

ADJUDICATOR'S DETERMINATION

**UNDER THE
CONSTRUCTION CONTRACTS (SECURITY OF PAYMENT)
ACT 2004 (NT)**

IN THE MATTER BETWEEN:

(Applicant)

AND

(Respondent)

BY

John P Fisher (Adjudicator)

ISSUED

18th May 2008

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1. DETAILS OF PARTIES

Contract To Which Payment Dispute Relates
Project Contract SA043

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Respondent's Solicitor

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2. ADJUDICATOR'S DETERMINATION

I, John Patrick Fisher, the appointed adjudicator in the matter of the dispute over payment between the Applicant and the Respondent determine that:

The Respondent shall pay to the Applicant the sum of \$1,337,821.89 (One million, three hundred and thirty seven thousand eight hundred and twenty one dollars and eighty nine cents) inclusive of GST within seven days of the issue of this determination (as dated on the front page). Thereafter if the sum remains, unpaid interest shall be due at the rate set out in accordance with the *Supreme Court Act* Section 85 until payment is made.

3. BACKGROUND

In February 2006 the Applicant commenced working for the Respondent supplying [manpower including both labour and supervisory staff] and other items to the Respondent for construction work on the [Project] in the Northern Territory. In addition the Applicant was required to supply certain other items essential to the operation of the workforce. The initial commission developed into a contract dated 15 May 2006 that continued into 2008.

A mechanism existed within the contract to make monthly payments based on the labour and materials supplied marked up by adding a percentage overhead and profit. A disagreement arose between the parties in late December 2007 over the payment mechanism and the right to audit payroll records of the labour supplied.

As a consequence of this disagreement only part of the amount claimed by the Applicant in the December 2007 invoice was certified for payment by the Respondent. When the amount claimed by the Applicant was not paid by the Respondent a payment dispute arose. The Applicant applied to have the dispute adjudicated under the *Construction Contracts (Security of Payments) Act* (NT).

4. APPOINTMENT OF THE ADJUDICATOR

On 18 April 2008 I, John Patrick Fisher, an adjudicator registered in the Northern Territory, was contacted by the Institute of Arbitrators and Mediators Australia ("IAMA") to establish if I was willing and able to accept the nomination as adjudicator for the adjudication of the payment dispute between the Applicant and the Respondent.

On 21 April 2008 IAMA formally nominated me and on the same date I emailed my acceptance to IAMA confirming that as far as I was aware I had no conflicts of interest. IAMA informed me that they would forward the Application forthwith.

On 23 April 2008 I received the Response from Clayton Utz Lawyers acting on behalf of the Respondent. It was apparent from the Response that the Application was served on 9 April 2008. This provided two issues that had to be resolved prior to confirming that I had jurisdiction to adjudicate the dispute.

1. Under the Construction Contracts (Security of Payments) Act 2004 ("Act") the Prescribed Appointer has 5 days in which to make a nomination. Unfortunately IAMA was holding its annual conference in Perth on 11-13 April 2008 and all senior staff were away from the Melbourne office to where the Application had been sent. As a consequence the length of time taken to make a nomination was 12 days.
2. I was in the position of receiving the Response before the Application. The Act requires that an adjudicator shall determine the issue within 10 working days of receipt of the Response unless the Registrar grants an extension. Clearly this timing assumes that the adjudicator has received the Application prior to the Response.

In order to resolve this situation I wrote to the Registrar on 24 April 2008 regarding both matters. He noted that due to the delay the validity of my appointment by IAMA was uncertain. Accordingly he exercised his power to appoint me under the Act to confirm my appointment. Further he agreed to me having a 20 working day extension from the date that the application was finally delivered to me, so as to put me in the same position that I would have been in had the Application been received by me on the same day as it was received by the Respondent.

On 29 April 2008 I received the Application from IAMA. Thus I was required to dismiss the Application or issue a determination no later than 27 May 2008.

5. CONFLICT OF INTEREST

I confirm that I have not dealt with either the Applicant or the Respondent previously and therefore perceive no conflict of interest. I have had brief professional dealings with both parties' solicitors on previous occasions on matters unrelated to the adjudication. I see no reason for disqualification due to conflict of interest under S.31 of the Act.

6. JURISDICTION

Jurisdiction is determined by the following factors:

1. That the adjudicator be appointed by either the Registrar or by a prescribed Appointer (refer s28(1) of the Act).
2. That the contract for the works was formed after the date of proclamation of the Act being 1st January 2005 (refer Part 1 s.2 (1)).
3. That the works be a "site in the Territory" (refer Part 1 s.6(1)).
4. That there is a payment dispute, as given in Part 1 s.8 of the Act.
5. That the applicant applying for adjudication be a party to the contract as defined in Part 3 s 27 of the Act, noting the exceptions under sub clauses (a) and (b).
6. That the application for adjudication be made within 90 days after the dispute arises, as defined under Part 3 s. 28 (1) of the Act.
7. That the matter relates to "construction work", as given in the definition of this term, Part 1s.6 of the Act.

With respect to the specific facts of this case, I deal below with each of the issues in points 1 to 7 above:

1. The manner of appointment has been dealt with above. The Application has been satisfactorily served in accordance with the requirements of S28. Although the time taken by IAMA to nominate an adjudicator was outside that required in the Act I am satisfied that confirmation of appointment by the Registrar is a valid appointment under the Act. I note further that both parties acceptance of my appointment by email on 29 April 2008.
2. The contract was dated 15 May 2006, which is after the commencement of operation of the Act.
3. The site is within the Northern Territory.
4. There is a payment dispute within the meaning of the Act. The dispute arose on 17 March 2008 due to non-payment of part of Invoice No 006.037 of 31 December 2007 within 45 days of certification.
5. The Applicant is a Party to the contract.
6. The application for adjudication was made on 4 April 2008, which was within 90 days after the dispute arose.
7. The matter related to the supply of labour and supervision for the site and the work clearly falls under the definition of "construction work"

Finally 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 therefore satisfied that I have jurisdiction to adjudicate.

7. DISPUTED ISSUES

Contentions of the Parties

The parties refer in their contentions to figures both including and excluding GST. For the purposes of clarity I have referred to all figures exclusive of GST.

For the avoidance of doubt I confirm that I have taken into account all the matters raised within the submissions of both parties. For expediency and economy within the spirit of the Act I have limited my comments on contentions to the salient points sufficient to show my reasons.

The Applicant contends that:

- The contract payments were based on rates, which were submitted in its proposal of November 2005.
- These rates were applicable to the first three months of the contract only.
- That the parties agreed to adjust these rates if the contract were to be extended beyond 31 May 2006 and that thereafter a rate adjustment would be made every 6 months.
- On 15 May 2006 the Parties formally entered into a construction contract, which provided for lump sums and other amounts calculated by reference to the rates.
- The Applicant submitted regular monthly invoices based on the rates for approximately two years.
- On this basis the Applicant submitted an invoice on 31 December 2007 for the sum of \$1,716,201.72, which the Respondent was required to certify in accordance with Clause 19.1 of the contract.
- On 24 January 2008 the Respondent's certifier certified partial payment only in the amount of \$191,680.48, stating that he was unable to determine correct monies due to the Applicant.
- On 26 March 2008 after negotiation between the parties the Respondent paid the sum of \$500,000.00 being the amount certified and a further sum on account.
- That the Applicant is due the outstanding amount of the 31 December 2007 invoice (*being \$1,216,201.72.*)
- That the Applicant is due interest at 8% per annum from 15 March 2008.

The Respondent contends that:

- It disputes two elements of the invoice of 31 December 2008, being:
 - \$1,321,562.64 claimed for wages labour, for which it certified \$0.00
 - \$61,604.00 claimed for tools, for which it certified \$57,400.00

As a consequence of these reduced figures the elements claimed for Contractor's Fee of 6% of the cumulative certified costs and the Contractor's Overhead of 15% of the cumulative certified costs were reduced in mathematical proportion.

- In accordance with the construction of the contract the payment is based, not on rates, but on actual costs substantiated by audited payroll records and therefore the amount claimed for wages labour was wrongly calculated.
- Since the Applicant had not established the wages labour cost actually paid, it was not possible to determine any amount in respect of wages labour and there was therefore no entitlement to payment until this was established.
- That on 15 January 2008 the Respondent attempted to audit the payroll records but was unable to do so since the Applicant failed to provide sufficient information.
- That subsequent to the attempted audit the Applicant had informed the Respondent that total wages labour paid on the basis of rates during the contract exceeded the payroll cost by \$987,960.

Issues to be Determined

On the basis of the Application and Response summarised in the contentions above I find that I need to decide:

1. The payment basis agreed in the contract,
2. Whether it was possible to determine and certify any amount in respect of wages labour within the invoice of 31 December 2008.
3. The amount, if any, to be certified for wages labour,
4. Whether there was a basis for a reduction in the certified amount for small tools, consumables and other items.
5. The amount to be certified for small tools, consumables and other items.

In consequence I will then need to determine any overall payment to be made.

Payment Basis of the Contract

I am in general agreement that the construction of the contract is as described by the Respondent in Section 2.2 of the Response. That is:

The Formal Agreement Clause 4 sets out the consideration in the contract:

The Principal shall pay to the Contractor in consideration of the carrying out of the services the Price or such other sum as becomes payable under the provisions of the Services Agreement at the times and in the manner prescribed by the Services Agreement.

The Price is defined in Clause 1.2 of Section 3 of the General Conditions as:

"Price" means the lump sum price, schedule of rates or other method of calculating the price as stated in Section 4 – schedules."

Section 4 – Schedules sets out the Price by reference to the "Terms of Compensation" which states:

The Terms of Compensation can be broken down into the following:

Schedule 1 – Reimbursable Contractors Costs

Schedule 2 – Unit Rates

Schedule 3 – Contractors Overhead and Fee

All costs are subject to audit in accordance with General Condition Clause 15. The Service Agreement is an “open book” Agreement whereby the Principal can review any costs on the Project.

Section 4 – Schedule 1 to 3 define the basis upon which the Contractor will be paid as well as the basis for establishing the Estimated Agreement value.

I would add that Clause 6 of the Formal Agreement states that:

“ The documents listed in Clause 2 shall constitute the entire Agreement between the parties and any prior agreement in conflict or at variance with it or any correspondence or documents relating to the subject matter of the Agreement that may have passed between the parties to the Agreement prior to its execution shall have no effect.”

It cannot therefore be construed that the practice of payment on account by reference to a schedule of rates for wages labour, which started prior to signing contract and continued until November 2007, changes the contract in any way. It is clear to me that the essence of the agreement was that final costs were to be established by an auditable open book process.

Certification of Wages Labour

Although the contract stated that the Price is to be determined on an open book basis, both parties acquiesced to the principal of interim payment on account by reference to rates for 36 consecutive invoices over a period from May 2006 to November 2007.

The Contract requires under Clause 19.1 of the General Conditions that:

“The Contractor shall deliver to the Principal by the last day of the month a Tax Invoice made out to the address of the Principal listed in Annexure A claiming all amounts the Contractor considers due to the Contractor for the Services performed during that month.”

The Clause describes the requirements for the content of the invoice and then states:

“The Principal shall, within fourteen (14) days of receipt of a Tax Invoice, certify the amount due to the Contractor.”

The term “certify” is not a defined term under the Contract. It can therefore be regarded as having its general meaning in common usage. The Oxford English Dictionary offers the meaning of “assess”. The nature of assessment is the making of a decision based on the evidence that is available. By implication the certifier becomes vested with duties that oblige him to act fairly and justly and with skill to both parties to the contract (*Perini Corporation v. Commonwealth of Australia [1969] 2 NSW 530*).

The certifier, having certified 36 previous invoices based on the basis of hours sheets and rates provided by the Applicant, had the ability to assess fairly and justly and with skill to both parties to the contract, the December invoice in the same manner as the previous invoices.

At about the same time that the payment was to be certified, the Respondent decided that they wished to audit the costs invoiced in all invoices under the Contract to that date. A dispute arose between the parties as to the amount of information that the Applicant should be obliged to supply to the Respondent at the audit. The Respondent claimed that, in accordance with the Terms of Compensation that:

“The Service Agreement is an “open book” Agreement whereby the Principal can review any costs on the Project.”

The penultimate sentence of Clause 1.2 of Schedule 1 – Reimbursable Contractor Costs, which states:

“Subject to General Conditions Clause 15 the Principal or an agent of the Principal may audit the payroll records to verify the hours actually paid pursuant to this clause.”

The Applicant took the view that only hours were auditable. In its letter to the Respondent of 21 December 2007 the Applicant added:

“For the avoidance of doubt, [the Respondent] is not entitled to audit [the Applicant’s] Wages Labour Rates, Lump Sum Charges and the labour costs of [the Applicant].”

The dispute over the entitlement to audit is a matter, which I, as adjudicator, have no authority to determine. However the audit dispute resulted in the payment dispute consequent upon the Respondent’s decision not to certify any wages labour costs on the basis that without the audit the Respondent had no mechanism for assessing the wages labour costs. It is the payment dispute, which is the subject of this adjudication.

In its Response at 2.2.1 (b) the Respondent asserts that:

*“In respect of wages labour for the period of the December payment claim, the [Applicant] did not claim, nor did it provide any evidence that established, the cost that it actually incurred in respect of wages labour, with the result that it is not entitled to **any** amount of wages labour” (my emphasis).*

On the balance of the evidence put before me I consider that this is incorrect. the Applicant provided records of hours worked and rates as estimates of wages labour incurred. For some 36 payments this evidence had been considered by the certifier to be sufficient to certify an on account payment. The basis of the evidence did not change when submitted in the December 2007 invoice.

In the event that such an on account payment results in an overpayment there is a mechanism in the contract under Clause 19.3 Set Off and Clause 19.5 Final Payment Certificate to claw back any over certified amount. Such clauses do not permit failure to certify.

I therefore determine that the Applicant did provide a breakdown of labour hours and that on the basis that the certifier had successfully done so on 36 previous occasions, it was possible for the certifier to certify an **on account** payment for wages labour and that the on account payment is \$1,321,562.64.

Certification of Payment For Small Tools, Consumables And Other Items

The parties dispute the amount payable for small tools and consumables. The Applicant has claimed \$61,604 and the Respondent has certified \$57,400.

The parties appear to be in agreement over the mechanism for payment within the contract and dispute only whether an amount has been claimed for General Superintendent, Engineer and Supervisor when such an amount is specifically excluded by the contract.

I refer to two schedules provided by the Applicant:

- Schedule 1.1 – Labour Chargeout Schedule
- Schedule 2.1 – Unit Rates Costs

Schedule 2.1 states that the total of direct man hours worked was 15,401 hours. The Applicant has not shown how it calculates this figure. Neither has the Respondent shown how it reaches the certified figure of \$57,400. I have therefore relied on my own calculations below, extracting figures from Schedule 2.1.

Hours	Normal Time	Time and a Half	Double Time	Double Time and a Half	Travel	TOTAL
General Superintendent	144.00	40.00	46.00	16.00	0.00	246.00
Engineer	48.00	16.00	40.00	0.00	30.00	134.00
Supervisor	466.00	144.00	374.50	37.50	94.00	1,116.00
TOTAL SUPERVISORY	658.00	200.00	460.50	53.50	124.00	1,496.00
All staff	8,453.00	2,494.50	4,636.50	465.50	1,104.00	17,153.50
LABOUR	7,795.00	2,294.50	4,176.00	412.00	980.00	15,657.50
Small tools rate/man hour						\$1.50
Trade consumables rate / man hour						\$2.50
TOTAL RATE						\$4.00
TOTAL DUE	(Labour x rate)					\$62,630.00

From the table above I note that **after deducting supervisory staff** the total small tools and consumables cost is \$62,630. Since the Applicant has claimed \$61,604, which is less than the total due according to the table. I determine that on the balance of probability, the Applicant has deducted hours for supervisory staff and therefore are due their claim of \$61,604.

It should be noted that again this payment is on account only and that the final amount will need to be settled following audit.

Amount Due For Payment

Based on the determinations above the amount which should have been paid is as set out in the Applicant's December 2007 invoice,

The Applicant has claimed interest on payments due and unpaid as at 15 March 2008. The date from which interest should become payable is calculated by reference to Clause 19.1.

"Within 45 days after the end of the month in which the Principal received the Contractor's claim for payment, the Principal shall pay to the Contractor the amount certified to be due to the Contractor."

The claim for payment was received in January and the final date for payment was 45 days after the end of the month, i.e. 16 March 2008, (there being only 29 days in February 2008). Interest is therefore due from the day after the final date for payment, i.e. 17 March 2008.

Section 85 of the Supreme Court Act provides for an interest rate of 8% and I have calculated that interest due would be \$17,859.84. However, the December 2007 payment was only on account and therefore, by its nature, an estimate. Further it is apparent that the Applicant's refusal to permit a full audit precipitated the dispute and that the Applicant is to some extent the architect of its own misfortune of delay to payment. Additionally, the Respondent's statement in para. 2.3.15 of the Response suggests that on the balance of probabilities overpayment of \$987,960.86 may have been established after the interim payment was due. I have therefore disallowed the claim for interest up to the date when I have determined payment should be made. If the payment remains unpaid thereafter interest will accrue at the rate of 8%.

Thus I determine that the amount due for payment is \$1,337,821.89 (including GST) calculated as follows:

Amount invoiced	1,716,201.72
Amount paid to date	<u>500,000.00</u>
Amount underpaid	1,216,201.72
GST	<u>121,620.17</u>
TOTAL due incl. GST	\$1,337,821.89

This amount shall be payable within seven days of the date of this determination (see front cover.)