

Adjudicator's Determination

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

Adjudication CJC.17.01

Applicant:

Address:

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And

Respondent:

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Adjudicator:

Jaswant Deo

Adjudicator Registration Number 47

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Adjudicator Decision

1. I, Jaswant S. Deo, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act, (The Act)* determine on 10 July 2017 that the respondent pay the applicant:
 - \$ 7,172.00 inclusive of GST.
 - Payment to be made on or before 17 July 2017.
2. The parties legal and preparation costs are not awarded.
3. The parties shall equally share the costs of the lodgment fee.

Appointment of Adjudicator

4. I was appointed as Adjudicator by Community Justice Centre (**CJC**) to determine this dispute on 13 June 2017 and the parties notified on 13 June 2017.

Application and Response

5. The applicant served its application on CJC on 13 June 2017 which was also served on the respondent on 13 June 2017.
6. The respondent was obliged to serve a written response on the applicant and appointed adjudicator within ten (10) working days after receipt by it of the applicant's written application. The respondent did respond to the applicant and the appointed adjudicator within ten (10) working days.

Conflict Of Interest

7. I have no material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen or in any party to the contract. This absence of material personal interest was declared to the Director of CJC, on 13 June 2017 and no objection was given by the applicant and respondent to such declaration.

Submissions from Parties

8. Following my appointment as adjudicator on 13 June 2017, I received from CJC by registered post on 26 June 2017 documents prepared by the applicant containing:
 - (a). the application comprising 5 pages and 42 appendices.
9. On 26 June 2017, I received from CJC by registered mail the response prepared by the respondent containing 3 pages and 3 appendices.

Background

10. On or about 23 June 2016 the applicant and respondent entered into an agreement whereby the applicant was to supply 66 kV Cable, 1 kV Cable, 6 x Outdoor Sealing Ends, 6 x Cable Joints, 2 x Cross Bonding, 2 x Earthing Boxes and labour to install 6 x 66kV Sealing Ends and 6 x 66 Joints on the [redacted] Project (**the WORKS**) in Northern Territory.
11. There were a number of correspondence between the applicant and respondent with regards to the terms and conditions of the contract which was finally settled on or about 24 June 2016, whereby the respondent's terms and conditions take precedence over the applicant's terms and conditions with a deviation to the terms by the applicant.
12. On or about 14 March 2017 the applicant submitted Invoice 150NPAINV4-1 which was for Installation of Brugg Cables in the amount of \$ 30,048.33 inclusive of GST. Included in this invoice was

the stand down time which the applicant was claiming in the amount of \$ 7,172.00 inclusive of GST.

13. On or about 16 March 2017 the respondent replied via email that it is disputing the amount claimed for stand down time in the amount of \$ 7,172.00 inclusive of GST and should be removed from invoice 150NPAINV4-1.
14. On or about 29 March 2017 the respondent sent a claim for credit number 76243 requesting the applicant to credit its account in the amount of \$ 7,172.00 inclusive of GST.
15. \$ 7,172.00 inclusive of GST of invoice 150NPAINV4-1 has not been paid and remains outstanding.

Contract

16. It is common ground that the Applicant and the Respondent entered into a contract for cabling works on or around 23 June 2017.
17. The contract relevant to the dispute is:
 - Typed quotation by the applicant dated 13 June 2016.
 - A typed Purchase order number 880708/90357 by the respondent agreeing to the price sent by the applicant. This purchase order is dated 23 June 2016.
18. The contract is for construction work on a site in the Northern Territory which complies with s6(1)(c) of the Act and therefore is a construction contract under s5(1)(a) of the Act.

Jurisdiction

19. Considering the many contentions from parties relating to the dispute, I must first determine if I have jurisdiction to adjudicate.

20. s33(1) of the Act requires that an appointed adjudicator must, within the prescribed time or any extension of it made under s34(3)(a):

- (a). *dismiss the application without making a determination of its merits if:*
 - (i). *the contract concerned is not a construction contract;*
 - (ii). *the application has not been prepared and served in accordance with s28;*
 - (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*
 - (v). *not in accordance with s20 of the Community Justice Centre Act which state that the amount of the payment claim for the dispute is less than \$10,000.00.*
- (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 s35; and*
 - (ii). *the date on or before which the amount must be paid or the security must be returned.*

21. With respect to s33(1)(a), I deal below with items (i), (ii), (iii) (iv) and (v).

- (i). I am satisfied the contract concerned is a construction contract as determined in paragraph 20 above.
- (ii). I am satisfied the application has been prepared and served in accordance with s28.
- (iii). I am satisfied there is no arbitrator or other person or a court or other body dealing with this matter or has made an order, judgment or other finding about the dispute.
- (iv). I am satisfied that the matter is not complex nor is the prescribed time insufficient for any reason.
- (v). I am satisfied that the amount claimed in Invoice 15ONPAINV4-1 dated 9 April 2015 in the amount of \$ 7,172.00 is in accordance with s20 of the Community Justice Centre Act.

22. Based on paragraphs 19, 20 and 21 above and since 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 satisfied that I have jurisdiction to adjudicate on the applicant's claim.

Validity of Application and Merits of the Claim

23. In order, to establish if a payment dispute exist in accordance with s8 of the Construction Contracts (Security of payment) Act, I must ascertain if a payment claim has been submitted by the Applicant.

24. I am satisfied that a payment dispute exists and that Invoice 15ONPAINV4-1 for the works has been submitted by the applicant on 14 March 2017.

25. The applicant contends that Tax Invoice 150NPAINV4-1 for the works was carried out in accordance with the contract as well as stand down time incurred by the applicant.

26. Since there is no written provision in the contract about when and how a party must respond to a payment claim and by when a payment must be made, I rely on s20 of the Construction Contracts (Security of Payment) Act, which implies into a contract certain provisions relating to responding to and paying payment claims. That section says:

The provisions in the schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:

(a) when and how a party must respond to a payment claim made by another party;

(b) by when a payment must be made.

27. The provisions of Division 5 of the schedule are therefore implied into the contract, which states:

Division 5 Responding to payment claims

6. Responding to payment claim by notice of dispute or payment.

(1) This clause applies if:

(a) a party receives a payment claim under this contract;
and

(b) the party:

(i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or

(ii) Disputes the whole or part of the claim.

(2) The party must:

(a) within 14 days of receiving the payment claim:

(i) give the claimant a notice of dispute; and

(ii). If the party disputes part of the claim – pay the amount of the claim that is not disputed; or

(b). within 28 days after receiving the payment claim, pay the whole of the amount of the claim.

(3) The notice of dispute must:

(a). be in writing;

(b). be addressed to the claimant;

(c). state the name of the party giving the notice;

(d). state the date of the notice;

(e). identify the claim to which the notice relates;

(f). if the claim is being rejected under subclause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract;

(g). if the claim is being disputed under subclause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reason for disputing it; and

(h). be signed by the party giving the notice.

28. By subclause (2) the respondent had 14 days from receipt of the notice to dispute it, failing which it had 28 days from receipt to pay it. Remembering that Division 5 is implied into the contract as a contractual term, the amount claimed was ‘due to be paid under the contract’ 28 days after receipt by the respondent.

29. Even though the respondent replied to the applicant disputing part of the claim on 16 March 2017, it was not in accordance with the provisions of Division 5 clause 6 subclause (2)

30. The respondent only complied in accordance with the provisions of Division 5 clause 6 subclause (2) on 29 March 2017 by way of email with a credit claim which is 15 days after the payment claim was issued.

31. In my view, the respondent's failure to give notice of dispute within 14 days after the payment claim in the form of Invoice 150NPAINV4-1 dated 14 March 2017 for the works, or pay the amount claimed within 28 days thereafter has the effect that the amount is due and payable under the terms of clause 6(2) of Division 5, which by virtue of s20 is a contractual term.

32. I therefore find that on the merits and on the balance of probabilities payment claim in the form of Invoice 150NPAINV4-1 in the amount of \$ 7,172.00 inclusive of GST is payable to the applicant.

Determination

33. In accordance with s38(1) of the Construction Contracts (Security of Payment) Act I determine that the amount to be paid by the respondent to the applicant is \$ 7,172.00 inclusive of GST.

34. Payment to be made on or before 17 July 2017.

Costs

35. I determine that:

- The parties legal and preparation costs are not awarded and are to be borne by the Parties.

- The parties shall equally share the cost of the lodgment fees.

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Jaswant S Deo
Adjudicator Registration Number 47