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worldwide**Dispute Resolution Service****Adjudicator's Determination**

Pursuant to the

*Construction Contracts (Security of Payments) Act*

Adjudication Number	<b>35.16.01</b>
Prescribed Appointor	<b>RICS Dispute Resolution Service</b>
Adjudicator	<b>John Tuhtan<sup>1</sup></b>
Applicant:	[redacted]
Respondent:	[redacted]
Project:	[redacted]
Amount to be paid by Respondent	<b>\$28,034.00 including GST</b>
Due date for payment	<b>Within 7 days of release of determination</b>
Adjudication Fees Apportionment	Applicant: 50% Respondent: 50%
Date of Determination or Dismissal	27 May 2016
Payment Claim	Claimed Amount: <b>\$28,034.00</b> including GST Dated : 21 January 2016
Notice of Dispute / Response to Payment Claim	Notice of Dispute Amount : \$13,034.00
Adjudication Application	Dated: 28 April 2016
Adjudicator Acceptance	Dated: 29 April 2016
Adjudication Response	Dated: 17 May 2016

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<sup>1</sup> Registered Adjudicator Number 35

**Table of Contents**

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Table of Contents ..... 2

DETERMINATION ..... 3

BACKGROUND ..... 3

APPOINTMENT OF ADJUDICATOR ..... 3

DOCUMENTS ..... 3

JURISDICTION ..... 4

PAYMENT CLAIM (INVOICE 00007639) ..... 4

NOTICE OF DISPUTE ..... 4

DATE OF PAYMENT DISPUTE ..... 5

APPLICATION FOR ADJUDICATION ..... 5

ADJUDICATION RESPONSE ..... 5

FURTHER SUBMISSIONS ..... 6

REASONS FOR THE DETERMINATION ..... 6

SUMMARY OF RELEVANT EVENTS ..... 6

THE DISPUTE ..... 8

*THE CONTRACT* ..... 9

*THE UNDISPUTED AND UNPAID PORTION OF THE WORKS* ..... 10

THE DISPUTED AND UNPAID PORTION OF THE WORKS ..... 12

THE DETAILS OF THE DETERMINATION ..... 13

CONFIDENTIAL INFORMATION ..... 14

## DETERMINATION

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- 1) I, John Tuhtan<sup>2</sup>, the adjudicator appointed pursuant to section 30(1)(a) of the *Construction Contracts (Security of Payments) Act (NT) (CCA)*, for the reasons set out below, determine that:
  - a) The amount to be paid by the respondent to the applicant is **\$28,034.00** including GST.
  - b) Interest is due on the adjudicated amount at a rate of 8% per annum from 1 March 2016.
  - c) The respondent is to pay the adjudicated amount to the applicant within 7 days of the date of the determination being released.

## BACKGROUND

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- 2) The application arises from an unpaid payment claim made by the applicant on the respondent under section 8(a) of the CCA for construction work carried out under a construction contract at the [project site redacted] in the Northern Territory (the **Project**).

## APPOINTMENT OF ADJUDICATOR

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- 3) Pursuant to section 28(1)(c)(iii) of the CCA, the applicant served its adjudication application on the RICS Dispute Resolution Service, which is a prescribed appointor under the CCA.
- 4) The adjudication application was referred to me as adjudicator on 29 April 2016 by the RICS Dispute Resolution Service pursuant to section 30(1)(a) of the CCA.
- 5) The RICS Dispute Resolution Service served a notice of my acceptance of the appointment on the claimant and the respondent on 29 April 2016.

## DOCUMENTS

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- 6) The following documents were provided to me:
  - a) Adjudication application submissions dated 28 April 2016 on 29 April 2016; and
  - b) Adjudication response that was provided to me on 17 May 2016.
  - c) The applicant's further submissions 16 May 2016.

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<sup>2</sup> Registered Adjudicator Number 35

- d) The respondent's further submissions 17 May 2016.

## JURISDICTION

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- 7) The parties entered into a contract to carry out building work relating to the [redacted] Project at [redacted] NT (**site**) on or about 15 May 2015. (**Contract**). The Contract was entered into after the commencement of section 9 of the CCA.
- 8) The work carried out under the Contract is '*construction work*' as defined in section 6(1) of the CCA.
- 9) Accordingly, the Contract is a construction contract as defined in section 5(1) of the CCA and the CCA applies to disputes arising under the Contract.
- 10) Pursuant to section 27 of the CCA, the applicant is a party to the Contract under which the payment dispute has arisen and is, therefore, entitled to apply to have the dispute adjudicated.
- 11) I am not aware of any unresolved application for adjudication or order, judgment or finding by an arbitrator or court dealing with a matter arising under the Contract as referred to in sections 27(a) or 27(b) of the CCA.
- 12) I am, therefore, satisfied that I have jurisdiction to determine the adjudication application pursuant to the CCA.

## PAYMENT CLAIM (INVOICE 00007639)

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- 13) The applicant served the respondent with its Payment Claim on 21 January 2016 that was described as; "*Final Payment for the supply and installation of operable walls at [the project site] and the terms and conditions and variations approved...*".
- 14) The Payment Claim which was a payment claim for the purposes of the CCA. The payment claim was in the amount of \$28,034.00 incl. GST.
- 15) The total amount claimed to date under the Contract is \$117,128.00 incl. GST.

## NOTICE OF DISPUTE

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- 16) The respondent received the applicant's Payment Claim on 21 January 2016 and issued a notice of dispute on 1 February 2016 pursuant to section 6 division 5 of Schedule of Implied Provisions to the CCA, which was implied into the Contract. The notice of dispute stated:

*"Pursuant to clause 27 in the terms and conditions of the purchase order, we will be withholding the amount of \$15,000 until all defects have been rectified. The balance of the invoice \$13,034.00 will be paid within the*

*terms and conditions of the purchase order agreement.”*

## **DATE OF PAYMENT DISPUTE**

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- 17) Pursuant to section 8(a) of the CCA, the payment dispute occurred on the day the amount claimed in the payment claim was wholly or partly disputed.
- 18) On 1 February 2016, the respondent indicated by way of its notice of dispute that the Payment Claim was partly rejected disputed, which is the date of the payment dispute<sup>3</sup> for the purposes of this determination.

## **APPLICATION FOR ADJUDICATION**

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- 19) Section 28(1) of the CCA entitles an applicant to make an application for adjudication of a payment dispute within 90 days of the occurrence of the payment dispute.
- 20) I am satisfied that the payment dispute occurred on 1 February 2016.
- 21) The applicant applied for adjudication of the payment dispute on 28 April 2016, which is within the time permitted by and in accordance with section 28(1) of the CCA. Specifically;
  - a) The application is in writing as required by section 28(1)(a) and 28(2) of the CCA.
  - b) The application was served on the respondent on 2 May 2016, pursuant to section 28(1)(b) of the CCA.
  - c) The application was served on RICS Dispute Resolution Service on 28 April 2016, pursuant to section 28(1)(c)(iii) of the CCA.
  - d) The adjudicator requested and the applicant has provided a deposit or security for the costs of the adjudication.
- 22) I am, therefore, satisfied that the adjudication application satisfies the requirements of section 28 of the CCA.

## **ADJUDICATION RESPONSE**

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- 23) Pursuant to section 29(1) of the CCA, the respondent has 10 working days after the date on which it is served with an application for adjudication to prepare and serve its written response on the adjudicator and the applicant.
- 24) The respondent served its adjudication response on 17 May 2016.

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<sup>3</sup> *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd [2012] NTSC 22 at 20.*

- 25) I am satisfied, therefore, that the respondent served its response within the timeframes prescribed in the CCA.

### **FURTHER SUBMISSIONS**

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- 26) During the course of the time within which the respondent was to provide its response, the applicant asserted that it had served the adjudication application on the respondent on 29 April 2016. The respondent rejected that claim and asserted that the adjudication application was served on the respondent on 2 May 2016.
- 27) I called for submissions in relation to the service of the adjudication application from the parties as to the date of service, which were provided within the specified timeframes.
- 28) The parties subsequently agreed that the date of service of the adjudication application was 2 May 2016.

### **REASONS FOR THE DETERMINATION**

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- 29) Pursuant to section 34 of the CCA, I have considered the following matters in making this determination:
- a) the adjudication application and its attachments;
  - b) the response and its attachments; and
  - c) the further written submissions validly made by the parties.

### **SUMMARY OF RELEVANT EVENTS**

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- 30) The parties entered into a contract to carry out for the supply and installation of operable walls relating to the [redacted] Project at [redacted] NT (**site**) on or about 15 May 2015. (**Contract**). The Contract sum was \$101,420.00 incl. GST.
- 31) On 5 November 2015, the respondent accepted the claimant's price submission to carry out variation work in the amount of \$15,708.00 incl. GST.
- 32) The applicant commenced fabrication of the operable walls and made two payment claims under the Contract on;
- a) 19 May 2015 in the amount of \$46,100.00 incl. GST; and
  - b) 17 November 2015 in the amount of \$42,994.00 incl. GST;
- both of which were paid in full by the respondent.
- 33) The site installation work commenced on or about the third week of November

2015.

- 34) On 28 November 2015, the applicant submitted a third payment claim in the amount of \$28,034.00 referenced '7639'. In particular, that payment claim stated:

*'The project will be completing on Wed 2<sup>nd</sup> December 2015. Payment is due the same day as agreed upon by [JL].*

- 35) The applicant has stated in its submissions;

*'In late November [2015] the [respondent's] Mr [C] noted that some panels had some minor scratches on them which had occurred during transport from Sydney. The Contractor had the necessary items for repair sent [redacted] via courier and were sanded and refinished on site and reinstalled. The [respondent] and [the principal], the owner, were satisfied with the work.'*

- 36) On 4 December 2015, the applicant sent an email to the respondent stating;

*'Gentlemen – I have now returned to Sydney and have photographs and video of the hand over to the client....'*

- 37) On 9 December 2015, the respondent sent an email to the applicant stating;

*'...There are still damages on the operable walls in addition to the damages that was identified earlier which I sent an email to [R]. [R] replied stating that this was being sorted out but there are still damages to the operable walls that did not get fixed.*

*2. The areas that you have tried to fix the damages are not acceptable as you can clearly see where you have tried to polish the damages out,...*

*3. There is also one operable wall where the bottom timber panel is a different colour to the rest of the timber panels.'*

- 38) The applicant states in its submissions, that pursuant to the respondent's request, it reissued to the respondent the payment claim that it had submitted on 28 November 2015 on 21 January 2016.

- 39) On 1 February 2016, the respondent issued a notice of dispute pursuant to section 6 division 5 of Schedule of Implied Provisions to the CCA, which was implied into the Contract. The notice of dispute stated:

*'Pursuant to clause 27 in the terms and conditions of the purchase order, we will be withholding the amount of \$15,000 until all defects have been rectified. The balance of the invoice \$13,034.00 will be paid within the*

*terms and conditions of the purchase order agreement.'*

- 40) On 18 March 2016, [BA] of the [principal] sent an email to the applicant. The applicant had informed [BA] of the dispute and [BA] indicated that he was aware of a dispute between the parties concerning defects but did not want to play any part in the resolution of the dispute. [BA] stated;

*'[The respondent] has advised us that when these Op' Walls were completed they identified a number of defects that were requested be rectified and that [the applicant] made numerous commitments to attend site to undertake this rectification work but still have not done so despite numerous requests from [the respondent].'*

- 41) The respondent states in its submissions;

*'Due to multiple defects identified by the [respondent] after the completion of the works, \$15,000.00 was withheld until all defects were rectified. The remaining \$13,034.00 was to be paid to the Applicant when they have organised to return to [the site] to rectify defects. Once all the defects have been rectified the payment of the final payment claim was to be made after the approval of the rectification works by the [respondent].'*

...

*Item 4 on the Background of Claim the applicant states that minor scratches on some of the panels identified by Mr [C] were sanded and refinished on site and reinstalled and that the [respondent] and the [principal] were satisfied with the work. This is not the case and the [respondent] was not satisfied with the work. Please refer to Attachment 1 being the email sent to [the applicant] in relation to the unacceptable repair works and other defects that were identified after an inspection was carried out after the completion of the works.'*

## THE DISPUTE

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- 42) The applicant requests the adjudicator to determine the adjudication application as follows;
- a) *'On 1/2/2016 the [respondent] sent a notice of dispute to the Contractor [Attachment C] agreeing to pay the invoice allow less \$15,000.00. The [respondent] has not paid the uncontested balance of \$13,034.00. The matter for the adjudicator to determine then is the Claimant's entitlement to the full claim for \$28,034.00.' [Emphasis added]*
- b) *'We request that the adjudicator determine that 100% of the adjudication and application costs be borne by the respondent.'*



- 43) The respondent denies that it is obliged to make any payment until the defects have been rectified as follow and requests the adjudicator to determine the adjudication application as follows;
- a) *'Due to multiple defects identified by the [respondent] after the completion of the works, \$15,000.00 was withheld until all defects were rectified. The remaining \$13,034.00 was to be paid to the Applicant when they have organised to return to [the site] to rectify defects. Once all the defects have been rectified the payment of the final payment claim was to be made after the approval of the rectification works by the [respondent]. {emphasis added}*
  - b) *'The respondent does not take any responsibility to the adjudication cost brought by the applicant chose not to rectify the outstanding defects so that the final payment could be made.*

*The respondent does not believe that the interest should be incurred on the claim amount owed from 28 February 2016 as the applicant chose not to rectify the outstanding defects so that the final payment could be made.'*

## THE CONTRACT

- 44) The parties entered into a contract for the supply and installation of operable walls to the '[redacted]' on the site on or about 15 May 2015.
- 45) The Contract is comprised of 2 documents. Specifically, the documents were:
- a) A Purchase Order referenced '003' and dated 15 May 2015;
  - b) A 2-page document entitled '*Terms and Conditions*' that is incorporated by reference in the Purchase Order.
- 46) Relevantly, the Contract states;
- a) At clause 22;  
*'The Company will pay the Seller the Price for the G&S within 30 days from receipt of a tax invoice or on the last day of the month following receipt of the invoice, whichever time expires later.'*
  - b) At clause 27;  
*'The Company may, withhold payment to the Seller where, in the Company's opinion the work contains defects.'*

**THE UNDISPUTED AND UNPAID PORTION OF THE WORKS**

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- 47) On 1 February 2016, the respondent issued a notice of dispute pursuant to clause 37.2 of the Contract on 1 February 2016. The notice of dispute stated:
- 'Pursuant to clause 27 in the terms and conditions of the purchase order, we will be withholding the amount of \$15,000 until all defects have been rectified. The balance of the invoice \$13,034.00 will be paid within the terms and conditions of the purchase order agreement.' [Emphasis added]*

- 48) In the adjudication response, the respondent further states;

*'... The remaining \$13,034.00 was to be paid to the Applicant when they have organised to return to [the site] to rectify defects....'*

- 49) In the notice of dispute, the respondent advised that it would make payment of the \$13,034.00 in accordance with the Contract. The effect of that advice is that the respondent accepted its liability to pay that amount within 30 days of the last day of the month in which the Payment Claim was made.

- 50) In the adjudication response, the respondent stated;

*'...The remaining \$13,034.00 was to be paid to the Applicant when they have organised to return to [the site] to rectify defects.'*

which indicates that the respondent changed its position and proposes to now hold \$13,034.00 until the applicant agrees to return to the site to carry out the defects rectification.

- 51) Clause 27 of the Contract entitles the respondent to retain an amount of money for defects rectification work, which it indicated was \$15,000.00.

- 52) Section 17 of the CCA states;

*'The provisions in the Schedule, Division 2 are implied in a construction contract that does not have a written provision about the amount, or a way of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs.'*

- 53) The relevant terms from Schedule, Division 2 implied into the Contract by the operation of law, are as follows:

*'2 Contractor entitled to be paid*

*(1) The contractor is entitled to be paid a reasonable amount for performing its obligations.*

(2) *Subclause (1) applies whether or not the contractor performs all of its obligations.*

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 after 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.*

- 54) The implied term referenced '2' makes it clear that the applicant is entitled to make a progress claim.
- 55) The respondent's notice of dispute made it clear that \$15,000.00 was in dispute and \$13,034.00 was not in dispute and would be paid within the terms and conditions of the purchase order agreement, which is by 1 March 2016.
- 56) By way of its notice of dispute, the respondent made an assessment of the cost of defects rectification and promised to pay \$13,034.00 by 1 March 2016.
- 57) There is nothing in the Contract that further attaches any condition precedent to the payment of any claim that is not disputed.
- 58) Furthermore, the respondent has not asserted the existence of any new defects arising after it issued its notice of dispute on 1 February 2016.

- 59) Accordingly, the respondent is now estopped from changing its position and now claiming that payment of the undisputed amount will only occur after some new event to which it has no contractual entitlement.
- 60) I, therefore, determine that the respondent must pay the applicant the \$13,034.00 that it promised to pay by way of its notice of dispute and that the due date for payment of that amount is 1 March 2016.

### THE DISPUTED AND UNPAID PORTION OF THE WORKS

- 61) During the last days of November 2015, the respondent carried out an inspection of the works (**1<sup>st</sup> inspection**) and identified certain defective work, which the applicant accepted and agreed to rectify.
- 62) In its email dated 4 December 2015, the applicant indicated that it had repaired the defective work and had handed over the works to the 'client'.
- 63) In its email dated 9 December 2015, the respondent indicated that it had carried out further inspection (**2<sup>nd</sup> inspection**) after hand-over to the 'client' and stated;
- 'There are still damages on the operable walls in addition to the damages that was identified earlier...'*
- which the applicant disputes by way of its submissions.
- 64) I read the respondent's email to mean;
- a) that some of the defects that were identified during the 1<sup>st</sup> inspection were not properly repaired; and
  - b) that some defects were noticed on the 2<sup>nd</sup> inspection that were not identified during the first inspection.
- 65) I do not read the respondent to assert that the applicant caused the damage that was first identified during the 2<sup>nd</sup> inspection regardless that the respondent holds the applicant liable to repair the further damage observed after the second inspection.
- 66) There is no dispute that the operable walls were handed over to the 'client' nor that the 'client' has used the operable walls since the works were handed over to the 'client'.
- 67) The respondent has not provided any evidence as to the defects that existed at the time the operable walls were handed over to the 'client', but did provide six photographs of damage on 9 December 2015.
- 68) Of the six photographs, 2 are in black and white, of poor quality and I have

presumed are intended to show the defective work identified during the 1<sup>st</sup> inspection that was not properly repaired. I cannot form a view as to whether there remains defective work that was notified after the 1<sup>st</sup> inspection.

- 69) I further note that the email from [BA] the 'client' [the principal] does not make mention of any defects that remain. It only makes mention of a dispute between the applicant and the respondent relating to defects.
- 70) On review of the evidence provided to me by the parties, the applicant has provided a statement of having repaired all of the defective work as at the time of handing over the works to the client, the respondent has only provided me with photographs of damage that was identified as occurring after the works were handed over to the 'client' and the 'client' has not identified any defects as of 18 March 2016.
- 71) On balance, therefore, I determine that the defects were all rectified as of the date of handing over the works to the 'client' on or about 4 December 2015 and there is no evidence that the damage noticed on the 2<sup>nd</sup> inspection was caused by the applicant.
- 72) Accordingly, the respondent is not entitled to withhold \$15,000.00 on account of defects rectification and the due date for payment of the payment claim for the above stated reasons is 1 March 2016.

#### **THE DETAILS OF THE DETERMINATION**

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- 73) Pursuant to s 34(1)(a) of the CCA, I have made this determination on the basis of the application and its attachments and the response and its attachments and the parties' submissions.
- 74) Pursuant to s 33(1)(b), I have determined that:
  - a) the value of completed work as at 21 January 2016 is; \$28,034.00 incl. GST;
  - b) the respondent must pay to the applicant the sum of \$ \$28,034.00 incl. GST within 7 days after the issue of the determination;
  - c) in accordance with clause 35(1)(b) of the CCA, I determine that interest is payable on the amount the respondent must pay to the applicant at the rate of 8% per annum from 1 March 2016.
- 75) Pursuant to section 36(1) of the CCA, each party shall bear their costs in relation to this adjudication for the following reasons:
  - a) The respondent asserted but failed to provide any evidence that the applicant caused the damage it identified during the second inspection.

- b) In breach of the Contract, the respondent changed its position in relation to the payment that it promised to make on 1 February 2016 and withheld money unlawfully.
  - c) In breach of the contract, the applicant procrastinated and has refused to carry out work, which it earlier promised to carry out. At the point in time that the applicant refused to carry out certain rectification, there was no dispute as to whether or not the work was work for the rectification of defects. I have determined that on the balance of probabilities, the work was for the rectification of damages caused by others.
  - d) The parties both failed to follow the processes set out in the Contract as amended by the implication of certain terms by the operation of the CCA and have to more or less extent caused this dispute.
- 76) Pursuant to section 46(5) of the CCA, the costs of the adjudication shall be shared equally by both parties.
- 77) The costs of the adjudication amount to 9.5 hours @ \$305.00 plus GST, which is; \$3,187.25 incl. GST.
- 78) I will issue one Tax Invoices to the applicant and the respondent must pay the applicant one half of the invoiced amount, which is \$1,593.63 within 7 days after the issue of the determination.

#### **CONFIDENTIAL INFORMATION**

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- 79) The parties have not indicated which parts of the information provided to me with their submissions are to be treated as confidential.
- 80) If either party considers any part of their submissions confidential or any part of this determination as confidential, I request that they notify me accordingly within 2 working days of receipt of this determination.



Signed:

John Tuhtan<sup>4</sup>

Date: 27 May 2016

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<sup>4</sup> Registered Adjudicator Number 35