

ADJUDICATOR'S DETERMINATION

PURSUANT TO

**CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT 2004
NORTHERN TERRITORY OF AUSTRALIA**

APPLICANT (A)

**MANAGING
DIRECTOR (MD)**

RESPONDENT (R)

**RESPONDENT'S
REPRESENTATIVE (RR)**

SUPERINTENDENT (S)

**SUPERINTENDENT'S
REPRESENTATIVE (RS)**

Adjudication Number 19-07-02

Date 7-8-2007

I, John Brears, as the appointed Adjudicator pursuant to the (Act), determine that;

1. The Respondent is liable to pay to the Applicant \$85,739.56, (inclusive of GST) before the 6th of September 2007
2. My fees are to be payed equally by the Applicant and the Respondent.

1. Appointment of Adjudicator

I was appointed as Adjudicator by the Territory Construction Association (TCA) to determine this dispute on Monday 2 July 2007.

2. Notification of the Appointment of Adjudicator and Teleconference

I notified both parties by letter on 4 July 2007 that I intended to hold a teleconference at 8.15 am on Thursday 5 July, and requested that S, who was to attend the conference on behalf of the Respondent, provide a letter of authority that he has executive power to act on behalf of the Respondent in this matter.

3. Teleconference

The teleconference was held at 8.15 am on Thursday 4 July 2007.

3.1 At the Territory Construction Association offices in Darwin, NT, were:

| | |
|--------------|---------------------------------|
| John Brears | Adjudicator |
| Chris Ottway | Financial Controller of the TCA |
| S | The Superintendent |

3.2 At A's office was MD.

3.3 I advised that from the "Notice of Dispute" and attached documentation, I had concluded that Applicant and the Respondent had entered into a "Construction Contract" as defined under the (*Act*) Section 5 (1).

Neither party disagreed.

3.4 I also concluded that the construction work was carried out in the Northern Territory, as defined in the (*Act*) Section 6 (1).

Neither party disagreed.

3.5 I further concluded that a payment dispute had arisen as defined in the *Act* Section 8.

Neither party disagreed.

3.5.1 I advised that I had no experience of, or commercial arrangements with Applicant. I advised that when I was the local Manager of Multiplex Constructions, up to some 5 years ago, I had entered into a number of construction contracts with the Respondent. Since then I had had no commercial dealings with it.

Neither party raised any suggestions that I had any "conflict of interest".

3.6 I requested that both parties nominated one person to be the point of contact for each party.

The Applicant nominated MD.

The Respondent nominated RR.

3.7 I noted that the Applicant had lodged their “Notice of Dispute” on the 29 June 2007, which S confirmed had been received by the Respondent on the same day.

I advised that the Respondent had 10 working days to lodge a response, ie by 13 July 2007 (ref *Act* Clause 29 (1)).

The Adjudicator then had a further 10 working days to make a determination (ref *Act* Clause 33 (1) and (3)) ie by 27 July 2007.

3.8 I advised that my published fees for carrying out the adjudication were \$180.00 per hour plus GST.

I asked both parties to deposit \$3,000.00 each with the financial controller of the TCA within 48 hours. This money would be held in the TCA Trust Fund until the Adjudicator had made a determination and directed how these monies were to be dispersed.

4. Documents Regarded In Making The Determination

In making this determination I have had regard to the following

4.1 The provisions of the *Construction Contracts (Security of Payments) Act 2004*.

4.2 The Adjudication Application, dated 29 June 2007 consisting of:

- (1) a covering letter (1 page)
- (2) an application for Adjudication (6 pages)
- (3) Appendices
 - A Letter of claim – 23 May 2007
Tax Compliant Invoice – 23 May 2007
 - B Practical Completion Certificate – 22 November 2006
String of emails – 26 Jul 2006
String of emails – 28 July 2006
Contract Documents
Selected Contract Drawings
 - C Affidavit from MD – 26 June 2007
 - D Change Order 1 – 22 September 2006
Change Order 2 – 5 October 2006
Change Order 3 – 25 October 2006
Change Order 4 – 3 November 2006
Change Order 5 – 8 November 2006
Change Order 6 – 10 November 2006
Change Order 7 - 7 December 2006
Change Order 8 – 14 December 2006
 - E Earthmoving Invoice – 22 May 2007
Plant Hire Rates – 13 April 2007
Signage Invoice – 3 May 2007

4.3 The Response dated 12 July 2007 consisting of:

- (1) Covering letter (1 page)
- (2) The detailed response (4 pages)
- (3) Annexure A (3 pages)
- (4) Attachment 1 (14 pages)
- (5) Attachment 2 (1 page)
- (6) Attachment 3 (2 pages)
- (7) Attachment 4 (2 pages)
- (8) Attachment 5 (2 pages)
- (9) Attachment 6 (3 pages)
- (10) Attachment 7 (1 page)
- (11) Attachment 8 (1 page)

- 4.4 Letter from Adjudicator – to the Respondent – 13 July 2007 (2 pages)
- 4.5 Letter from the Respondent to Applicant – 13 July 2007 (3 pages)
- 4.6 Email from the Respondent to Adjudicator 18 July 2007 (1 page)
- 4.7 Email from Applicant to Adjudicator 19 July 2007 (4 pages)
- 4.8 Faxed letter from Applicant to Adjudicator - 19 July 2007 (1 page)
- 4.9 Email from Applicant to Adjudicator - 20 July 2007 (6 pages)
- 4.10 Email from Applicant to Adjudicator - 20 July 2007 (1 page)
- 4.11 Letter from Adjudicator to the Respondent - 20 July 2007 (1 page)
- 4.12 Letter from the Respondent to Adjudicator – 24 July 2007 (1 page)
- 4.13 Letter from Adjudicator to the Respondent – 26 July 2007 (1 page)
- 4.14 Letter from Applicant to Adjudicator – 2 August 2007 (2 pages)
- 4.15 Letter from Adjudicator to the Respondent – 2 August 2007 (1 page)

5. No Payment Claim to Adjudicate

- 5.1 The Respondent disputes that it has received a payment claim from the Applicant as defined in Section 4 of the *Act*.

Under the *Act* “*payment claim*” means a claim under a construction contract

- (a) *by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract.*

Firstly although a “Certificate of Practical Completion” was issued on 22 November 2006, the defects liability period for the works runs until 23 May 2007. The issue of the “Final Certificate” or “Return of Security” (Clause 42.7 of the conditions of contract) has not taken place yet. Therefore, when the directions were issued on 5 April 2007 by the (SR), the construction contract was still in place.

Whether the instructions by SR were given under Clause (37), (39) or Clause (40) of the General Conditions of Contract, is not clear, because there is no written confirmation by SR of what his intentions were. Under Clauses (37), (39) and (40) the Applicant is required to carry out additional works if directed to do so.

The Applicant has carried out these additional works, but the “conditions of contract” are silent on how these works specifically carried out during the “Defects Liability Period” should be claimed and paid for by the Respondent. However, clause 2.10 of the

“Amendments to the General Conditions of Contract” refers specifically to the provision of a “Tax Compliant Invoice” showing the value of the work carried out.

I therefore consider that the Applicant’s claim in the form of a “Tax Compliant Invoice” is a payment claim as defined under Section 4 of the *Act*.

- 5.2 The Respondent further claims that the Applicant’s letter of 23 May 2007 and attached invoice, are time barred, referring to Clause 48 and the legal precedent of *Opat Decorating Service (Aust) Pty Ltd v Hansen Yuncken (SA) Pty Ltd* (1994) (ODvHY).

The legal precedent quoted (ODvHY) refers to a claim for “an extension of time” to the contract period, and the requirement for a contractor to give 14 days notice of the cause of a delay that will delay the completion of the contractor’s work.

I consider that this is significantly different to a “payment claim” made by a Contractor and should not be used as a precedent for my decision. The time requirements specified in certain clauses in the “conditions of contract” are generally to ensure that both parties are informed, as soon as possible, of any events or actions that may result in additional costs or delays to the progress and completion of the works. In particular, where one Party may be aware of the event or actions and the other Party not, the requirement to give notice within a specific period of time, ensures that both parties have the opportunity to fully investigate these “events or actions” soon after they occur and not later in, or at the end of the contract period.

In this dispute, RS clearly instructed the Applicant to carry out repairs to the road surface. RS would have known that costs would be incurred by the Applicant, but apparently failed to give consideration as to who should bear the costs, until receiving the Applicant’s letter (23 May 2007) and attached invoice.

The timetable of events from documents that I have received is as follows,

1. 5 April 2007: SR instructed the Applicant to carry out repairs.
2. 5, 6 and 7 April 2007: the Applicant’s subcontractors installed warning signs and carried out repairs.
3. 27 to 30 April 2007: the Applicant carried out further repairs.
4. 3 and 22 May 2007: the Applicant received invoices from subcontractors.
5. 23 May 2007: the Applicant submitted letter and Tax Invoice.

From the above timetable, I consider that Applicant submitted its claim within 28 days from receiving all detailed invoices from its subcontractors and is therefore not time barred.

6. Rejection of Applicant comments on the Respondent response

The Respondent has requested that the Adjudicator not consider the comments by Applicant on the Respondent’s response (letter 24 July 2007).

Under the Act Clause 34 (1) (b), the Adjudicator

is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator considers appropriate.

And in clause 34 (2) the Applicant may

request a party to make a, or a further, written submission or to provide information or documents, and may set a dead line for doing so.

Between the first verbal instructions to the Applicant by the Respondent on 5 April 2007 and the Applicant's application to adjudicate the dispute, I have no correspondence from the Respondent indicating their response to the Applicant's payment claim. I therefore consider it fair to the Applicant that when the Respondent finally "put pen to paper" that they should have the opportunity to comment on the reasons the Respondent gave for not paying their Tax Invoice.

I am therefore rejecting the Respondent's request to ignore the Applicant's comments.

7. Determination

The Act requires in Section 33 (1) (b) that the Adjudicator must

"determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or 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."*

The "Notice of Application for Adjudication of a Payment Dispute" (29 June 2007) relates to a letter of claim and tax invoice dated 23 May 2007, which was received in the post by the Respondent, on 28 May 2007. The letter of claim was detailed and extensive, including photographs and a full breakdown of costs making up the total amount claimed of \$84,486.00.

Between 28 May 2007 and 29 June 2007 the Respondent has not, according to the Applicant, made any contact with the Applicant, apart from seeking a further copy of a subcontractor invoice. The response from the Respondent provides no details of any correspondence during this period of time.

The Applicant refers to Clause 2.1 (a typographical error I assume), which I take to be Clause 2.10 of the "Amendments to General Conditions of Contract", which provides that "Principal shall issue a progress certificate and make payments within 30 days of receipt of claims that are correct and in order for payment.

The Respondent has failed to comply with the requirements of Clause 2.10. The reasons given in the Respondent's response I have considered earlier in this determination, and rejected. In summary I consider that the letter of claim and tax invoice submitted by the Applicant on 23 May 2007 meet the requirements of Clause 2.10 and should have been dealt with by the Respondent accordingly.

8. The Value of Work Carried Out by Applicant

The letter of claim, dated 23 May 2007 provides details of work carried out by both the Applicant, using his own labour and plant, and the subcontractors that he engaged. Copies of the subcontractors' invoices to Applicant have also been provided and substantiate the amount claimed by Applicant.

The Respondent in its response challenges

- (a) The reasons for the failure of the road surface and
- (b) The method used to carry out the repairs and the costs involved.

Considering each of them in turn

- (a) The reasons for the failure of the road surface.

The Applicant has given its reasons why the road surface failed and the Respondent has similarly given its explanation for the failure, however the Adjudicator is not required to be an independent technical expert, and the decision on who is ultimately responsible should be decided by an independent technical expert, not the Adjudicator.

- (b) The method used to carry out the repairs and the costs involved.

The Respondent, in its response, seeks to challenge the way that the repairs to the surface were first carried out by the Applicant. The Adjudicator is not required to decide upon the merits of the method used to carry out the repairs, but does note that when the need to carry out the repairs was first discovered, no technical directions as how to carry out the repairs were given by RS and the Applicant and its subcontractors were left to make their own decisions as to how to carry out the repairs, presumably based on their experience in this area.

It is unreasonable in my opinion for the Respondent to now seek to challenge the methods that the Applicant used to carry out the repairs.

9. The Value of the Determination

Having received verbal instructions from RS, I consider that the Applicant acted properly under the terms of the contract and arranged for the road surface to be repaired as soon as possible.

I consider that the details of the costs involved in carrying out the repairs are reasonable, and dismiss the challenge by the Respondent as to the methods used by Applicant to carry out the repairs.

I consider that Applicant complied with the terms of the contract in submitting a letter of claim and tax invoice on 23 May 2007, but the Respondent failed to comply with their responsibilities under the contract by not responding to the Applicant's letter of the claim within the required time period, forcing the Applicant to have to resort to adjudication to seek payment for the work that it had carried out and considered that it should be paid for.

For these reasons, I consider that Applicant should be paid the whole of the claimed amount plus any interest due, calculated under the terms of the contract.

Details of Payment and Interest Due

Payment Claim of \$84,486.00 made on 23 May 2007, and received by the Respondent on 28 May 2007.

Payment due within 30 days of receipt of claim, (clause 2.10)

Therefore, payment should have been made by 28 June 2007.

I determine that payment shall now be made within 30 days from the date of this decision (7 August 2007), ie before 6 September 2007.

Calculation of Interest Due

The conditions of contract, Clause 42.1 and the changes detailed in the “Amendments to the General Conditions of Contract” detail how the interest is to be calculated, based on the ninety day bank bill rate published on 1 June 2007.

I calculate that the interest due is \$1253.56

Amount Due

| | |
|--------------|-------------------|
| Payment Due | \$84,486.00 |
| Interest Due | <u>\$1,253.56</u> |
| Total Due | \$85,739.56 |