

## Adjudicator's Determination

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

#### Adjudication 18-08-02

1. 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 18 June 2008 is \$44,608.08 including GST.
2. The date payable is 20 March 2008. Interest due and payable to 11 August 2008 is \$1,847.92 and interest continues to accrue at the rate of \$12.83 per day until payment is made.
3. The parties legal and preparation costs are not awarded.
4. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

**Appointment of Adjudicator**

5. I was invited to adjudicate this matter by the Territory Construction Association 25 June 2008.
6. I accepted the invitation and was appointed as Adjudicator by the Territory Construction Association 25 June 2008. The parties were notified of the appointment the same day.
7. The Adjudicator has been properly appointed in accordance with the *Construction Contracts (Security of Payments) Act 2004*.

**Documents Regarded in Making the Determination**

8. In making the determination I have had regard to the following.
  - 8.1. The provisions of the *Construction Contracts (Security of Payments) Act 2004*. (*as in force 8 January 2008*)
  - 8.2. The provisions of the *Interpretation Act*. (*as in force 17 May 2007*)
  - 8.3. Application from the Applicant dated 18 June 2008.
  - 8.4. Payment Claim dated 21 February 2008.
  - 8.5. Provisional Response from the Respondent dated 27 June 2008.
  - 8.6. Adjudicator's notes from Preliminary Conference dated 1 July 2008.
  - 8.7. Further Response from Respondent dated 24 July 2008.
  - 8.8. Reply from the Applicant dated 30 July 2008.
  - 8.9. Letters from Respondent dated 1 August 2008 and 5 August 2008.

**The Adjudication Application**

9. The Adjudication Application was served on the Respondent and the Prescribed Appointer on 18 June 2008 and consists of the following documents;
  - 9.1. Adjudication Application, and
  - 9.2. 22 Attachments.

**The Provisional Response**

10. 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;
  - 10.1. Response document, and
  - 10.2. 2 Attachments.

**The Further Response**

11. The Further Response to the Application was served on the Adjudicator and the Applicant on 24 July 2008, within the period as extended as notified by the Adjudicator, and consists of the following documents;

- 11.1. Further Response document, and
- 11.2. 17 Attachments.

### **The Reply**

12. The Reply to the Further Response was served on the Adjudicator and the Respondent on 30 July 2008, within the period as notified by the Adjudicator, and consists of the following documents;
  - 12.1. Reply document, and
  - 12.2. 4 Attachments.

### **Jurisdiction**

13. The Respondent objects to jurisdiction on the basis of the matter being subject to an agreement between the parties and not subject to a construction contract.
14. The dispute arises out of a partly written and partly verbal arrangement between the parties for the Applicant to provide joinery and other residential finishes to the Respondent for consideration based on two price quotations. The first quotation was for the initial scope of work and the second quotation addressed additional work scope as defined by the Respondent's architect.
15. The works and arrangements between the parties meet the definitions of construction contract and construction work as defined in Section 6 of the Act. The work is on a site in the Northern Territory and the contract was entered into not earlier than 17 August 2005, after the commencement date of the Act and is therefore a construction contract according to the Act.
16. The dispute relates to settlement of consideration for services performed under the contract. As such it is a direct consequence of the contract and its resolution is an integral part of final contract settlement.
17. At a preliminary conference, 1 July 2008, 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.
18. The parties have provided no advice of the dispute being "subject of any other order, judgment or other finding".
19. On the balance of probabilities, I determine the Adjudicator has jurisdiction to adjudicate the dispute in accordance with the Act.

### **The Payment Claim**

20. The payment claim referred to in the Application is dated 21 February 2008. The amount claimed is \$72,204.68 inclusive of GST.

21. The summary details of the 21 February 2008 claim (GST inclusive) are:

<b>Accepted Assessment by Quantity Surveyor</b>	<b>\$286,979.22</b>
Less unpaid contract value as varied	<u>\$214,775.54</u>
<b>Net Claim</b>	<b>\$72,203.68</b>

### **Extended Time for Adjudication**

22. In providing the Provisional Response, Counsel for the Respondent requested an extension of the adjudication period to provide the Respondent, who was overseas at the time, with an opportunity to provide a detailed response to the Application. The Adjudicator obtained the Registrar's consent to extend the prescribed time under Section 34 (3) (a) and advised the parties the due date for the Further Response was 24 July 2008. Further, the Applicant was provided the opportunity to reply to this Further Response by 30 July 2008. The revised date for Adjudicator's Report became 11 August 2008.

### **Issues to be Determined**

23. The existence of a payment dispute within the meaning of the Act is disputed by the Respondent.
24. The Respondent claims the Application was not validly served.
25. The Respondent presents a value of defective work in the Further Response. The Applicant denies these claims.
26. The parties are reliant upon an agreement between them that the costs for the work would be determined by consultation between quantity surveyors separately engaged by each party. Additionally the parties further agreed that the quantity surveyors would adhere to a valuation process defined in the Respondent's letter dated 7 September 2007. The Respondent disputes the claim quantum on the basis that the quantity surveyors did not adhere to the agreed valuation process.
27. The Respondent has alleged that the Applicant in submitting his Reply to the Further Response has introduced new assertions not included in the Application. It is claimed such assertions should not be considered or alternatively the Respondent should be extended a right of reply based on the principles of natural justice.
28. Both parties seek entitlement to legal and claim preparation costs.
29. In the event there is a legitimate claim then quantum is to be determined.
30. The due date for the payment of any legitimate claim is to be determined along with any interest due.

**Status of the "Payment Dispute"**

31. As noted above the contract is partly written and partly verbal. The written elements relate to the initial pricing of the works and since there are no documented conditions of contract the implied provisions in the Act prevail.
32. The Applicant's claim dated 21 February complies in all respects with the requirements of Division 4 of the implied Provisions Schedule in the Act.
33. Under Section 8 of the Act a payment dispute arises if the amount claimed has not been paid when it is due or if the claim has been wholly or partly disputed. Under the implied provisions the Respondent had 14 days to dispute the claim or 28 days to pay the claim in full. The Respondent did not provide any written response to the Claim and 2 subsequent letters on the matter until 20 May 2008. The Respondent claims there were various conversations concerning the claim between the parties prior to the Applicants first follow up letter dated 25 March 2008. As the Act requires notification in writing any such discussions cannot be considered proper notification as defined in the Act.
34. The Respondent asserts that the claim demanded payment on terms other than defined in the implied provisions of the Act and as such constitutes a conditional offer. Even if this interpretation is correct, the offer is an offer of a claim and an invoice to settle a disagreement on consideration. Since the specific condition in the claim is additional to all the requirements for a claim under the implied provisions then the condition does not flaw the existence of a claim under the Act.
35. I therefore determine that a Payment Dispute under the Act existed 28 days after the Applicant's submission of the claim; i.e. 20 March 2008.

**Service of the Application**

36. The Application was served on an employee of the Respondent at the Respondent's place of business 18 June 2008, 90 days after the delivery of the payment claim and within the period defined in the Act.
37. The contract relates to work at the Respondent's residence and is hence unrelated to the Respondent's business activity. However the Respondent has accepted and replied to correspondence, in relation to the contract, directed to his business postal address. Moreover critical correspondence, upon which the Respondent relies in the dispute, was printed on the Respondent's business stationery. Therefore for the purposes of the contract it was reasonable to assume the Respondent's address was his business address.
38. Section 25 (1) (d) of the Interpretation Act provides that a person may serve a document on an individual by leaving it, addressed to the recipient, at the recipient's address with someone who appears to be at least 16 years old and who appears to be employed there.

39. On the balance of probabilities, I determine that the Application was properly served.

### **Value of Defective Work**

40. In the Further Response at Attachment 12, the Respondent lists costs for rectification of defective or incomplete work totaling \$15,840.70. The Applicant contests the listing of work described as defective in his Reply to the Further Response.
41. In his letter dated 18 June 2008 the Respondent makes the point that the Respondent *“has not sought any allowance for the repair of still outstanding defective work. He reserves the right to claim and recover this cost should this dispute not be resolved in the manner agreed.”*
42. The Further Response also contains the statement; the Respondent *“does not require an estimation of remedying defective work ... and ... seeks a speedy and equitable resolution without further complication.”*
43. The Respondent further states he *“wishes it noted that his dissatisfaction with the work and performance of the Applicant is not the reason the claim has not been paid.”*
44. I therefore determine that provided the works are valued adhering to at least the spirit of the methodology agreed by the parties then the Value of Defective Work is not to be considered in the determination on quantum.

### **Valuation Methodology**

45. Correspondence between the parties establishes an agreement on valuation methodology. In broad terms the methodology requires acknowledgement of the originally quoted price for the works and valuation of both additional and omitted works to arrive at a final value. I am satisfied that the parties proceeded in agreement on these terms with the valuations to be conducted by two quantity surveyors independently engaged by the parties. In addition the Applicant agreed to pay 50% of Respondent's quantity surveying fees on this task.
46. The quantity surveyor engaged by the Respondent had earlier determined the value of the works, 14 December 2006, at \$215,860 exclusive of GST. Subsequent to the agreement on methodology and following the briefing of quantity surveyors and discussions between them the quantity surveyor engaged by the Respondent acknowledged the omission of several items from his initial valuation. Accordingly he issued a revised valuation, 20 February 2008, for all of the works conducted by the Applicant at \$260,890.20 exclusive of GST.
47. Ultimately the Applicant has accepted this valuation and indeed relies upon it in his claim dated 21 February 2006.

48. The parties agree that this valuation provides for all of the works conducted under the contract. The Respondent contests the valuation methodology as not in accordance with their agreement. The Applicant argues the nature and extent of the changes were such that the agreed methodology was rendered impractical. The Respondent does not accept this argument.
49. The Adjudicator has independently consulted with the quantity surveyor engaged by the Respondent for comment on the adopted methodology. The quantity surveyor confirms that the estimate was based on industry norms applicable at the time tempered by material prices included in the Applicants quotations. The quantity surveyor further advises this approach was adopted in the interests of reducing the complexity of the task. All of this advice simply supports the Respondent's assertion that the agreed process was not followed.
50. In his initial valuation dated 14 December 2006 the quantity surveyor engaged by the Respondent values the initial price for joinery as per the original drawings at \$103,765. This compares with the Applicant's revised initial quote of \$95,770. The difference arises from a price deduced on industry norms and a price quoted under commercial pressures to secure work. The Applicant's quoted value is then 92.295% of the quantity surveyors determined value.
51. On the balance of probabilities I determine as follows;
- 51.1. The Respondents claim that the agreed methodology was not followed is correct.
- 51.2. The Respondents insistence that the Applicant honour his original quotation is reasonable.
- 51.3. The Applicant's assertion that the works as varied are sufficiently different as to render the agreed methodology impractical may be correct. These differences are a fundamental premise of the Applicant's claim, however the Applicant has failed to provide sufficient definitive evidence of the differences between the works as built and works as originally documented to sustain the validity of that argument. It is therefore reasonable for the Respondent to maintain his insistence on adherence to the defined methodology.
- 51.4. An effective mechanism to adjust the quantity surveyor's value and satisfy the intent of the defined methodology is to pro rata the quantity surveyor's final value in accordance with the ratio evident from the initial valuation as shown in paragraph 50. That is, accept the final value of the works in accordance with the agreement to be 92.295% of the quantity surveyor's final value. This method accommodates both additions and deductions to the quoted works whilst inherently retaining the quoted works value in the revaluation, all as required by the agreement. The revised value is then 92.295% of \$260,890.20, i.e. \$240,788.42 (GST exclusive).

## New Assertions in the Applicant's Reply

52. In correspondence dated 5 August 2008, the Respondent claims that the Reply to the Further Response includes "*assertions which seemingly constitute new allegations of fact*". That letter goes on to require either setting those assertions aside or providing the Respondent an opportunity to reply.
53. The determinations in this adjudication do not rely upon any of the matters considered by the Respondent to be further assertions and hence they are effectively set aside.

## Costs

54. The parties seek claim preparation costs.
55. Clause 36 (1) of the Act requires the parties to bear their own costs.
56. 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.
57. The agreement between the parties provided that the Applicant accept 50% of the fee for the quantity surveyor engaged by the Respondent. On the balance of probabilities I accept the Respondent's claim that the Applicant's share of this fee is \$5,000 and that it remains owing.
58. I therefore determine that;
- 58.1. The parties legal and preparation costs are not awarded and are to be borne by the parties.
- 58.2. The adjudicator's costs are to be shared equally by the parties.
- 58.3. The adjudicated value is to be adjusted to account for the outstanding \$5,000 quantity surveyor fees.

## Quantum

59. At paragraph 50.4 I determined the value of work at \$240,788.42 (GST exclusive).
60. At paragraph 57.3 I determined a deduction of \$5,000 for fees owing.
61. The parties agree that contract payments to date total \$214,759.18 including GST
62. I therefore determine quantum as follows:  
((Total value of work – Fees owing) + 10% GST) – (Payments to date))  
= ((\$240,788.42 - \$5,000) \* 1.10) - \$214,759.18  
= \$259,367.26 - \$214,759.18  
= \$44,608.08 (GST inclusive)



**Interest**

63. The Applicant's claim was presented 21 February 2008. Section 6 of the Implied Provisions Schedule under the Act requires payment within 28 days after receiving the payment claim.
64. 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.
65. On the balance of probabilities I determine as follows;
  - 65.1. The payment was due on or before 20 March 2008.
  - 65.2. Interest is accruing at the daily rate of 10.5% of \$44,608.08 / 365 = \$12.83 per day
  - 65.3. Interest due and payable up to 11 August 2008 is \$1,847.92

**Conclusion**

66. As requested I have conducted the adjudication and concluded as follows:
  - 66.1. For the reasons set out in the Adjudication, I determine the Adjudicated Amount for the Applicant is \$44,608.08 including GST.
  - 66.2. The date payable is 20 March 2007. Interest due and payable to 11 August 2008 is \$1,847.92 and interest continues to accrue at the rate of \$12.83 per day until payment is made.
  - 66.3. The parties legal and preparation costs are not awarded.
  - 66.4. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

Brian J Gallagher  
**NT Registered Adjudicator No 18.**  
**11 August 2008**