

Adjudicator's Determination

Adjudicator Registration Number 17
Identification No: 17.16.01

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

XXX (Applicant)

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And

XXX (Respondent)

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1. I, Charles H. Wright, as the appointed adjudicator pursuant to the *Construction Contracts (Security of Payments) Act* (the Act), dismiss this application.
2. I determine that each party shall bear their own costs.

Appointment of Adjudicator

3. I was appointed as adjudicator to determine this dispute by the Registrar of Contractor Accreditation Limited (CAL) on Monday 15 February 2016, and later, by agreement with the parties.

Acceptance of Adjudication Application

4. By letter dated 19 February 2016 I advised the parties of my appointment as an adjudicator and my appointment was confirmed by agreement of the parties in the teleconference held Tuesday 23 February 2016.

Documents Regarded in Making the Determination

5. In making this determination I have had regard to the following:
 - 5.1 The provision of the *Construction Contracts (Security of Payments) Act*;
 - 5.2 The cover letter to the application for adjudication dated 11 February 2016;
 - 5.3 The application for adjudication dated 12 February 2016;
 - 5.4 Attachments numbered from No. 1 to No. 52 inclusive and being supporting information to the application for adjudication;
 - 5.5 The response to the application for adjudication dated 26 February 2016;
 - 5.6 Attachments numbered from No. 1 to No. 51 inclusive and being supporting information to the Response;
 - 5.7 Collins Concise English Dictionary Reprinted 1986.
6. A response was required to be served in accordance with section 29(1) of the Act. The Act requires:
 - (1) *Within 10 working days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on:*
 - (a) *the applicant and on any other party that has been served with the application; and*
 - (b) *the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointer on which the application was served under section 28(1)(c).*
7. A response was received by hand by the Adjudicator on Monday 29 February.

Communication with the Parties

8. A telephone conference with the parties took place at 1.00pm ACST time, Tuesday 23 February to discuss formal and procedural matters.
 - 8.1 The following matters were agreed at the telephone conference:
 - 8.1.1 The parties confirmed that no prior application for adjudication had been made;
 - 8.1.2 The parties confirmed that the dispute is not the subject of any order, judgement or finding by an arbitrator, court or other body;
 - 8.1.3 The Adjudicator declared that he had no conflict of interest in this matter;
 - 8.1.4 The application for adjudication was confirmed to be served on the Adjudicator by the Registrar of CAL on Monday 15 February 2016;
 - 8.1.5 The Respondent confirmed being served with the application for adjudication on Monday 15 February 2016;
 - 8.1.6 The date of service of the application for adjudication was confirmed as Monday 15 February 2016;
 - 8.1.7 Noted that a response was required within ten (10) days of service of the application for adjudication;
 - 8.1.8 The response was required on or before Monday 29 February 2016;
 - 8.1.9 that the determination is to be made within the prescribed time which is Monday 14 March 2016;
 - 8.1.10 The Adjudicator enquired if either party had an objection with his appointment as the Adjudicator;
 - 8.2 As no objections to my appointment were received, my appointment was confirmed.
 - 8.3 Both parties were given an estimate of the adjudication fee and requested to forward a deposit to be held on trust and were provided with the details for making payment electronically.
 - 8.4 The parties were asked if they had any items to discuss:
 - (a) The Applicant enquired if additional material may be submitted. The Adjudicator advised it could not unless in response to the Adjudicator requesting clarification of an item. However no new material could be provided nor a new matter raised;
 - (b) The Respondent enquired if they were required to appear before the Adjudicator. The Adjudicator advised that would not be necessary;

- (c) The Applicant sought advice on enforcing the determination. The Adjudicator advised the Applicant to consult a lawyer or go on to the appropriate web site.

Determination

9. The Act requires (at s.33(1) (a) and (b)) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) –*
- (a) *dismiss the application without making a determination of its merits if:*
 - (i) *the contract concerned is not a construction contract; or*
 - (ii) *the application has not been prepared and served in accordance with section 28; or*
 - (iii) *an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or*
 - (iv) *satisfied it is not possible to fairly make a determination:*
 - (A) *because of the complexity of the matter; or*
 - (B) *because the prescribed time or any extension of it is not sufficient for another reason; or*
 - (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.*
10. The respondent's response was received, and therefore, s.33 of the Act requires a determination to be made within the **prescribed time** in accordance with s.33(3);
- prescribed time** means:
- (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).*
11. My determination is therefore required by Monday 14 March 2016.

The Adjudication Application

12. The application for adjudication consists of the following papers;
 - 12.1 Cover letter to the application for adjudication dated 11 February 2016;
 - 12.2 Application for appointment of an adjudicator dated 12 February 2016 consisting of 20 pages detailing the dispute;
 - 12.3 Attachments numbered Tab 1 to Tab 52 inclusive and providing supporting information to the application for adjudication;
 - 12.4 The value the applicant seeks to recover through the adjudication process is not defined in the application for adjudication but on the balance of probability, the amounts would be the combined value of the two Tax Invoices and the costs in preparing the application of adjudication, both dealt with in the following paragraphs.

The Adjudication Response

13. The response consists of the following pages:
 - 13.1 Document Transmittal dated 26 February 2016;
 - 13.2 Contents page dated 26 February 2016;
 - 13.3 Respondents Response for Adjudication dated 26 February 2016 and consisting of 18 pages detailing the response;
 - 13.4 Attachments numbered Tab 1 to Tab 51 inclusive and providing supporting information to the response.

The Construction Contract for the purposes of the Act

14. The Act defines a **construction contract** (s.5(1)(a)) 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 the construction work;*
 - (c) *to provide, on or off site where construction work is being carried out, professional services that are related to the construction work;*
 - (d) *to provide, on the site where construction work is being carried out, on-site services that are related to the construction work.*
15. The construction contract is for work on a **site in the Territory**, is a contract undertaking **construction work** as defined in s.6(1)(d)(i) and s.6(1)(f)(ii) of the Act and is therefore a **construction contract** under the Act.

Contract

16. The contract between the parties is part written and part oral and relies on the Implied Provisions where there is no written agreement between the parties.

Conditions for Determining the Adjudications

17. The conditions for determining the adjudication have been met:
- 17.1 The contract is a **construction contract** as defined by the Act;
 - 17.2 The site is a **site in the Territory**;
 - 17.3 The application for adjudication was served within the prescribed time on the Appointer and Respondent;
 - 17.4 A response was served within the prescribed time;
18. Tax invoices have been issued that do not comply strictly with the requirements of the Schedule Implied Provisions, Division 4 section

The Payment Claim

19. Two Tax Invoices have been issued;
- 19.1 Tax invoice No: 00026226 dated 23-11-15 for the total amount of \$61,655.66 including GST;
 - 19.2 Tax invoice No: 00026517 dated 15/01/2016 for the total amount of \$12,545.70 including GST;
20. The payment claim, the subject of this adjudication, is both Tax Invoices as noted in subclause 12.4 above; invoice No: 00026226 and invoice No: 00026517 for a combined values of \$74,201.36 inclusive of GST as shown on the Applicant's Statement dated 15/01/2016.

21. **Schedule Implied provisions**

Division 4 Making claims for payment

5. Content of claim for payment

- (1) *A payment claim under this contract **must** (emphasis added):*
- (a) *be in writing; and*
 - (b) *be addressed to the party to which the claim is made; and*
 - (c) *state the name of the claimant; and*
 - (d) *state the date of the claim; and*
 - (e) *state the amount claimed; and*

- (f) *for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and*
 - (g) *for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim; and*
 - (h) *be signed by the claimant; and*
 - (i) *be given to the party to which the claim is made.*
- (2) *For a claim by the contractor, the amount claimed must be calculated in accordance with this contract or, if this contract does not provide a way of calculating the amount, the amount claimed must be:*
- (a) *if this contract states that the principal must pay the contractor one amount (the **contract sum**) for the performance by the contractor of all of its obligations under this contract (the **total obligations**) – the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations; or*
 - (b) *if this contract states that the principal must pay the contractor in accordance with rates stated in this contract – the value of the obligations performed and detailed in the claim calculated by reference to the rates; or*
 - (c) *otherwise – a reasonable amount for the obligations performed and detailed in the claim.*
- (3) *Subclause (2) does not prevent the amount claimed in a progress claim from being an aggregate of amounts calculated under one or more of subclause (2)(a), (b) and (c).*

- 22. Tax Invoice No: 00026226 dated 23-11-15 fails to comply with 5(1)(h) as it is not signed.
- 23. Tax Invoice No: 00026517 dated 15/01/2016 fails to comply with 5(1)(h) as it is not signed;
- 24. The Statement dated 15/01/2016 is not a Tax Invoice and is not signed;

Issues for Consideration

Payment Claim:

- 25. Referring to subclause 12.4 above, the application for adjudication requires me to consider the following;
 - 25.1 Tax Invoice No: 00026226 dated 23-11-15 is a payment claim in the sum of \$61,655.66 including GST;
 - 25.2 Tax Invoice No: 00026517 dated 15/01/2016 is a payment claim in the sum of \$12,545.70 including GST;

25.3 In the application for adjudication at Section 8. Costs to Date, the Applicant seeks to recover the cost of preparing the application for adjudication in the sum of \$8,453.50; it is not indicated if this amount includes or excludes GST.

26. Taking Item 25.1 above;

26.1 The payment claim, Tax Invoice No: 00026226 dated 23-11-15, is not valid as it does not strictly comply with the Schedule Implied Provisions, Division 4, section 5(1)(h), in all other respects it complies;

26.2 The payment claim, Tax invoice No: 00026517 dated 15/01/2016, is not valid as it does not strictly comply with the Schedule Implied Provisions, Division 4, section 5(1)(h) in all other respect it complies;

26.3 As the Tax Invoices are invalid I dismiss the application;

26.4 I have reached this determination having regard to the definition in Collins Concise English Dictionary Reprinted 1986 of "*must*", the word at the end of the direction to Division 4, Making claims for payment: '***must*** 1. to express obligation or compulsion';

26.5 In dismissing this application I make no determination of the merits of the application for adjudication.

Costs Payment Claim:

27. Taking Item 25.3 above;

27.1 The application for adjudication failed so the applicant's request for the respondent to make payment in total for the applicant's costs fails.

Conclusion

28. I make the following determination;

28.1 The application for adjudication is dismissed;

28.2 Each party to pay the adjudicator's fee in equal proportion; and

28.3 Each party pay their own costs.

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Charles H. Wright
Adjudicator

14 March 2016