

Adjudicator's Determination

Adjudicator Registration Number 17
Identification No: 17.14.01

Pursuant to the Construction Contracts (Security of Payments) Act 2004 (NT)

(Applicant)

Contact Details

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And

(Respondent)

1. I, Charles H. Wright, as the appointed adjudicator pursuant to the *Construction Contracts (Security of Payments) Act* (the Act), dismiss this application.
2. I determine that each party shall bear their own costs.

Section 1.01 Appointment of Adjudicator

3. I was appointed as adjudicator to determine this dispute by the Master Builders Northern Territory on Monday 30 June 2014, and later, by agreement with the parties.

Acceptance of Adjudication Application

4. By letter dated 8 July 2014, I advised the parties of my appointment as an adjudicator and as no objection to my appointment was made by 5pm Thursday 10 July 2014, my appointment was confirmed.

Documents Regarded in Making the Determination

5. In making this determination I have had regard to the following:
 - 5.1 The provision of the *Construction Contracts (Security of Payments) Act*;
 - 5.2 Submission by the applicant under cover of a letter dated 27 June 2014 submitted with the application for adjudication;
 - 5.3 Attachments numbered from No. 1 to No. 28 inclusive and being supporting information to the application for adjudication;
 - 5.4 The applicant's legal representative's facsimile dated 28 June 2014 enclosing amended pages 17, 20 and 21 and replacement pages for Tab 28 of the application for adjudication;
6. A response was required to be served in accordance with section 29(1) of the Act. The Act requires:
 - (1) *Within 10 working days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on:*
 - (a) *the applicant and on any other party that has been served with the application; and*
 - (b) *the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointer on which the application was served under section 28(1)(c).*
7. A response was served electronically within time on 11 July 2014 but as it was not 'served' correctly either by post or facsimile, for the purpose of this determination, the contents have not been considered.

Communication with the Parties

8. A telephone conference with the parties was attempted but it did not occur due to the applicant's legal representative being unable to confirm their attendance within the stipulated time. Instead, I sent a letter to the parties setting out a number of procedural matters, namely;
 - 8.1 The parties to the dispute were confirmed;
 - 8.2 The parties agreed that an application for adjudication was served on the Master Builders Association Northern Territory Incorporated on 27 June 2014;
 - 8.3 The application for adjudication was served by facsimile and email on the respondent on 27 June 2014;
 - 8.4 Amended pages to the application for adjudication were served by email to the respondent on 28 June 2014;
 - 8.5 Noted that a response was required within ten (10) days of service of the application for adjudication;
 - 8.6 The day for services of the application for adjudication was taken as Monday 30 June 2014 in consideration of the amended pages being served on a Saturday therefore taken as the next business day;
 - 8.7 The response is required on or before Monday 14 July 2014;
 - 8.8 Confirmed that no previous application for adjudication had been made on this matter;
 - 8.9 Confirmed that no prior order, judgment or other finding by an arbitrator or court or other body had been made;
 - 8.10 Confirmation that the respondent had received the application for adjudication on 27 June 2014 and the amended pages on 28 June 2014;
 - 8.11 The parties were requested to raise any objection to my appointment as an adjudicator before 5pm Thursday 10 July 2014;
 - 8.12 I declared that I had no known conflict of interest in the matter;
 - 8.13 As no objections to my appointment were received, my appointment was taken as being confirmed;
 - 8.14 Both parties were given an estimate of the adjudication fee and requested to forward a deposit to be held on trust and were provided with the details for making payment electronically.
9. Subsequent to the letter being received by the applicants legal representative, they made a submission to the adjudicator that the date for service of the response ought to be Friday 11 July 2014 as the application for adjudication was served on Friday 27 June 2014.

10. I considered the consequences of the amended pages served on Saturday 28 June 2014 and as they were minor corrections to calculations and did not alter the applicant's arguments in any way, I issued further advice to the parties amending the date the response was required to Friday 11 July 2014.

Determination

11. The Act requires (at s.33(1) (a) and (b)) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) –*
- (a) *dismiss the application without making a determination of its merits if:*
 - (i) *the contract concerned is not a construction contract; or*
 - (ii) *the application has not been prepared and served in accordance with section 28; or*
 - (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*
 - (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 section 35; and*
 - (ii) *the date on or before which the amount must be paid or the security must be returned.*
12. For the purpose of this adjudication the respondent's response was not received, and therefore, s.33 of the Act requires a determination to be made within the *prescribed time* in accordance with s33(3)(b) which provides that;
- (b) *otherwise – 10 working days after the last date on which a response is required to be served under section 29(1).*
13. My determination is therefore required by Monday 28 July 2014 taking into account excluded days within Darwin.

The Adjudication Application

14. The application for adjudication consists of the following papers;
 - 14.1 Application for appointment of adjudicator dated 27 June 2014 consisting of 24 pages including cover letter and cover page detailing the dispute between the applicant and the respondent;
 - 14.2 Attachment numbered Tab 1 to Tab 28 inclusive and providing supporting information to the application for adjudication;
 - 14.3 A two-page email enclosing a cover letter advising of corrections to several calculations, three replacement pages being pages 17, 20 and 21 and replacement contents of Tab 28.

The Adjudication Response

15. A response was not served in accordance with section 29(1) of the Act.
16. Notwithstanding that a response was not served as part of this adjudication, the application for adjudication contains various items of correspondence for the respondents case set out in Tabs 13, 15, 23 and 26.

The Construction Contract for the purposes of the Act

17. The Act defines a *Construction Contract* (s.5(1)(a)) as:
 - (1) *A construction contract is a contract (whether or not in writing) under which a person (the **contractor**) has one or more of the following obligations:*
 - (a) *to carry out construction work;*
18. The contract is for work on a *site in the Territory*, is a contract undertaking *construction work* as defined in s.6(1)(c) of the Act and is therefore a *construction contract* under the Act.

Contract

19. The contract between the parties is part written and part oral and relies on the Implied Provisions where there is no written agreement between the parties.

Conditions for Determining the Adjudications

20. The conditions for determining the adjudication have been met:
 - 20.1 The contract is a *construction contract* as defined by the Act;
 - 20.2 The site is a site in the *Territory*;
 - 20.3 A tax invoice has been issued that does not comply strictly with the requirements of Implied Provisions, Schedule, Division 4 section 5(1)(f) and 5(2)(a).

The Payment Claim

21. The payment claim, the subject of this adjudication, is Tax Invoice No. 42161 dated 3 March 2014 for the total sum of \$13,970.00 inclusive of GST.

22. Schedule, *Division 4 Making claims for payment*

5. *Content of claim for payment*

(1) *A payment claim under this contract must:*

- (a) *be in writing; and*
- (b) *be addressed to the party to which the claim is made; and*
- (c) *state the name of the claimant; and*
- (d) *state the date of the claim; and*
- (e) *state the amount claimed; and*
- (f) *for a claim by the contractor – itemise and describe the obligation the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and*
- (g) *for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim; and*
- (h) *be signed by the claimant; and*
- (i) *be given to the party to which the claim is made.*

(2) *For a claim by the contractor, the amount claimed must be calculated in accordance with the contract or, if this contract does not provide a way of calculating the amount, the amount claimed must be:*

- (a) *if this contract states that the principal must pay the contractor one amount (the **contract sum**) for the performance by the contractor of all its obligations under the contract (the **total obligations**) – the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations; or*
- (b) *if this contract states that the principal must pay the contractor in accordance with rates stated in this contract – the value of the obligations performed and detailed in the claim calculated by reference to the rates; or*
- (c) *otherwise – a reasonable amount for the obligations performed and detailed in the claim.*

(3) *Subclause (2) does not prevent the amount claimed in a progress claim from being an aggregate of amounts calculated under one or more of subclause (2)(a), (b) and (c).*

23. Tax Invoice No. 42161 dated 3/03/2014 fails to comply with 5(1)(f) as it states '*Steelwork for [project site] consisting of*', then lists out a series of trade related activities without connecting any of the scope of work to the payment claim.
24. Tax Invoice No. 42161 dated 3/03/2014 fails to comply with 5(2)(a) as it does not state what proportion of the total contract sum the payment claim relates to or what it relates to, for example:
 - I. is it a claim for variations; or
 - II. a claim for outstanding monies; or
 - III. a progress claim; or
 - IV. a final claim; or
 - V. a total claim; or
 - VI. a payment on account; or
 - VII. an interim claim; or
 - VIII. a combination of any of the above; or
 - IX. for any other reason.

Issues for Consideration

25. The application for adjudication requires me to consider the following;
 - 25.1 Claim 1: Payment for the 3 March 201(3)4 Payment Claim in the sum of \$12,700 plus GST;
 - 25.2 Claim 2: Payment for interest for overdue payments in the sum of \$242.17 plus GST;
 - 25.3 Claim 3: Payment of the adjudicators fees in total; and
 - 25.4 Claim 4: Payment of AKS' costs of the adjudication in the sum of \$6,851.00 plus GST.
26. Taking Item 25.1 above;
 - 26.1 The payment claim, Invoice No. 42161 dated 3/03/2014, is not valid as it does not strictly comply with the Schedule, Implied Provisions, Division 4, section 5(1)(f);
 - 26.2 The payment claim, invoice No. 42161 dated 3/03/2014, is not valid as it does not strictly comply with the Schedule, Implied Provisions, Division 4, section 5(2)(a);
 - 26.3 There is no money due and payable by the respondent to the applicant.
27. Taking Item 25.2 above;

27.1 As the payment claim, Invoice No. 42161 dated 3/03/214, is not valid, no interest is payable.

28. Taking Item 25.3 above;

28.1 The application for adjudication failed so the applicant's request for the respondent to make payment in total of the adjudicator's fees fails.

29. Taking Item 25.4 above;

29.1 The application for adjudication failed so the applicant's request for the respondent to make payment in total for the applicant's costs fails.

Conclusion

30. I make the following determination;

30.1 The application for adjudication is dismissed;

30.2 No interest is payable;

30.3 Each party to pay the adjudicator's fee in equal proportion; and

30.4 Each party pay their own costs.

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Charles H. Wright
Adjudicator

28 July 2014