

ADJUDICATOR'S DETERMINATION

**PURSUANT TO THE
*CONSTRUCTION CONTRACTS (SECURITY OF PAYMENT)
ACT 2004 (NT)***

IN THE MATTER BETWEEN:

(Applicant)

AND

(Respondent)

BY

Paul W Baxter (Adjudicator)

ISSUED

28th April 2010

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1. DETAILS OF PARTIES

Contract To Which Payment Dispute Relates
Project Contract 0747/15.100

Applicant

Applicant's Solicitor

MinterEllison Lawyers
Level 4, 66 Smith Street
DARWIN
NT 0800
Attention: Mr. Cris Cureton

Respondent

Respondent's Solicitor

Cridlands MB
GPO Box 1302
DARWIN
NT 0801
Attention: Ms. Lisa Heames

Adjudicator

Mr. Paul William Baxter
5 Little Street
FANNIE BAY NT 0820
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Email: pbaxter@pwbaxter.com.au

2. ADJUDICATOR'S DETERMINATION

I, Paul William Baxter, determine on 28 April 2010 that the amount to be paid by the Respondent to the Applicant is \$202,184.11 (incl GST) plus interest from the date when payment ought to have been made on 14 January 2010 until the date of this determination, being the 28 April 2010, and thereafter interest accruing upon the determination amount pursuant to the Act, or such other amount determined by me.

In the case that the Applicant is forced to pay the Respondent's fees, the Applicant will be entitled to seek reimbursement of the Respondent's fees from the Respondent. In accordance with clause 38 (1) of the Act the costs to be paid by the Respondent to the Applicant will include a further \$3,025.00 (incl GST), with interest accruing at the rate of \$0.87 per day.

These amounts are payable immediately. There is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the *Construction Contracts (Security of Payments) Act 2004* (NT).

Contact details:

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3. BACKGROUND

1. The Applicant, is a company which provides civil services and earth moving equipment hire in the Northern Territory.
2. [Respondent details]
3. In or about late May 2008, the [Principal] released a Request for Tender for the [project description] The terms of tender were provided by the Pprincipal, and incorporated NPWC Edition 3 (1981) general conditions of contract as amended, as the terms of contract upon the acceptance of the tender (the '**RFT**').
4. The Applicant was nominated as a subcontractor to carry out works for the [Contractor] in the Contractor's tender to the Principal.
5. On 16 June 2008, the Applicant submitted a quote for consideration by facsimile to J H of the Contractor to carry out works identified in the RFT.
6. On 20 June 2008, the Contractor was awarded the contract for the works by the Principal. The contract between the Contractor and the Principal comprised the terms incorporated by reference and annexure to the RFT including the NPWC General Conditions of Contract (the '**Head Contract**').
7. Upon award of Head Contract to the Contractor on 20 June 2008, the Contractor accepted the Applicant's quotation for works and formed a subcontract for the Applicant. The subcontract to the Applicant included the carrying out of works identified in the Applicant's completed tender form on the terms and conditions identified in the RFT being terms incorporated by reference into the Subcontract (the '**Subcontract**').
8. At some time after the formation of the Head Contract and the Subcontract, all assets of the Contract were transferred to the Respondent. This included transfer of the Head Contract and Subcontract, with the express or implied consent of all parties, including the Applicant.
9. The Applicant does not have a copy of the Subcontract document in its control, possession or custody. The Respondent has previously indicated that while it has a copy of the Subcontract document, it refuses and declines to provide a copy of it, despite request by the Applicant and their solicitors.
10. Under the terms of the Subcontract, the Applicant mobilised to [project location] to execute the Subcontract works as specified. For the duration of works, the Applicant made progress claims for Subcontract works executed at various stages of the project, and the Respondent paid those claims.
11. On 6 November 2008, the Applicant appointed Stephen Duncan and Peter Lanthois of KordaMentha (Adelaide) as administrators (the '**Administrators**') pursuant to the *Corporations Act*. The Administrators assumed management of the Applicant's business,

including the Subcontract. The Applicant continued execution of works under the Subcontract with the Respondent until January 2009, when the Respondent varied the scope of the Subcontract Works and no longer required the Applicant's services.

12. A payment claim has been submitted to the Respondent by the Applicant for the contract value of the Subcontract Works completed up until January 2009, payment of which has been ignored by the Respondent.
13. The Respondent has submitted no response to this Application for Adjudication, nor has it submitted a Dispute Claim regarding the Applicant's payment claim.

4. ABSENCE OF RESPONSE TO APPLICATION

I have received no Response to the Application for Adjudication by the Respondent within the prescribed time.

A letter 23 April 2020 was received from the Respondent's legal representative generally stating that the Application for Adjudication failed to comply with section 28 of the Act. It made reference to a dispute that I am cannot deal with and contained no evidence to support the claim.

The Response is a matter of contract. Either a term in the contract or terms are implied. Refer s 20 and Division 5 of the Schedule.

If the Respondent does not dispute the payment claim by a notice of dispute then the whole of the sum becomes payable pursuant to the contract.

In the case that the Respondent fails to pay their Adjudication fees and the Applicant is forced to cover both their own and the Respondent's fees of Adjudication, the Applicant is entitled to full reimbursement of \$3,025.00 (incl GST) constituting the Respondent's fees, accruing interest at the rate of \$0.87 per day hereafter.

I am obliged to make my determination in accordance with the Act.

5. APPOINTMENT OF THE ADJUDICATOR

The applicant applied 31 March 2010 for an adjudication under the *Construction Contracts (Security of Payments) Act (NT)* (the Act), consequent upon which I was appointed adjudicator on 8 April 2010 by the Master Builder's Association of the Northern Territory to determine this application. The Master Builder's Association NT is a prescribed appointer under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1) (c) (iii) of the Act.

6. CONFLICT OF INTEREST

I have known the Applicant's solicitor Mr Cris Curetron on a professional basis only. I have had no dealings with either the Applicant or its Administrators or the Respondent. I have conducted no business with either of these two parties and I therefore see no reason for disqualification due to conflict of interest under S.31 of the Act.

7. JURISDICTION

Jurisdiction is determined by the following factors:

1. That the adjudicator be appointed by either the Registrar or by a prescribed Appointer (refer s28 (1) of the Act).
2. That the contract for the works was formed after the date of proclamation of the Act being 1st January 2005 (refer Part 1 s.2 (1)).
3. That the works be a "site in the Territory" (refer Part 1 s.6 (1)).
4. That there is a payment dispute, as given in Part 1 s.8 of the Act.
5. That the applicant applying for adjudication be a party to the contract as defined in Part 3 s 27 of the Act, noting the exceptions under sub clauses (a) and (b).
6. That the application for adjudication be made within 90 days after the dispute arises, as defined under Part 3 s. 28 (1) of the Act.
7. That the matter relates to "construction work", as given in the definition of this term, Part 1s.6 of the Act.

With respect to the specific facts of this case, I deal below with each of the issues in points 1 to 7 above:

1. The manner of appointment has been dealt with above. The Application has been satisfactorily served in accordance with the requirements of S28.
 2. The Contract was dated after the commencement of the operation of the Act.
 3. The site is within the Northern Territory.
 4. There is a payment dispute within the meaning of s 8 the Act. The dispute arose January 2009 due to non-payment of Payment Claims dated between November 2008 and January 2009.
 5. The Applicant is a Party to the contract.
 6. The application for adjudication was made on 31 March 2010, which was within 90 days after the time for the payment of the claim arose.
- A. 23) I find that the application is in time in respect of the payment claim 14 January 2010
- a. The Payment Claim complied with the implied terms of the Contract (see paragraph 9 above), in that it:
 - i. was in writing;
 - ii. was addressed to the contractor ('the Respondent') as the party to which the claim is made;
 - iii. stated the Applicant as the claimant;
 - iv. stated the date of the claim;
 - v. stated the amount claimed;
 - vi. described the basis for the claim in sufficient details for the contractor to assess the claim;
 - vii. was signed by the claimant ('the Applicant'); and
 - viii. was given to the Respondent, being the party to which the claim is made.

7. The matter related to the supply of labour and supervision for the site and the work clearly falls under the definition of “construction work”

Finally neither party has raised any suggestion that there exists any judgment or other finding about the dispute that is the subject of the application.

I am therefore satisfied that I have jurisdiction in this matter.

8. DOCUMENTS RECEIVED BY ADJUDICATOR

The Applicant submitted the following documents for consideration by the Adjudicator:

- Application for Adjudication of Payment Dispute 23 pages
- Attachment A: Request for Tender – [project description]
– Tender No. NRD0123908. 123 pages
- Attachment B: Quotation from Applicant, dated June 16 2008. 14 pages
- Attachment C: Email from NG to AG, dated 2/12/2008. 2 pages
- Attachment D: BD Statutory Declaration, dated 29/3/2010. 4 pages
- Attachment E: Various tax invoices. 7 pages
- Attachment F: NG Statutory Declaration, dated 31/3/2010. 2 pages
- Attachment G: Email from AG to NG. Subject: outstanding invoices
owed to Respondent by Applicant dated 17/7/2009. 5 pages
- Attachment H: Fax from Applicant dated 17/12/2009. 8 pages
- Attachment I: Email from NG dated 4/2/2010. 1 page
- Attachment J: Cameron Ford Adjudication No. 16.06.01. 16 pages

The Respondent has not submitted any documents that I can consider for this Adjudication..

As well as these documents issued to the Adjudicator by the Applicant, I have also taken into consideration the *Construction Contracts (Security of Payments) Act* (NT) for the determination of this Adjudication.

9. COMPLIANCE ISSUES

Compliance with Section 33(1) (a)

1. I find the contract concerned is a construction contract and that the application has been prepared and served in accordance with section 28 of the Act.
2. I find there is no order, judgment or the finding about the dispute that is the subject of the application.
3. I am not satisfied as to the matters contained in Section 33(1) (a) (iv).
4. Given that the Application is not dismissed the adjudicator has to move to the second stage of the determination.

Determination - Section 33(1) (b)

5. The Act provides that if the application is not dismissed because of the matters provided for in section 33(1) (a) then the adjudicator has to determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment. Section 33(1)(b)
6. As set out in Statutory Declaration BD, the Applicant executed the Subcontract works in accordance with the Subcontract, submitting progress claims from time to time as and when the stages of the Subcontract Works were completed and inspected to the satisfaction of the Respondent.
7. The Contractor did not appoint a Superintendent under the Subcontract or have any person acting reasonably and independently of the interests of the Contractor when assessing or certifying progress claims for the Subcontract Works executed by the Applicant or other matters, including delay under the Subcontract. The Respondent had its officers and representatives undertake inspections and approval processes under the Subcontract.
8. The Subcontract Works were progressed satisfactorily and approved by the Respondent. The Applicant assumes these works were approved by the Principal under the Head Contract, as the Respondent was paid under the Head Contract. Variations to the scope of the Subcontract works occurred, in the normal course.
9. From time to time, the Applicant made progress claims based generally on the inspection times of the Respondent and its representatives, predicated upon the tendered schedule of rates. In practice there was an accepted entitlement on behalf of the Applicant to bring payment claims from time to time as the Subcontract Works were executed. The dates of the six payment claims preceding Payment Claim No. 7, the subject of this dispute, were issued by the Applicant under the Subcontract.

Variations to the Subcontract Works

10. On 12 January 2009, AG of the Respondent advised BD of the Applicant that the remaining items of the Subcontract Works would need to wait until the Dry Season to be carried out due to wet weather delays. These included the tarmacing of a trench and the electrical connection of the pump station.
11. On 14 January 2009, NG, director of Korda Mentha Adelaide was advised via telephone by AG that the Applicant was to submit a payment claim for the Subcontract Works completed to date and that the Respondent would complete those remaining items of work in the Dry Season as seen in Statutory Declaration NG.
12. AG's instruction amounted to a variation pursuant to section 40 of the Subcontract of the Subcontract Works by omitting items of work that the Applicant was otherwise obliged to carry out (the '**Variation**').
13. It was understood that neither the Applicant nor its Administrators would pursue the Respondent for the benefit it would have received in completing the original Subcontract scope of works.
14. The Subcontract was priced on a schedule of rates basis, therefore the Variation of the

Subcontract Works did not require a deduction of the Subcontract price payable to the Applicant. Any work not executed as a result of the Variation would not therefore be claimed for by the Applicant.

Breaches of the Subcontract

15. The Respondent varied the scope of works under the Subcontract by omitting specific items of work from the Subcontract Works. This variation meant that the Respondent did not require the Applicant or its Administrators to complete those remaining items of work awaiting approval by the Principal or those items unable to be completed at the time due to the wet weather complications.
16. The Respondent cannot and has not asserted that the placing of the Applicant into external administration by the appointment of Administrators and consequent entry into a deed of company administration under the *Corporations Act* entitled it to take the remaining works from the Applicant, in the circumstances where the Subcontract Works were suspended, as:
 - a) the Respondent did not provide any notice of intention to terminate the Subcontract;
 - b) the provision of a proper notice adequately identified and delivered as a notice of default or termination under clause 44 of the General Conditions of Contract is a condition precedent to the exercise of rights of termination of a contract or removal of works from a contractor under those contract terms, and
 - c) the Respondent evinced a clear intention to continue with the Subcontract with the Applicant under external administration by encouraging the Applicant and its Administrators to continue the execution of the Subcontract Works and to incur the costs of doing so up until the Wet Season delayed the completion of the original Subcontract Works in January 2009.
17. On 17 July 2009, AG from the Respondent emailed NG on behalf of the Applicant, stating that the Subcontract Works had reached practical completion and advising of the costs claimed to have been incurred by the Respondent in the carrying out and completion of the Applicant's contracted Works under the Subcontract. AG enclosed copies of the invoices received from the third party contractors contracted to complete the Subcontract Works.
18. The costs which the Respondent claims to have been incurred by having third party contractors complete the remaining items of Subcontract Works are the subject of the Variation, and any alleged defects that would be typically undertaken in a defect liability period following practical completion of the Subcontract Works, are excessive to the remaining costs to complete the Subcontract Works under the Subcontract. The Respondent has no right under the terms of the Subcontract or the law to purport to set off, deduct or claim payment of those costs in circumstances where they are incurred as a result of its own breaches of and instructions made under the Subcontract.
19. In so far as the Respondent is seeking to purport to deduct or set off any amount as against the payment claim submitted for consideration in the Applicant's application for adjudication, the Applicant submits that such deduction cannot be permitted where the Respondent has failed to bring a payment claim, and to prosecute that payment claim under the Subcontract, before raising that allegation of an alleged entitlement in an adjudication application.
20. Further, if the Respondent had properly notified the Applicant of its intention to terminate the Subcontract or remove the remaining Subcontract Works from the Applicant under clause 44 of the Subcontract, the Respondent was under an obligation to exercise the right conferred by section 44 of the Subcontract reasonably, honestly and bona fide in both forming the opinion that the Applicant had failed to show cause that it could not properly complete the Subcontract Works (because of the appointment of the Administrators).
21. In this case, the Respondent did not issue the Applicant with any notice to show cause or provide it with any opportunity to complete those remaining items of the original Subcontract Works. It is clear by the continued progress of the Subcontract Works post appointment of the Administrators, that the Applicant remained ready and willing and had capacity to complete the Subcontract Works, notwithstanding the fact that the works had been varied.

22. The Respondent's acts in failing to give notice to the Applicant to attend site or provide it with the opportunity to complete the original Subcontract Works evinces an intention on behalf of the Respondent not to be bound by the Subcontract and practically prevented the Applicant from being able to perform its obligations. This constitutes a repudiation of the Subcontract by the Respondent, which repudiation the Applicant, in the circumstances of its lack of access to the site and the remaining items of the Subcontract Works having been completed by others, had no alternative but to accept.
23. The Applicant's rights, including right to payment for the Subcontract Works executed prior to the repudiation of the Subcontract by the Respondent remain extant and operative.

Payment Claim

24. On 17 December 2009 the Respondent was provided by facsimile with a copy of the Applicant's progress payment claim described as Payment Claim No. 7, for work executed under the Subcontract to the period ending 13 July 2009 for the sum of \$202,184.11 (incl GST).
25. The Payment Claim complied with the terms of the Subcontract, in that it:
 - a) was in writing;
 - b) was addressed to the Respondent as the party to which the claim is made;
 - c) stated the Applicant as the claimant;
 - d) stated the date of the claim;
 - e) stated the amount claimed;
 - f) described the basis for the claim in sufficient detail for the Respondent to assess the claim;
 - g) was signed by the Applicant; and
 - h) was given to the Respondent, being the party to which the claim is made by personally delivering it to their address under the Subcontract on 17 December 2009.
26. The Respondent has not provided a notice of dispute in accordance with the implied terms of the Subcontract, or at all. The only response received from the Respondent was an email dated 4 February 2010 by MG, CEO of the Respondent, advising that the Respondent would be in contact with the Administrators.
27. In circumstances where a party who receives a payment claim does not give notice of a dispute within 14 days, it is entitled to pay the entire amount of the claim within 28 days of receipt of the payment claim.
28. The Payment Claim therefore had to be paid by 14 January 2010, that is, 28 days after the Respondent received Payment Claim No. 7, and a payment dispute under the Act arose on that day when payment was not made as due by the Respondent.
29. Absent of a notice of dispute, the Respondent is obligated to pay the full amount of Payment Claim No. 7, without set-off or deduction. Accordingly, I am not required to descend into an assessment of the merits of Payment Claim No. 7 itself, and am entitled to rely upon the lack of response by the Respondent to deem the Payment Claim No. 7 and the amount there claimed as immediately due by operation of the Act.
30. I have considered Payment Claim No. 7 on its merits, noting the part of Payment Claim No. 7 attached for consideration in the Applicant's application for adjudication. Payment Claim No. 7 identifies with particularity the items of the Subcontract Works (by reference to the original schedule of rates items and where additional works, by identification of those items being variations) the subject of the claim and the percentage or quantity by which that item has completed.

10. SUMMARY OF ADJUDICATION

Conclusion

In the absence of any response by the Respondent within the terms of the Act, the Applicant is entitled to payment on account, without deduction, of Payment Claim No. 7 for the work executed by it.

The Respondent cannot, absent of a proper payment claim in accordance with the terms of the Act for its alleged damages having been brought and determined due under the Subcontract, assert any right of deduction or set off against Payment Claim No. 7 due to the Applicant. Permitting such claims would be allowing the Respondent to take advantage of its own breaches of the terms of the Subcontract.

I hereby determine that the Applicant is entitled to payment on account of the sum of \$202,184.11 (incl GST) plus interest from the date when payment ought to have been made on 14 January 2010 until the date of this determination, being the 28 April 2010, and thereafter interest accruing upon the determination amount pursuant to the Act, or such other amount determined by me.

In the case that the Applicant is forced to pay the Respondent's fees, the Applicant will be entitled to seek reimbursement of the Respondent's fees from the Respondent. In accordance with clause 38 (1) of the Act the costs to be paid by the Respondent to the Applicant will include a further \$3,025.00 (incl GST), with interest accruing at the rate of \$0.87 per day.

Determination

In accordance with s 38(1) of the Act I determine that the amount to be paid by the Respondent to the Applicant is \$202,184.11.

I determine there is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the Act.

Dated: 28th April 2010

Paul Baxter
Registered Adjudicator