

IN THE MATTER OF THE CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS)

ACT 2004 OF NORTHERN TERRITORY OF NORTHERN AUSTRALIA

MATTER NUMBER 11 – 08 - 01

DETERMINATION

APPOINTED ADJUDICATOR

Alan V Riley

DATE OF DETERMINATION

25 June 2008

Definitions

In this determination the following words and phrases shall, subject to the Construction Contracts (Security of Payments) Act 2004, have the meanings given to them as follows:

“**Act**” means the Northern Territory of Australia Construction Contracts (Security of Payments) Act 2004.

“**Applicant**” means the person described in Item 1 of Annexure A.

“**Construction Work**” means the work described in Item 4 of Annexure A.

“**Respondent**” means the person described in Item 2 of Annexure A.

“**Site**” means the place described in Item 3 of Annexure A.

Determination

For the reasons set out in this determination, I determine that the Respondent is liable to pay to the Applicant, on or before 4 July 2008, the sum of \$117,975.57 including GST.

Appointment of Adjudicator

1. By written notice from the Construction Contracts Registrar dated 10 June 2008, I was appointed the Adjudicator to determine this matter.
2. I was at 10 June 2008, and am at the date of this determination, a registered Adjudicator as provided for in section 52 of the Act.
3. With the Registrar's notice dated 10 June 2008, I was served with the Applicant's application dated 27 May 2008 with supporting documents.
4. The Application complies *prima facie* in its form and content with the requirements of section 28 of the Act.

Conflict of Interest

5. For the purposes of section 31 of the Act, I am not aware of any matter in this case that would give rise to my disqualification from adjudicating the dispute.

Construction Contract

6. Section 5 of the Act defines "construction contract" (in summary) as a contract or other agreement, whether in writing or not, under which the "contractor" has an obligation to carry out construction work, and/or to supply to the construction work site any related goods or services.
7. Section 6 of the Act defines "construction work" to mean any work on a site in the Territory of a class described in section 6(1).
8. The work undertaken in this case is on a site in the Territory and includes work of a class described in section 6(1).
9. The contract in this case is evidenced by a written agreement between the Applicant and the Respondent made in June 2007.
10. The contract is a "construction contract" for the purposes of section 5 of the Act and the payment terms are expressed in that contract.

Payment Claim and Date of Payment Dispute Arising

11. Section 27 of the Act provides that an application for adjudication may be made if a payment dispute arises under a construction contract.
12. Section 8 of the Act provides (in summary) that a payment dispute arises if the amount claimed in a payment claim is due to be paid and the amount has not been paid in full, or the claim has been rejected or disputed. Section 8 also provides for a payment dispute to arise in respect of retention money or security.
13. Under section 4 of the Act, a payment claim includes a claim by the contractor (in this case the Applicant for the purposes of section 4) for payment of an amount in relation to the performance of its obligations under a construction contract.
14. The payment claim identified by the Applicant's application for the purposes of section 28(2)(b)(ii) of the Act is the progress claim produced by the Respondent itself at a meeting on or about 19 or 20 March 2008 in the sum of \$646,544.11 (excluding GST), being the Respondent's own assessment of the value of work done to 31 March 2008. It is therefore not open to the Respondent to deny this as a valid payment claim.
15. On 3 and 4 April 2008, payment certificate No 8 was issued by the Respondent in the amount of \$646,544.11 (excluding GST), which accords with the amount of \$711,198.52 stated in the adjudication application when GST is added.
16. Under the terms of the contract, the Respondent was obliged to pay to the Applicant the amount due within thirty (30) days after the end of the month in which the payment claim was received, such that payment was due to be made on or before 30 April 2008. However, the Respondent has paid only \$462,000.00 (including GST), or \$249,198.52 (including GST) less than the amount certified.
17. By the operation of section 8 of the Act, a payment dispute under a construction contract arose in this case on 30 April 2008 and the Applicant made its application for

adjudication to the Law Society Northern Territory within 28 days after the payment dispute arose.

Application for Adjudication

18. The application for adjudication was served on me through the Registrar pursuant to S 30 of the Act and on the Respondent in accordance with section 28 of the Act.
19. The application was prepared in accordance with the regulations and, therefore, with section 28(2)(a) of the Act.
20. The application set out, or had attached to it, the documents required under section 28 of the Act. Those documents contain the information required by section 28(2)(b) and it is the information contained in that documentation upon which the Applicant therefore relied for the purposes of section 28(2)(c) of the Act.

Response to application

21. By letter dated 11 June 2008, the Respondent served upon me and upon the Applicant its response to the application for adjudication. The response was therefore served in the manner, and within the time, prescribed by section 29(1) of the Act.
22. The response was prepared in accordance with the regulations and, therefore, with section 29(2)(a) of the Act.
23. The response set out the details of the rejection or dispute of the Applicant's payment claim that has given rise to this payment dispute, as required by section 29(2)(b) of the Act.
24. The response contains the information required by section 29(2)(b) of the Act and it is the information contained in the Response upon which the Applicant therefore relied for the purposes of section 29(2)(c) of the Act.
25. As provided in S 34(2) of the Act, I requested that the Applicant provide me with certain further information and documentation, and I received that information on 24 June 2008, with the result that I am satisfied that it is not open to the Respondent to deny the validity

of the March payment claim which, as stated at paragraph 14 above, was generated and subsequently confirmed in writing twice by the Respondent.

Determination

26. Both the Applicant and the Respondent are legally represented and their respective submissions are thoroughly and professionally prepared, containing legal argument in support of their respective positions. For the Respondent, the arguments include positions (in essence) that no valid payment claim has been made nor any payment certificate issued in accordance with the contract.
27. As to the existence or otherwise of a valid payment claim, I find as a matter of fact that the Respondent itself assessed and prepared the March 2008 payment claim and I therefore do not accept the Respondent's submission that no payment claim was received by the Respondent.
28. As to the document issued by the Respondent on 3 and 4 April 2008, the Respondent contends that this was not a payment certificate for the purposes of the contract since it contained arithmetic and other errors. In support of this contention, the Respondent cites the final paragraph of clause 28.1 of the General Conditions of Contract that enables the Respondent to correct at any time, by a payment certificate, any error in a previous payment certificate and the Respondent urges me to accept that a second payment certificate issued on 5 June 2008 effects such correction and that I should disregard completely the 3 April 2008 document.
29. To the extent that the Respondent relies upon the final paragraph of clause 28.1 to justify its issuing of a second payment certificate to correct errors in a previous payment certificate, the Respondent admits that the document issued on 3 and 4 April 2008 was, in fact, a payment certificate and the Respondent is hoist by its own petard.

30. In any event, I do not accept the Respondent's contention that the 3 April 2008 payment certificate is fatally flawed by reason of errors within it. There are three aspects of the 3 April 2008 payment certificate that the Respondent would have me consider, as I now do.
31. The first error identified by the Respondent is the duplication of two variation claim amounts (items 1 and 13) which the Respondent says were caused by spreadsheet formula errors. I agree with the Respondent that these errors are obvious such that the amount claimed is clearly overstated by \$120,271.87 excluding GST or \$132,299.06 including GST. I also agree with the Respondent that the Respondent is entitled to correct these two errors at any time by another payment certificate.
32. The second and third errors identified by the Respondent relate to substantial reductions or deductions that the Respondent evidently wishes to make and says it is entitled to make in respect of scope of work changes and back-charges, but these matters were not identified in the 3 April 2008 certificate at all and I am satisfied that it is not open to the Respondent to treat these matters as errors in the 3 April 2008 certificate.
33. The Respondent may well wish to make such deductions or to recover such back-charges, but it cannot use the last paragraph of clause 28.1 for that purpose. The correction power provided in clause 28.1 goes only to errors discovered *in* any previous payment certificate and the fact that no scope reductions or back-charges at all were dealt with in the 3 April 2008 certificate means that there could not possibly have been an error in either regard *in* the certificate.
34. Further, the Respondent has not provided to me any evidence whatsoever in support of its cross-claims for scope changes and back-charges, such that there is no basis upon which I could begin to weigh the validity of those cross-claims even if I were to take them into account. I also note that they are shown as "estimates" in the 5 June 2008 certificate such that I have no idea whether the cross-claims relate to matters yet to be quantified or even to occur. Therefore, as these cross-claims are merely bare assertions

with no substantiation, I give no weight to them at all as well as excluding them in principle from the operation of clause 28.1 for the reason stated in paragraph 33 above.

35. With reference to paragraph 31 above, I therefore determine that the Respondent was liable to pay to the Applicant \$578,899.46 (including GST) by 30 April 2008. As the Respondent paid only \$462,000.00 (including GST), the Respondent remained liable to pay to the Applicant the sum of \$116,899.46 (including GST) on and from 30 April 2008.

Interest

36. In accordance with S 35(1)(b) of the Act, I determine that interest is to be paid on the amount of \$116,899.46 from 30 April 2008 at 6% per annum until and including the date of this determination, i.e. \$1,076.11 (including GST).

Costs

37. Having regard to the provisions of Ss 36(1) of the Act, each party bears its own costs in relation to the adjudication of the dispute.

38. Pursuant to the provisions of subsection 46(5) of the Act, the parties to an adjudication are, as between themselves, liable to pay my fees in equal shares.

Signed by Alan V Riley

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Adjudicator

25 June 2008

ANNEXURE A TO CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS)

ACT ADJUDICATION NUMBER: 11 – 08 - 01

Item	Definition	Description
1	Applicant	
2	Respondent	
3	Site	Northern Territory
4	Construction Work	Structural steel works