

Registrar's note: *This is an edited version of the determination. Details that would identify the parties have been redacted.*

Adjudicator's Determination

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

Adjudication CJC.18.01

Applicant: *[Applicant's details redacted]*
Address:
Mailing Address:
Telephone:
Fax:
Email:

Contact:
Telephone:

And

Respondent: *[Respondent's details redacted]*
Mailing Address:
Telephone:
Fax:
Email:
Contact:
Telephone:

Adjudicator: **Jaswant Deo**
Adjudicator Registration Number 47

Address: Level 1, Magistrates Court, Nichols Place Darwin NT
0800
Mailing Address: GPO Box 1722 Darwin NT 0801
Telephone: 1800 000 473
Fax: (08) 89996226
Email: cjc.doj@nt.gov.au

Adjudicator Decision

1. I, Jaswant S. Deo, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act, (the Act)* determine on 14 September 2018 that the respondent pay the applicant:
 - \$8,052.00 inclusive of GST.
 - Payment to be made on or before 21 September 2018.
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 20 August 2018 and the parties notified on 18 August 2018.

Application and Response

5. The applicant served its application on CJC on 14 August 2018 which was also served on the respondent on 18 August 2018.
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 14 August 2018 and no objection was given by the applicant and respondent to such declaration.

Submissions from Parties

8. Following my appointment as adjudicator on 20 August 2018, I received from CJC on 3 September 2018 documents prepared by the applicant containing the application comprising 12 pages.

9. On 3 September 2018, I received from CJC the response prepared by the respondent containing 108 pages.

Background

10. On or about 18 April 2018 the applicant sent a quotation number 651 for the sum of \$7,062.00 inclusive of GST to resurface [*a swimming pool*] [*site details redacted*] (**the Works**) in Northern Territory.
11. On or about 24 April 2018, the applicant and respondent entered into an agreement for the Works.
12. On or about 24 April 2018, the respondent instructed the applicant to air freight the material from Perth to Darwin so that the Works would not be delayed.
13. On or about 9 May 2018 the Works commenced.
14. On or about 10 May 2018 the applicant submitted Invoice 661 in the amount of \$990.00 inclusive of GST for the air freight of the materials.
15. On or about 31 May 2018 the applicant submitted Invoice 672 in the amount of \$7,062.00 inclusive of GST for the Works.
16. On or about 12 June 2018 the applicant submitted a claim stating that Invoices 661 and 672 remain unpaid.
17. On or about 6 July 2018 the applicant instructed De Silva Hebron Barristers and Solicitors to submit a letter to the respondent advising that there has been no response from it in regards to the invoice amounts. In this letter De Silva Hebron Barristers and Solicitors offered to resolve the matter by offering a credit of \$4,437.90 from the invoices leaving \$3,614.10 to be paid by the respondent. The offer is to remain open until close of business Friday 13 July 2018.
18. On or about 13 July 2018, MSP Legal acting on behalf of the respondent sent a letter to De Silva Hebron Barristers and Solicitors advising that it was taking instructions from the respondent and will respond by close of business Friday 20 July 2018.
19. \$8,052.00 inclusive of GST of invoices 661 and 672 have not been paid and remains outstanding.

Contract

20. It is common ground that the Applicant and the Respondent entered into an agreement for the Works on 24 April 2018.
21. The agreement 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

22. Considering the many contentions from parties relating to the dispute, I must first determine if I have jurisdiction to adjudicate.
23. Section 33(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 section 28;*
 - (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 s35; and*
 - (ii) *the date on or before which the amount must be paid or the security must be returned.*
- 24. With respect to s33(1)(a), I deal below with items (i), (ii), (iii), and (iv).
 - (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.
- 25. Section 22 of the *Community Justice Centre Act* also prevents me from making a determination that would result in the total amount to be paid to be \$10,000 or more. I am satisfied that the amount claimed in Invoices 661 and 672 dated 10 May 2018 in the amount of \$990.00 and 31 May 2018 in the amount of \$7,062.00 respectively is in accordance with s22 of the *Community Justice Centre Act*.
- 26. Based on paragraphs 23, 24 and 25 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

- 27. In order, to establish if a payment dispute exist in accordance with s8 of the Act, I must ascertain if a payment claim has been submitted by the Applicant.
- 28. I am satisfied that a payment dispute exists and that Invoices 661 and 672 for the works has been submitted by the applicant on 10 May 2018 and 31 May 2018 respectively.
- 29. The applicant contends that Tax Invoices 661 and 672 for the works was carried out in accordance with the agreement.

30. 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 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.*

31. 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 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.*

- (3) *The notice of dispute must:*
- (a) *be in writing; and*
 - (b) *be addressed to the claimant; and*
 - (c) *state the name of the party giving the notice; and*
 - (d) *state the date of the notice; and*
 - (e) *identify the claim to which the notice relates; and*
 - (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; and*
 - (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 reasons for disputing it; and*
 - (h) *be signed by the party giving the notice.*

32. By subclause (2), the respondent had 14 days from receipt of the claim 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.
33. The respondent had not given notice of dispute to the applicant nor had it responded by way of emails or letters.
34. In my view, the respondent’s failure to give notice of dispute within 14 days after the payment claim in the form of Invoices 661 and 672 dated 10 May 2018 and 31 May 2018 respectively 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.
35. I therefore find that on the merits and on the balance of probabilities payment claims in the form of Invoices 661 and 672 in the amount of \$ 8,052.00 inclusive of GST is payable to the applicant.

Determination

36. In accordance with s38(1) of the Act, I determine that the amount to be paid by the respondent to the applicant is \$ 8,052.00 inclusive of GST.

37. Payment to be made on or before 21 September 2018.

Costs

38. 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.

.....
Jaswant S Deo
Adjudicator Registration Number 47