

**ADJUDICATOR'S DETERMINATION**

**Adjudication Identification Number:** 43.14.01

**Adjudicator:** Neil Kirkpatrick

Address: PO Box 2218  
Brighton North  
Melbourne, VIC 3186

Phone Number: 03 9592 9324

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**Applicant:**

**Respondent:**

**Date of Adjudication Claim:** 14 July 2014

In respect of the Application for Adjudication made on 14 July 2014 by the Applicant pursuant to the *Construction Contracts (Security of Payments) Act* (the "Act") I, Neil Kirkpatrick, as the registered adjudicator appointed under Part 3 of the Act make the following determination:

1. The adjudicator dismisses the application without making a determination on its merits.
2. The Applicant is to pay \$ 695.75 to the Respondent being half the Adjudicator's fee pursuant to s.46(9) of the Act on or before 13 August 2014.

The reasons for my determination are annexed as Schedule 1 (Pages 2-8).

A list of information that, because of its confidential nature, is not suitable for publication by the Registrar is annexed as Schedule 2 (Page 9).

Date: 6 August 2014

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**Neil Kirkpatrick**  
Registered Adjudicator Number 43

## Schedule 1: Reasons for Determination

### Summary

1. The Applicant entered into a written contract on 29 October 2013 in the form of a purchase order raised by the Respondent numbered PO105161 that embraced a quotation submitted by the Applicant dated 29 October 2013 reference Q13-1241 including *terms and conditions of trade* numbered 1.0 through to 22.8 pursuant to which the Applicant was obliged to undertake [*the works*] detailed within its quotation in relation to [*the project*] (the “**Contract**”). The Applicant submitted a claim for payment numbered 1 April 2014 seeking the amount of \$ 20,211.00<sup>1</sup>. Payment was not received by the Applicant and this application was subsequently made on 14 July 2014.

### Appointment of Adjudicator

2. By notice dated 15 July 2014 the Royal Institution of Chartered Surveyors, Dispute Resolution Service (the “**Prescribed Appointer**”), appointed me adjudicator for the purposes of determining the payment dispute which I confirmed in my letter to the parties dated 15 July 2014 (the “**Letter**”).

### Application and Response

3. The Prescribed Appointer recorded that the Applicant served its written application on 11 July 2014 which comprised of an adjudication application, a three page written submission together with attachment marked “A” to “G”.
4. The Respondent was, in the event that it was served with the application on the day that the Applicant served it on the Prescribed Appointer, required to serve its written response on the Applicant and on the appointed adjudicator within 10 business days after the date of service, by 25 July 2014.
5. In my Letter, I requested the Applicant advise me in writing by 17 July 2014 as to the date upon which the application was served on the Respondent and for the Respondent to raise any issues in relation to the date of service within its response. The Applicant provided a copy of an Australian Post tracking notice confirming that the Respondent was served the application on 14 July 2014. The Respondent did not raise any contradictory advice, and I therefore accept that the application was served on the Respondent on 14 July 2014 three days after it was served on the Prescribed Appointer, resulting in the latest date for service of a response of 28 July 2014 Pursuant to section 29 of the Act.
6. The Respondent served its response on me by email on 24 July 2014 within the time limited by the Act. The response comprised of a written adjudication response, together with correspondence referenced *back charge excavation works, [the Applicant’s] original quotation main project works, variations remittance advice* including three further emails relating to the project.

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<sup>1</sup> Sums of money referred to in these reasons are inclusive of GST.

### **Conflicts of Interest**

7. From my review of the written application, I formed the view that I had 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 parties in my Letter and no objection was given by either party to such declaration.

### **Letter to the Parties**

8. In my Letter, I requested that the parties advise me in writing by as to whether there had been any order, judgement or other finding by an arbitrator or other person or court or other body about the dispute that is the subject of the application.
9. Neither the Applicant nor the Respondent replied to my enquiry in this regard and in the absence of any contradictory advice, I accept that there has been no order, judgement or other finding about the dispute.

### **Construction Contract for the Purposes of the Act**

10. The contract under which the payment dispute has arisen was a purchase order reference PO10516 accepting the Applicants quotation dated 29 October 2013 describing the work to be undertaken as being “*electrical works, ground works, and exterior lighting*” to [the project site] between the Applicant and the Respondent (the “**Contract**”). The Contract sum was stated in the Respondent’s purchase order as \$43,420.30 further stating “*as per Q13-1241...*” which is the reference number shown on the Applicant’s quotation. The Applicant’s quotation stated: “*Quote subject to Terms of Trade...*”, a copy of which were provided with the application for adjudication extending to seven pages embracing terms 1.0 to 22.8 inclusive.
11. Section 5 of the Act defines “construction contract” as a contract, whether in writing or not, under which a person (*the contractor*) has one or more of these obligations –
  - (a) *to carry out construction work;*
  - (b) *to supply to the site where construction work is being carried out any goods that are related to construction work;*
  - (c) *to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work;*
  - (d) *to provide, on the site where construction work is being carried out, on-site services that are related to the construction work;*
12. Section 6(1) of the Act defines “construction work” on a site in the Territory as including –
  - (c) *constructing the whole or a part of any civil works, or a building or structure, that forms or will form, whether permanently or not and whether in the Territory, part of land or the sea bed whether above or below it; (my emphasis)*

- (d) **fixing or installing** on or in anything mentioned in paragraph (c) any fittings forming, or to form, (whether or not permanently) part of the thing, including:
  - (i) **fittings for electricity**, gas, water, fuel oil, air, sanitation, irrigation, **telecommunications**, air-conditioning, heating, ventilation, fire protection, cleaning, the security of the thing or the safety of people; (my emphasis)
- (f) **any work that is preparatory to, necessary for, an integral part of**, or for the completion of, any work referred to in paragraph (a), (b), (c), (d) or (e) (my emphasis)

13. From these, I find the Contract under which the payment dispute has arisen is a construction contract for the purposes of the Act.

### **Documents Forming Basis for Determination**

14. The parties served the following documents on each other and on me for the purposes of having the payment dispute determined.

- (a) The Applicant's written application for adjudication dated 11 July 2014 which included -
  - (i) Application for adjudication and Adjudication submission (7 pages),
  - (ii) Attachment A, quotation reference Q13-1241 including terms and conditions numbered 1.0 to 22.8 inclusive,
  - (iii) Attachment B, payment claim in the amount of \$20,211.00 dated and served on the Respondent on 1 April 2014,
  - (iv) Attachment C, two quotations embracing variation works,
  - (v) Attachment D, details of costs applied against the Applicant referred to as *back charges*, raised by the Respondent,
  - (vi) Attachment E, correspondence relating to back charges and late payment of invoices,
  - (vii) Attachment F, invoices and correspondence, and
  - (viii) Attachment G, correspondence and programme of work.
- (b) The Respondent's written response received on 24 July 2014 which included -
  - (i) Written adjudication response (4 pages),
  - (ii) Correspondence detailing back charges for excavation works,
  - (iii) The Applicant's original quotation referenced *Main Project Works*,
  - (iv) A variations remittance advice, and
  - (v) Three emails relating to project correspondence.

15. In making this determination, I have given regard to the parties' submissions and the -

- (a) The provisions of the Act and associated Regulations,

- (b) The provisions of the Contract under which the adjudication application has arisen,
- (c) The application for adjudication and the response received.

### **Construction Contract and its Terms**

16. The Applicant entered into a Contract with the Respondent on or about 29 October 2013 in which the Applicants "*Terms and Conditions of Trade*" were embraced, a copy of which were included in the application for adjudication.

17. The "*Terms and Conditions of Trade*" that are relevant to the determination of the subject payment dispute include –

#### **2. *Acceptance***

2.1 *The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of the Goods/Equipment.*

2.2 *These terms and conditions may only be amended with [the Applicant's] consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and [the Applicant].*

#### **4. *Price and Payment***

4.4 *Time for payment for the Goods/Equipment being of the essence, the Price will be payable by the Client on the date/s determined by [the Applicant], which may be:*

- (a) *on delivery of the Goods/Equipment;*
- (b) *thirty (30) days following the end of the month in which a statement is posted to the Client's address or address for notices;*
- (c) *fourteen (14) days from the date of invoice;*
- (d) *the date specified on any invoice or other form as being the date for payment; or*
- (e) *failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by [the Applicant].*

### **Payment Dispute**

18. For the purpose of section 8 of the Act and the subject of this application for adjudication, the Applicant contends that it made a claim under the construction contract to the Respondent for payment of an amount in relation to the performance by it of its obligations under the Contract. The claim for payment ("**Payment Claim**") in the amount of \$ 20,211.00 which was submitted to the Respondent on 1 April 2014 was based on a number of invoices previously submitted to the Respondent which can be summarised in the following manner –

<b>Invoice Number</b>	<b>Invoice Description</b>	<b>Invoice Date</b>	<b>Date for Payment</b>	<b>Invoice Value</b>
13-1104C	Remainder of contract price due	18/12/2013	01/01/2014	\$ 17,985.00
13-1104D	Variation to move Under canopy lights	16/01/2014	30/01/2014	\$ 851.00
13-1104E	Connect canopy light box and pylon sign	18/12/2013	01/01/2014	\$ 550.00
13-1104F	Install 1 x 6mmsq Earth From main switchboard	18/12/2013	01/01/2014	\$ <u>825.00</u>
<b>Total</b>				<b><u>\$ 20,211.00</u></b>

19. From the terms of the Contract set out in paragraph [17] above, the Respondent was to pay the Applicant the amount due by the dates “*specified on any invoice or other form as being the date for payment*”. The Contract included payment terms as “*fourteen days from the date of invoice*” consistent with the due date for payment shown on each individual invoice submitted.
20. From *Silent Vector Pty Ltd T/AS Sizer v Squarcini* [2008] WASAT 39 at [61-65] and section 28(1)(a) of the Act, it follows that the application for adjudication had to be served within 90 days of the date on which each payment dispute arose calculated as follows -

<b>Invoice Number</b>	<b>Invoice Description</b>	<b>Invoice Date</b>	<b>Date for Payment</b>	<b>Application Date</b>
13-1104C	Remainder of contract price due	18/12/2013	01/01/2014	01/04/2014
13-1104D	Variation to move Under canopy lights	16/01/2014	30/01/2014	30/04/2014
13-1104E	Connect canopy light box and pylon sign	18/12/2013	01/01/2014	01/04/2014
13-1104F	Install 1 x 6mm sq Earth from main switchboard	18/12/2013	01/01/2014	01/04/2014

### **Adjudicator’s Functions**

21. Section 33(1) of the Act requires that an appointed adjudicator must, within the prescribed time or any extension of it made 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;*
- (ii) *the application has not been prepared and served in accordance with section 28;*

22. Section 28 of the Act requires that -

- (1) *To apply for a payment dispute to be adjudicated, a party to the contract must, within 90 days after the dispute arises, or if applicable within a period provided for by section 39(2)(b):*
  - (a) *prepare a written application for adjudication; and*
  - (b) *serve it on each other party to the contract; and*
  - (c) *serve it on:*
    - (i) *if the parties to the contract have appointed a registered adjudicator and that adjudicator consents, the adjudicator; or*
    - (ii) *if the parties to the contract have appointed a prescribed appointor, the appointor; or*
    - (iii) *otherwise, a prescribed appointor chosen by the party; and*
- (2) *The application must:*
  - (a) *be prepared in accordance with, and contain the information prescribed by, the Regulations; and*
  - (b) *state the details of, or have attached to it:*
    - (i) *the construction contract involved or relevant extracts of it; and*
    - (ii) *any payment claim that has given rise to the payment dispute; and*
  - (c) *state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.*

23. From the foregoing and pursuant to section 33(1)(a)(ii) I dismiss the application for adjudication for following reasons.

- (a) The application for adjudication was based on previously submitted payment claims and was therefore not served within 90 days from the dates on which each payment dispute arose in accordance with section 28(1) of the Act, the latest dates available to make an application for adjudication ranged from 1 April 2014 through to 30 April 2014.
- (b) The Respondent was not served the application for adjudication until 14 July 2014 outside the time limits allowed by section 28 (1) of the Act, my calculation of the last day available for service of the application is 30 June 2014.

### **Costs of Adjudication**

24. From my reading of sections 36(1), 36(2), 46(5) and 46(6) of the Act, the adjudicator's power to decide that one party must pay some or all of the other party's costs of the adjudication is limited to the costs of an adjudication as defined in subsections 46(1A)(a) and 46(1A)(b) of the Act. From these, the costs of adjudication do not include a nomination fee that may be levied by a prescribed appointer.

25. There is no basis for a determination under section 36(2) of the Act or to depart from the usual principle that costs of the adjudication be met equally under section 46(5) of the Act, therefore I determine that the parties must pay the costs of the adjudication in equal shares.
26. My costs and fees for the adjudication and my reasonable disbursements have been calculated as \$ 1,391.50 inclusive of GST. I determine that each party is liable to pay \$ 695.75 being half the total cost for the adjudication.
27. In my Letter I requested security from each party in the amount of \$ 1,500.00. The Applicant did not make a payment toward security, the Respondent made payment of security requested in the amount of \$ 1,500.00 which was received on 25 July 2014. I therefore determine that the Applicant is liable to make a payment to the Respondent of \$ 695.75 pursuant to section 46(9) of the Act.
28. I return the amount of \$ 108.50 to the Respondent.
29. Payment should be made on or before 13 August 2014.

Date: 6 August 2014

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**Neil Kirkpatrick**  
Registered Adjudicator Number 43



## **Schedule 2: Confidential Information**

The following information should remain confidential:

- (1) The names of the parties and their representatives; and
- (2) The location of the works

Date: 6 August 2014

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**Neil Kirkpatrick**  
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