

Adjudicator's Determination
Pursuant to the Construction Contracts Act 2004

| | | | | | |
|---|--|------------|----|-------------|------|
| Adjudication Number | 34.14.02 | | | | |
| Prescribed Appointor | Law Society Northern Territory | | | | |
| Adjudicator | Colin Bond (Adjudicator 34) | | | | |
| Applicant: | | | | | |
| Respondent: | | | | | |
| Project: | [omitted] Darwin, NT | | | | |
| Amount to be paid by Respondent | \$187,536.23 including GST | | | | |
| Due Date For Payment | Within 7 days of release of determination | | | | |
| Adjudication Fees Apportionment | <table border="0"> <tr> <td>Applicant:</td> <td align="right">0%</td> </tr> <tr> <td>Respondent:</td> <td align="right">100%</td> </tr> </table> | Applicant: | 0% | Respondent: | 100% |
| Applicant: | 0% | | | | |
| Respondent: | 100% | | | | |
| Date of Determination or Dismissal | 23 rd August 2014 | | | | |
| | | | | | |
| Payment Claim | <p align="center">Claimed Amount : \$207,518.55 including GST</p> <p align="center">Dated : 27th May 2014</p> | | | | |
| Notice of Dispute / Response to Payment Claim | Notice of Dispute Amount : Nil | | | | |
| Adjudication Application | Dated: 23 rd July 2014 | | | | |
| Adjudicator Acceptance | Dated: 29 th July 2014 | | | | |
| Adjudication Response | Dated: 12 th August 2014 | | | | |

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The Determination or Dismissal

1. I, Colin Bond, Registered Adjudicator Number 34, as the Adjudicator pursuant to the Construction Contracts (Security of Payments) Act (the Act), for the reasons set out in this determination, determine that:
 - i. The amount to be paid by the respondent to the applicant is **\$187,536.23** including GST.
 - ii. Interest is due on the adjudicated amount at a rate of 8.5% per annum from 11th June 2014.
 - iii. The respondent is to pay the amount due to the applicant within 7(seven) days of the date of the determination being released.

Background

2. The application arises from an unpaid payment claim made by the applicant on the respondent in respect of construction work carried out under a contract between the parties to undertake the hard tiling refurbishment of [project details omitted], Darwin, Northern Territory (the Project) for the labour and associated waterproofing.

Appointment

3. The applicant served its adjudication application on the Law Society Northern Territory, a Prescribed Appointer under the Act, pursuant to section 28(1)(iii) of the Act.
4. The adjudication application was referred to me as adjudicator on 29th July 2014 by the Law Society Northern Territory pursuant to section 30(1)(a) of the Act.
5. The Law Society Northern Territory served a notice of my acceptance of the appointment on the Applicant and the respondent on 29th July 2014.

Material

6. The following material was provided to me:
 - Adjudication Application dated 23rd July 2014
 - Adjudication Response dated 12th August 2014
7. On 12th August 2014 pursuant to section 34(2)(a) of the Act I requested further submissions from the applicant in respect of the service of the adjudication application on the respondent and requested the respondent to make its comments, if any, on the applicant's further submission. The following responses were received:

- The applicant's further submission dated 14th August 2014
- The respondent's further submission dated 14th August 2014

Jurisdiction

8. The work executed under the construction contract is 'construction work' as defined under section 6(1) of the Act.
9. The construction contract was entered into after the commencement of the Act pursuant to section 9(1) of the Act.
10. The Applicant is a party who, under the construction contract concerned and under which a payment dispute has occurred, is entitled to apply to have the dispute adjudicated pursuant to section 27 of the Act.
11. To the best of my knowledge neither of the events stated in section 27(a) or 27(b) has occurred in respect of this matter.
12. I am therefore satisfied that the adjudication application falls within the jurisdiction of the Act.

Payment Claim

13. The applicant served the respondent with its Tax invoice/5th Payment Claim 065 dated 27th May 2014 for the [project] tiling works in the amount of \$207,518.55 including GST.
14. The respondent has not denied receiving the applicant's invoice.
15. It is common ground that a construction contract exists.
16. I am satisfied that the payment claim has not been issued in previous months and therefore do not consider it to be out of time.

Notice of Dispute / Response to Payment Claim

17. An adjudication response was served by the respondent in accordance with section 29 of the Act and within the prescribed timeframes.
18. Pursuant to section 8(a) of the Act, the dispute is taken to have arisen on the day the amount claimed in a payment claim is due to be paid, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed.

Adjudication Application

19. Section 28(1) of the Act provides for the applicant to apply for adjudication of a payment dispute within 90 days after the dispute arises.
20. I am satisfied with the evidence provided that the payment dispute arose on 11th June 2014.

21. The applicant applied for adjudication of the payment dispute on 23rd July 2014 and within the time allowed pursuant to section 28(1) of the Act.
22. The application is in writing pursuant to section 28(1)(a) of the Act.
23. The application was served on the respondent pursuant to section 28(1)(b) of the Act.
24. The application was served on Law Society Northern Territory pursuant to section 28(1)(c)(iii) of the Act.
25. I am therefore satisfied that the adjudication application complies with the requirements of section 28 of the Act.

Adjudication Response

26. Pursuant to section 29(1) of the Act the respondent has 10 working days after the date on which it is served with an application for adjudication in which to prepare and serve its written response on the adjudicator and the applicant.
27. I am satisfied that the respondent served its response within the timeframes prescribed in the Act.

Reason for the Determination

28. In making this determination I have had regard to the following matters, pursuant to section 34 of the Act:
 - the application and its attachments; and
 - the further written submissions validly made by the parties.

Contract

29. It is common ground that a Construction Contract exists between the parties for the labour and associated waterproofing for installation of floor and wall tiles in bathrooms at Hilton and Double Tree by Hilton hotels, Darwin, Northern Territory (the Project).

Issues in Dispute

30. In its Payment Claim the Applicant submitted a progress payment in the sum of \$207,518.55 (inclusive of GST) being the 5th Payment Claim on the project to which the Respondent responded with a Notice of Dispute identifying reasons for withholding payment.

Payment of GST

31. The respondent has raised in its Adjudication Response that the Applicant is not registered for GST. Included in the materials provided by the respondent is an ABN search on the Applicant's ABN 26 164 576 578, which identifies that there is no historical or current registration associated with this ABN.
32. Upon undertaking my own ABN search, I have reached the same conclusion that Aus Tile QLD Pty Ltd do not appear to be registered for GST and therefore I conclude that the GST component claimed in the Payment Claim of \$18,865.32 should be valued at **Nil**.

Offset Items

Offset Item 1 – Slip testing conducted by Circa

33. The applicant in its Adjudication Application has accepted the amount of \$600.00 (excluding GST) being claimed for this item. Therefore I value this offset in the amount of **\$600.00** (excl GST) and will be deducting this amount from the Payment Claim in the Valuation of the Works.

Offset Item 2 – Rectify and make good silicon works

34. The respondent in the Notice of Dispute has identified a sum in the amount of \$7,800.00 (excluding GST) for the rectification and make good of the silicon works.
35. Whilst there does appear to be some evidence of defective silicon works, the respondent has not adequately demonstrated the costs that were directly incurred in rectifying these works. In the Adjudication Response, the respondent estimates that cost to rectify the poorly applied silicone as \$13,540.00 as follows:
 - i. [Firm name omitted] – 130 hours @ \$58/hr = \$7,540.00
 - ii. [individual's name omitted] – 120 hours @ \$50/hr = \$6,000.00
36. The statement from [individual's name omitted] makes reference to an estimated number of hours spent but no specific invoice shows the hours dedicated to the rectification of the silicon works and therefore the costs that the respondent has incurred are not clear. The onus is on the respondent to clearly articulate and provide back-up invoices for costs it intends to offset and I do not believe the respondent has sufficiently done so to support this offset claim.
37. With regard to rectification works undertaken by [firm name omitted] whilst Sections 2.5 and 2.6 of the Adjudication Response include tax invoices, again, the number of hours allocated to the rectification of the silicon works are not clear and indeed some refer to other works i.e. Bunnings Refurbishment and do not sufficiently support the amounts claimed for this offset claim.
38. Therefore, I value Offset Item 2 as **Nil**.

Offset Item 3 – Part cost to repair chipped vanity units

39. The respondent in the Notice of Dispute has identified a sum in the amount of \$1,375.00 (excluding GST) for the part cost to repair chipped vanities in 11 rooms.
40. The respondent in its Adjudication Response has provided a Statutory Declaration and a photograph. Whilst the photograph shows someone working over a vanity, there is no evidence to link the applicant with the damage to vanities in any rooms or indeed 11 rooms. Moreover, the lead plumber engaged by the respondent has provided a statement included in the Adjudication Application to confirm that at least three of the vanity tops were damaged by the carpenters employed by the respondent. Once again, the onus is on the respondent to clearly articulate and provide back-up invoices for costs it intends to offset and I do not believe the respondent has sufficiently done so to support this offset claim.
41. Therefore, I value Offset Item 3 as **Nil**.

Offset Item 4 – Rectification of floor drains

42. The respondent in the Notice of Dispute has identified a sum in the amount of \$29,241.00 (excluding GST) for the rectification of floor drains.
43. The respondent in its Adjudication Response has provided a Trade Break Up from what appears to be its in-house estimating system of the costs of works for rectification of the floor drains and apportioned 80% of these costs to the applicant with regard to this offset.
44. There are no tax invoices or any further evidence of actual costs incurred and based on the information provided the respondent has not sufficiently proven that the responsibility for this offset was purely the responsibility of the applicant. Again, the onus is on the respondent to clearly articulate and provide evidence and back-up invoices for costs it intends to offset and I do not believe it has sufficiently done so to support this offset claim.
45. Therefore, I value Offset Item 4 as **Nil**.

Offset Item 5 – Repair mirror lights installed too low

46. The respondent in the Notice of Dispute has identified a sum in the amount of \$322.00 (excluding GST) to repair mirror lights installed too low.
47. The respondent in its Adjudication Response states that on five occasions the applicant tiled at the wrong height which interfered with the towel rails and the electrician had to remove the tiling and rectify. The applicant states that the lighting holes were already cut and wired into the wall and tiles were cut accordingly.
48. The onus is on the respondent to clearly articulate and provide evidence and back-up invoices for costs it intends to offset and I do not believe it has sufficiently done so to support this offset claim.

49. Therefore, I value Offset Item 5 as **Nil**.

Offset Item 6 – Waterproofing installation

50. The respondent in the Notice of Dispute has identified a sum in the amount of \$2,500,000.00 (excluding GST) to completely rectify, remove, re-waterproof and relay tiles in all wet areas of the [omitted] bathrooms in the Project.
51. This offset relates to alleged defects in the waterproofing installation in each bathroom. The respondent asserts that the waterproofing membrane is not the required thickness of 1000microns thick when dry and hence does not meet the requirements of the manufacturer's warranty.
52. On 23rd May 2014, the certifier, [name omitted], wrote to the respondent, a copy of which is attached as item F in the annex of the Adjudication Application. The certifier stated that during his final inspections he was alerted by an unidentified third party to the fact that there may have been issues with the waterproofing membrane.
53. On the same day, the respondent stated in his response to the certifier that there are "*no certified or Australian standards test results available for scrutiny. No tests of that type were conducted*" and also that the Respondent notes "*no failure whatsoever of any membrane, adjacent finish or evidence of water egress or ingress at all, on either [project]. I am in daily contact with my team on the ground in both [projects], and the [project's] management. I am sure I would be aware if there was an issue within a matter of hours*" and "*I would also be pretty confident of you finding anything as well, give your very thorough appraisal of the works.*"
54. Given this compelling evidence stemming from the respondent's response I do not consider this offset to be valid in any way and therefore value Offset Item 6 as **Nil**.

Offset Item 7 – Tile wastage

55. The respondent has now conceded Offset Item 7 and I therefore value this item as **Nil**.

Offset Item 8 – Supply of silicon

56. The respondent in the Notice of Dispute has identified a sum in the amount of \$8,073.00 (excluding GST) for the supply of silicon due to insufficient supplies provided by the applicant.
57. In the Adjudication Application, the applicant has provided copies of receipts for the purchases of silicone in relation to the works. The respondent in the Adjudication Response has provided copies of tax invoices in relation to the purchase of silicon but as asserted by the applicant, has not clearly ascertained the silicon purchased for the tiling component only as opposed to silicon for plumbing, carpentry and glazing.
58. Based on the evidence provided by the parties I agree with the applicant's assertions.

59. The onus is on the respondent to clearly articulate and provide evidence and back-up invoices for costs it intends to offset and I do not believe has sufficiently done so to support this offset claim.

60. Therefore, I value Offset Item 8 as **Nil**.

Offset Item 9 – Supply of Sikaflex sausages for waterproofing

61. The respondent in the Notice of Dispute has identified a sum in the amount of \$1,800.00 (excluding GST) for the supply of Sikaflex sausages for waterproofing silicon due to insufficient supplies provided by the applicant.

62. In the Adjudication Application, the applicant has provided copies of receipts for the purchases of Sikaflex sausages for waterproofing. The respondent in the Adjudication Response has not provided any evidence of costs incurred for the purchase of the Sikaflex.

63. The onus is on the respondent to provide the relevant evidence and back-up invoices for costs it intends to offset and I do not believe it has sufficiently done so to support this offset claim.

64. Therefore, I value Offset Item 9 as **Nil**.

Offset Item 10 – Change of flight – [name omitted]

65. The applicant in its Adjudication Application has accepted the amount of \$517.00 (excluding GST) being claimed for this item. Therefore I value this offset in the amount of **\$517.00** (excl GST) and will be deducting this amount from the Payment Claim in the Valuation of the Works.

Offset Item 11 – Hotel Costs incurred by the Respondent

66. The respondent has now conceded Offset Item 11 and I therefore value this item as **Nil**.

Retention Money

67. I have not been provided with any evidence to demonstrate why the respondent should be entitled to deduct retention money from the payment claim. I therefore value this item as **Nil**.

Subcontract Works

68. There does not appear to be any dispute in relation to the value of the subcontract works. I have valued this item in the payment claim as **\$128,885.43** excluding GST.

Variation Works

69. The respondent has valued the variations slightly higher than the applicant due to several rooms being under-measured by the applicant. I have however, valued the variation works at the amount claimed in the Payment Claim as **\$59,767.80** excluding GST.

70. My determination in relation to this adjudication is as follows:

| | | <i>Summary of Adjudicated Amount</i> |
|-----|----------------------------|--------------------------------------|
| 1. | Subcontract works claimed | \$128,885.43 |
| 2. | Variations | \$59,767.80 |
| | Gross Total Claimed | \$188,653.23 |
| 3. | Offset 1 | \$600.00 |
| 4. | Offset 2 | Nil |
| 5. | Offset 3 | Nil |
| 6. | Offset 4 | Nil |
| 7. | Offset 5 | Nil |
| 8. | Offset 6 | Nil |
| 9. | Offset 7 | Nil |
| 10. | Offset 8 | Nil |
| 11. | Offset 9 | Nil |
| 12. | Offset 10 | \$517.00 |
| 13. | Offset 11 | Nil |
| | Less Total Offsets | -\$1,117.00 |
| | Retention Money | Nil |
| | Total | \$187,536.23 |
| | GST (not claimable) | Nil |
| | Adjudicated Amount | \$187,536.23 |

71. I therefore find that the adjudicated amount is **\$187,536.23**.

Adjudication costs

72. Pursuant to section 36(2) of the Act I determine that the Respondent shall bear the costs in relation to this adjudication dispute.

73. The adjudication costs for this determination amount to 26.5 hours @ \$325.00 plus GST = \$8,612.50 including GST and as stated in paragraph 71 above, is to be paid fully by the Respondent. A tax invoice will be issued accordingly.

Interest Costs

74. I determine that interest is payable on the adjudicated amount in accordance with clause 35(1) (b) of the Act at rate of 8.5% per annum from the 11th June 2014.

Confidential information

75. Pursuant to section 38(e) identify the following information, that because of its confidential nature, is not suitable for publication by the Registrar under section 54 of the Act:
- i. The identity of the parties.
 - ii. The identity and location of the project.



Signed:
Colin Bond – Registered Adjudicator No. 34

Dated: 23rd August 2014