Less unpaid contract value as varied	<u>\$285,925.41</u>
	<b>Net Claim</b>	<b>\$1,026,801.26</b>

### Issues to be Determined

18. The status of the contract on or around December 2006 is contested by the parties and determination is required on commencement date, works taken over by the Applicant and contractual obligations not fulfilled by the Respondent.
19. The Applicant claims a right to costs incurred completing and rectifying the works, which were the contractual obligations of the Respondent.
20. The Applicant claims a right to actual delay costs incurred as a result of the failure of the Respondent to complete its contractual obligations within the prescribed timeframe.
21. If it is determined that the Applicant is entitled to any costs then the matter of quantum must be determined.
22. The due date for the payment of any legitimate claim is to be determined along with any interest due.

### Status of the Contract

23. The status of the contract on or around the end of November 2006 is a matter of consideration pertinent to this adjudication.

24. In their various submissions, claims and statements, the parties present a number of views in terms of the commencement date of the contract. The executed contract document is dated 17 January 2006. The Applicant claims the contract date is an error and that the contract was not entered into until about 22 February 2006. The Respondent states in an affidavit that he believes the contract was executed on 17 January 2006.
25. The Applicant has provided several examples of notification to the Respondent that the contract between the parties remained in place and that the Respondent should be aware of his contractual obligations and potential claim for any costs in the event of failure to fulfill those responsibilities.
26. A typical example of the Applicant's advice to the Respondent is found in Item 38, Annexure A, Volume 2 of the claim. This states in part; (actual names edited out) *The Respondent has never been relieved from any part of his contractual obligations on this project in any format as has been stated so many times. All work that has been done on this project by the Applicant employing Subcontractors has been on behalf of the Respondent at the Respondent's cost.*
27. The Respondent has submitted an affidavit detailing the nature of the discussions between him and the Applicant in the Respondent's office 24 November 2006. Paragraphs 33 to 41 of the affidavit refer. It is clear that at least the Respondent was of the view that the Applicant was taking over the contract.
28. The Respondent has also provided a document dated 25 November 2006 which purports to present a summary of the discussions between the Applicant and the Respondent. In effect the document details a revised valuation and payment provision for the contract on the basis that the Applicant was to complete all works under the contract.
29. This meeting was clearly preceded by other meetings and discussions between the parties as evidenced by the Applicant's 10 November 2006 advice to the Respondent; *I can report that the Applicant has, based on your conversations over the last couple of days and as per his telephone message left this afternoon instigated additional tilers to start works on Monday 13/11/06 on (the next stage)*
30. The Applicant responds, later in the day, to this advice with the query; *I realise the project is way behind schedule and I have no problems with the Applicant putting more tilers on to push things along, but where do my tilers go next week if you put tilers on (next stage of work).*
31. There are two clauses in the contract by which the alleged agreement outlined above could have been implemented. Clause 11 covers variations and Clause 14 provides for termination of the contract. Both clauses would require notification as defined at Clause 17.6.

32. Clause 11.1 of the Contract permits the Applicant to instruct the Respondent to implement a variation without invalidating the contract. Clause 11.2 covers provision for payment to be agreed between the parties or failing agreement determined by the Applicant.
33. Clause 14.1 addresses termination by the Applicant for insolvency or breach by the Respondent. Clause 14.3 defines termination by the Applicant for its sole convenience.
34. On the balance of probabilities I determine as follows;
  - 34.1. The parties agree that a contract existed between them on or about 22 February 2006. Whether or not the contract commenced 22 February 2006 or 17 January 2006 is not a question that materially affects the Adjudication and hence I accept 22 February 2006 as the contract commencement date.
  - 34.2. The parties arrived at a verbal agreement to in effect either terminate the contract under clause 14.3 for the convenience of the Applicant or alternatively conclude the contract via a series of variations to deduct the value of work not done at the end of November.
  - 34.3. The Applicant did not proceed with the necessary contractual formalities to execute the agreement under the contract.
  - 34.4. All the provisions and individual responsibilities under the terms of the contract remained in place on or around the end of November 2006 and the Respondents failure to fulfill those responsibilities constituted a breach of the contract. However, the full nature and extent of that breach is not defined and remains contested.

### **Entitlement to Costs of Rectification and Completion**

35. The Applicant's rights under the contract to recover costs of rectification and completion are a matter of consideration pertinent to this adjudication.
36. The Applicant has claimed for the following costs;
  - Tiling rectification
  - Tiling completion
  - Tile resupply
  - Kitchen rectification
  - Kitchen completion
  - Completion of cupboard lights
  - Granite installation
  - Bathroom furniture installation
  - Install penthouse vanities and feature glass
  - Installation and replacement of mirrors
  - Install shower screens
  - Design rectification
  - Miscellaneous transport costs

37. Based on all the documentation provided in the Applicant's Claim and Application for Adjudication along with documentation provided by the Respondent I am satisfied that the parties agree that the Applicant did in fact perform work and incurred costs under the various activities listed above.
38. The contract provides two options for recovery of costs by the Applicant at Clauses 14.2 and 17.3. Clause 14.2 covers entitlements after termination in the event of insolvency or breach. Clause 17.3 has the following provisions;  
*The Applicant may, either itself or by a third party, perform an obligation under the contract which the Respondent was obliged to perform but which it failed to perform within the time required in accordance with the contract.*  
and;  
*The costs, expenses and damages suffered or incurred by the Applicant in so performing such a contract obligation will be a debt due from the Respondent to the Applicant and shall be deductible from any monies due from the Applicant to the Respondent.*
39. Clause 10 of the contract covers provisions for contract time, programming, and extensions of time. The Respondent is required to prepare programs based on the Construction Program and submit them to the Applicant for approval. For a delay claim the Respondent is required to notify the Applicant within 5 days of the cause of the delay and issue continuing effect notices every five days until the cause of the delay ceases and the details of the delay claim are lodged within a further five days. If the Respondent complies with these requirements and is entitled to claim an extension of time then Clause 10.4 provides;  
*The Applicant will extend the date for Completion by a reasonable period....*
40. Clause 10.5 provides;  
*The Applicant may in its absolute discretion, at any time and from time to time by written notice to the Respondent, unilaterally extend the Date for Completion.*
41. As noted above the Applicant elected not to exercise his options under clause 14.1 and hence the provisions of clause 14.2 are not applicable.
42. The Applicant has in fact based his entitlement to claim costs on Clause 17.3. with a dependence upon the provisions of the second paragraph of that clause. There is however an important qualifier in the first paragraph. The clause can only be applied to obligations which were not performed within the time required in accordance with the contract. Since the both obligation and time are the critical elements both have to defined and determined in accordance with the contract.
43. The Applicant claims that the standard of work produced by the Respondent did not meet industry standards. The Respondent counters with affidavits stating the Applicant's workmanship was below industry standards and this introduced significant degrees of difficulty for the Respondent in seeking to satisfy the workmanship demands by the Applicant. The Respondent also asserts that the standards expected by the Applicant were beyond industry standards.

44. In conjunction with this disparity in perceived standards the Respondent maintains that the extent of intervention action taken by the Applicant was not warranted in the circumstances. The Respondent is claiming acceptable outcomes could have been produced with much less corrective effort.
45. At paragraph 34.4, I determined that the obligations in question remained obligations under the contract and that the Respondent did not perform them. That satisfies the first part of the test for applying Clause 17.3 even though the full extent of the obligations remains contested.
46. The contract document includes as an attachment a construction program nominating a commencement date of 28 March 2006 for works on site and a completion date of 22 November 2006. The Contract Agreement Part B which lists Contract Particulars defines the Date for Completion "*as per program attached*" i.e. 22 November 2006. At the outset the parties had a contract with a construction program that allowed a construction period of 34 weeks.
47. In his payment claim dated 8 October the Applicant asserts;  
*The initial completion date for the project was 2 November 2006 as per the program for completion of the Works submitted to the Respondent 24 February.*  
and then;  
*As a direct result of the Respondent's failure to meet the initial program, the program was revised .... The Revised Program was issued to subcontractors on 15 September 2006. A Subcontractors' Progress Meeting was held on site on 18 September 2006 to discuss any issues subcontractors may have with Revised Program. This meeting was attended by the Respondent. The Respondent accepted the Revised Program at that meeting. At this meeting the Initial completion date was extended to 29 November 2006 in accordance with the Revised Program.*
48. The sequence of events in relation to construction Programs can be summarized;
- Parties agree 33 week construction period ending 22 February 2006.
  - Applicant notifies Respondent, 24 February 2006, the time for completion has been reduced by 3 weeks to 2 November 2006.
  - On 15 September 2006 Applicant issues new program requiring construction in 11 weeks. This program reverts the time for completion back to 22 November 2006.
  - On 18 September Applicant advises Respondent that because of the Respondent's failure to perform to the revised program the completion date is extended by 1 week to 29 November 2006.
49. On the balance of probabilities I determine as follows:
- 49.1. The Applicants administration of contract time followed a practice of presenting construction programs as *fait accompli* and demanding compliance. The Applicant unilaterally reduced the construction period by 10% and then further reduced this to less than one third of the original period and held the Respondent accountable for performance within the significantly shorter period. None of this



- could be construed as reasonable consideration of all the relevant factors by the Applicant.
- 49.2. Whilst accepting that the Applicant could argue literal compliance with the contract it is my view that the wording of Clause 10.4 implies that the Applicant will act reasonably.
- 49.3. Although the parties present considerable evidence of e-mail and reference to discussion there is very little evidence of satisfactory successful communication between them. The responsibility for real communication is shared equally and hence the liability for failed communication is shared equally.
- 49.4. If the Applicant's version of events is accepted then the Respondent is 100% liable. If the Respondents version is accepted then the Applicant is 100 % liable. The evidence available supports neither position.
- 49.5. There is sufficient merit in the argument from both sides to warrant a 50:50 liability for costs incurred.

### **Entitlement to Delay Costs**

50. The Applicant's rights under the contract to recover delay costs are a matter of consideration pertinent to this adjudication.
51. The Applicant has claimed for the following delay costs;
- Direct and hired labour
  - External Costs
  - Bank fee costs
52. The Applicant relies on the provisions of Clause 17.3 and in particular the Respondent's failure *to perform within the time required in accordance with the contract*. In other words the Applicant claims he is entitled to costs because the Respondent did not reach Completion by the Date for Completion.
53. Clause 13.4 of the contract provides for liquidated damages;  
*If the Respondent does not reach completion by the Date for Completion, it must pay liquidated damages at the rate specified in the Contract Particulars for every day after the Date for Completion until it reaches Completion or the Contract is terminated, whichever is first.*  
The clause further states;  
*This amount is a genuine pre-estimate of the loss the Applicant will suffer if Completion is not achieved by the Date for Completion.*
54. The Applicant's entitlements under Clause 17.3 include damages as well as costs.
55. The wording of clause 13.4 is quite unequivocal. The Respondent must pay damages for failure to complete on time. The Applicant does not have an option to argue recovery of costs incurred. The Applicant can only recover damages at his genuinely pre-estimated rate included in the Contract Particulars. In this case the declared rate is \$2,100 per day.

56. The Applicant has failed to produce a Completion Notice as defined and required by Clause 13.2 of the contract. The Applicant did not terminate the contract. Hence there is no basis to determine the number of days which attract liquidated damages.
57. Compounding this problem of defining a period to which liquidated damages could possibly apply is my determination at paragraph 49.1 that the Date for Completion has not been reasonable determined.
58. On the balance of probabilities I determine as follows;
- 58.1. The Applicant does not have an entitlement under the contract to recover actual delay costs as presented in his claim.
- 58.2. The Applicant's management and administration of time under the contract lacks the rigour required to accurately determine a period to which liquidated damages could reasonably be applied.
- 58.3. The parties have failed to provide sufficient evidence to enable a reasonable determination of any liquidated damages entitlement.

## Quantum

59. The Respondent has provided very little information with respect to quantum. Accordingly, I am reliant upon the claim costs and contract reconciliation provided by the Applicant.
60. At paragraph 49.5, I determined a 50% entitlement to costs under the headings list at paragraph 36.
61. At paragraph 58.1, I determined no entitlement to costs under the headings list at paragraph 51.
62. Hence the entitlement to costs = 50% (\$1,312,726.77 - \$491,500.98)  
= \$410,612.90
63. The amount due to the Applicant by the Respondent equals the entitlement to costs less the value of funds owing to the Respondent under the contract.
64. Clause 4.1 provides that the Respondent must provide a maximum of 5% of the value of the contract as security.
65. Clause 4.2 provides for security reduced to 2.5% within 21 days of issue of a completion notice and a release of the balance when the Defects Liability Period has expired and the Respondent has complied with all its obligations under the contract.
66. The Applicant's claim relies upon the assertion that the Respondent withdrew from the site in late November and that the Applicant rectified all deficient work performed by the Respondent up to that date. There is then a substantive argument that the defects liability period for work produced by the Respondent expired in November 2007 and that accordingly the Applicant ought no longer hold security.
67. Alternatively it can be argued that the claim seeks restitution for obligations under the contract and therefore any determination must imply compliance with obligations

provided the conditions of the determination are met. So the determination ought not provide for the continued retention of any security.

68. The Applicant's contract reconciliation gives a revised contract value of \$1,015,924.71 and a total value of monies paid to the Respondent of \$704,540.35. Hence the value of funds owing to the Respondent under the contract is \$311,384.36.
69. On the balance of probabilities I determine the Amount due to the Applicant from the Respondent is \$410,612.90 less \$311,384.36 which equals \$99,228.54. This amount is inclusive of GST.

### **Interest**

70. The Applicant's claim was presented 8 October 2007. Section 6 of the Implied Provisions Schedule under the Act requires payment within 20 days after receiving the payment claim.
71. 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.
72. On the balance of probabilities I determine as follows;
- 72.1. The payment was due on or before 28 October 2007.
- 72.2. Interest is accruing at the daily rate of 10.5% of \$99,228.54 / 365 = \$28.55 per day
- 72.3. Interest due and payable up to 26 March 2008 is \$4,281.78

### **Costs**

73. The Applicant seeks claim preparation costs.
74. Clause 36 (1) of the Act requires the parties to bear their own costs.
75. 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.
76. I therefore determine that;
- 76.1. The parties legal and preparation costs are not awarded and are to be borne by the parties
- 76.2. The adjudicators costs are to be shared equally by the parties
77. The parties were advised 25 March that the Adjudication Report would available for release 26 March pending deposit of additional funds to the Territory construction Association trust account to cover the Adjudicator's fees. The Respondent has not responded to this advice or request. The Applicant has advised he will make up the shortfall in the trust fund to enable release of the Report.

78. I therefore further determine that the difference between the Respondent's share of the Adjudicator's fees and the Respondent's share of TCA trust funds available be added to the amount determined in favour of the Applicant. This additional amount is \$1,930.00

## **Conclusion**

79. As instructed I have proceeded with the adjudication and concluded as follows:
- 79.1. For the reasons set out in the Adjudication, I determine the Adjudicated Amount for the Applicant is \$99,228.54 including GST.
  - 79.2. The date payable is 28 October 2007. Interest due and payable to 26 March 2008 is \$4,281.78 and interest continues to accrue at the rate of \$28.55 per day until payment is made.
  - 79.3. The parties legal and preparation costs are not awarded.
  - 79.4. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.
  - 79.5. The Adjudicated Amount in favour of the Applicant is supplemented with \$1,930.00 for Adjudicator's fees owed by the Respondent and paid by the Applicant.

Brian J Gallagher  
**NT Registered Adjudicator No 18.**  
**27 March 2008**