

**Adjudicator's Determination**  
17.07.01

Adjudicator Registration Number 17

**Pursuant to the Construction Contracts (Security of Payments)  
Act 2004 (NT)**

I, Charles H. Wright, as the appointed Adjudicator pursuant to the Construction Contracts (Security of Payments) Act 2004 (the Act), determine that the Adjudicated amount in respect of the Adjudicated Application served 18 December 2006 is \$176,771.38 inclusive of GST.

1. The date payable is no later than 5 February 2007.
2. No security is presently due to be returned.

### **Appointment of Adjudicator**

3. I was appointed as Adjudicator to determine this dispute by the Territory Construction Association Incorporated on Friday 15 December 2006, and later, by agreement with the parties.

### **Acceptance of Adjudication Application**

4. I confirmed my acceptance as adjudicator in a telephone conference call on Monday 8 January 2007 and recorded in Item 12. of the Minutes of Telephone Conference Call (item 7.10 below refers)

### **Documents Regarded in Making the Determination**

5. In making this determination I have had regard to the following:
  - 5.1 The provision of the Construction Contracts (Security of Payments) Act 2004;
  - 5.2 Extracts of the provisions of the construction contract from which the adjudication arose;
  - 5.3 Extract of a presentation relating to a Construction Contracts course session;
  - 5.4 Change Order Request Number COR #029 dated 16 November 2006 to which the application relates;
  - 5.5 The response to Claim Ref: COR #029 by the Respondent's Architect dated 17 November 2006;
  - 5.6 The payment claim dated 30 October 2006 to which the application relates;
  - 5.7 The response to the payment claim by the Respondent's Architect dated 22 November 2006;
  - 5.8 The notification of Practical Completion dated 31 October 2006 to which the application relates;
  - 5.9 The response to the Practical Completion notification by the Respondent's Architect dated 23 November 2006;
  - 5.10 Submission from the Applicant dated 12 December 2006 submitted with the Application for Appointment of Adjudicator;
  - 5.11 The Adjudication Response by the Respondent dated 28 December 2006;
  - 5.12 A question put by the Adjudicator to both the Applicant and the Respondent and the Respondent's Solicitor and Agent dated 12 January 2007;

5.13 A response from the Applicant to the Adjudicator question dated 12 January 2007.

### **Conference with the Parties**

6. A telephone conference was held with the parties on Monday 8 January 2007 to deal with formal and procedural matters. The following matters were agreed at the telephone conference;
  - 6.1 The individuals agreed that they had authority to make decisions and bind the parties they represent;
  - 6.2 The parties agreed that the Adjudicator had jurisdiction in this payment dispute;
  - 6.3 The parties agreed to adhere to the proposed timetable for any further responses required;
  - 6.4 The parties agreed that no other adjudication application had been sought;
  - 6.5 The parties agreed that this payment dispute is not subject to an order, judgement or other finding by an arbitrator or other person or a court or other body;
  - 6.6 The parties agreed that they were satisfied that no conflict of interested existed between the parties and the Adjudicator;
  - 6.7 The Respondent's Solicitor and Agent confirmed and agreed that the Adjudication Application was correctly served on the Respondent on 18 December 2006;
  - 6.8 It was confirmed and agreed that the Respondent's response was served on the Adjudicator by the Appointer on Tuesday 2 January 2007 although the response is dated 28 December 2006 and was served on the Applicant and the Appointer on that date;
  - 6.9 Neither party has any objections to the Adjudicator;
  - 6.10 The Adjudicator had accepted the appointment on 15 December 2006;
  - 6.11 Both parties accepted the estimate of the fee and agreed to have the fee allocated as determined by the Adjudicator.

### **Determination**

7. The Act requires (at s.33(1)) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) -*
  - (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 section 35; and*
    - (ii) *the date on or before which the amount must be paid or the security must be returned.*

8. The Respondent's response has been received, and therefore, s.33 of the Act requires a determination to be made within the *prescribed time* in accordance with s33(3)(a) which provides that;
  - 8.1 (a) if the appointed adjudicator is served with a response under section 29(1) – 10 working days after the date of the service of the response; or
  - 9.2 (b) otherwise – 10 working days after the last date on which a response is required to be served under section 29(1).
  - 9.3 My determination is therefore required by 15 January 2007 taking into account excluded days within Darwin.

### **The Adjudication Application**

9. The adjudication application consists of the following papers:
  - 9.1 Application for Appointment of Adjudicator (6 pages) dated 12 December 2006 and detailing the dispute between the Applicant and the Respondent which includes the following;
    - (a) Schedule of Correspondences;
    - (b) Various items of correspondence from the Applicant to the Respondent;
    - (c) Various items of correspondence from the Respondent to the Applicant;
    - (d) Copy of Australian Building Industry Contract ABIW MW – 1 2003 Major Works Contract;
    - (e) Extracts of a presentation relating to Construction Contracts course session.

### **The Construction Contract for the purposes of the Act**

11. The Act defines a *Construction Contract* (s.5) as:

11.1 (1) *A construction contract is a contract (whether or not in writing) under which a person (the "Contractor") has one or more of the following obligations:*

- (f) *to carry out construction work;*

12. The contract is for work on a *site in the Territory*, is a contract undertaking *construction work* as defined in s.6(1)(c) of the Act and is therefore a *construction contract* under the Act.

13. Compliance with certain conditions of the contract in dispute;

13.1 Additional work was performed by the Applicant with the application for payment being rejected by the Respondent's Architect;

13.2 A payment claim had been submitted by the Applicant and has not been paid in full;

13.3 Practical Completion has been denied by the Respondent's Architect preventing the

return of one half of security being held to the Applicant;

13.4 The Applicant relies on section 20 of the Act, in particular Schedule, Division 5 which is rejected by the Respondent's Solicitor and Agent.

14. Certain conditions of the contract are not in dispute;

14.1 A construction contract was entered into in or about March 2006;

14.2 Condition of contract ABIC MW – 1 2003 Major Works Contract;

14.3 The Architect identified in Item 2 of the Introduction of the contract has been appointed in accordance with clause A6 of the contract;

14.4 The contract makes provision for dealing with claims to adjust the contract and variations to the works.

15. Prohibited provisions;

15.1 The payment terms stated in the contract fall within the maximum period stated in s.13 of the Act and are therefore not a prohibited provision.

16. Implied provisions;

16.1 The Applicant relies on section 20 of the Act, in particular Schedule, Division 5 which is rejected by the Respondent's Solicitor and Agent.

16.2 The remaining implied conditions are not relevant to this adjudication.

### **Conditions for Determining the Adjudications**

17. The conditions for determining the adjudication have been met. The contract is a construction contract as defined by the Act. The site is a site in the Territory. There is a payment dispute. The Application for adjudication has been prepared and served and save and except in respect of the claim hereinafter referred to as Part A, is in accordance with s.28 of the Act, within time limits, served on the parties and the Adjudicator. The Adjudicator requires no deposit to be paid in this instance. The parties have confirmed that there is no other proceedings on a matter raised arising from the construction contract and being the subject of this determination.

### **Separation of Issues**

18. There are three separate issues for determination that will be dealt with in the following manner;

18.1 **PART A** – A payment claim for additional works recorded in the Applicant's Change Order Request Number COR #029 dated 16 November 2006 that is rejected by the Respondent's Architect;

18.2 **PART B** – A payment claim dated 30 October 2006 made by the Applicant that has not been certified to be paid in full by the Respondent's Architect that is disputed by the Applicant;

18.3 **PART C** – Return of one half of the Applicant’s security held by the Respondent is applied for by the Applicant and the application for the return of the security is rejected by the Respondent.

## **PART A**

### **The Payment Claim**

19. The payment claim is dated 16 November 2006. The amount claimed is \$1,169.30 including GST.

20. The details of the claim are;

Replace damaged ceiling tiles	\$ 966.36
Subtotal	\$ 966.36
10% Builder’s Mark-up	\$ 96.64
	\$1,063.00
10% GST	\$ 106.30
<b>TOTAL (inclusive of GST)</b>	<b>\$1,169.30</b>

### **The Applicant’s Supporting Documents**

21. The Applicant’s supporting documents are;

21.1 The Applicants Change Order Request Number COR – 0027 dated 21 September 2006 being for the supply and installation of 12 concealed thermal and remote LED’s cabling and associated fittings, and noting that “Any damage to ceiling is extra”;

21.2 The Applicants Change Order Request Number COR #029 dated 16 November 2006 being for replacement of damaged ceiling tiles;

21.3 The Respondent’s Architect letter dated 17 November 2006 dismissing the Applicants claim for payment for COR #029;

21.4 The Applicant’s letter dated 17 November 2006 expanding on the circumstances surrounding COR 027 and COR 029 and requests payment of “...the Invoice attached for this work within 7 days.....” ;

21.5 Adjudication Application dated 12 December 2006;

### **Response to Payment Claim**

22. The Respondent’s Solicitor and Agent disputes that there are any grounds for a claim and denies any agreement was made between the parties, there are no contractual terms to support the claim, the claim does not include information required to be included when making a claim to adjust the contract under section H of the contract, the work is not a variation to the contract, and section 8 of the Act does not apply as the amount is not due to be paid under the contract.

## The Respondent's Supporting Documents

23. The Respondent's supporting documents are;

23.1 The Respondent's Architect's letter dated 17 November 2006;

23.2 Adjudication Response dated 28 December 2006;

23.3 The condition of contract ABIC MW – 1 2003 Major Works Contract.

### Payment Claim

24. The payment claim is taken to be the Applicant's Change Order Request Number COR #029 dated 16 November 2006 in the sum of \$1,169.30 inclusive of GST.

25. On 17 November 2006 the Respondent's Architect dismissed the claim.

26. On 17 November 2006 the Applicant responded to the Respondent's Architect letter of the same date expanding on circumstances leading to COR 027 and COR 029 and ending the letter with;

*We require payment of the Invoice attached for this work within 7 days otherwise we will be obliged to recover the monies due in accordance with the Construction Contracts (Security of Payments) Act 2004 (Northern Territory).*

27. The Applicant's letter dated 17 November 2006 and provided for this Adjudication contains one page and is minus the attachment.

28. The dispute arose on 17 November 2006 with the rejection by the Respondent's Architect of the Applicant's claim with the Applicant serving the Respondent with the Application for Adjudication on the 18 December 2006, 31 calendar days later which is outside the time prescribed under section 28(1) of the Act.

29. The Act requires (at s.33(1)) *An appointed adjudicator must, within the prescribed time or any extension of it 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;*

30. Accordingly there is no jurisdiction to consider this payment claim, or any matter arising from the claim, as the application was not served within the time prescribed by section 28(1) of the Act.

31. However, had the Application for Adjudication been served within the time required in section 28(1) of the Act, my findings would have been as follows;

31.1 Taking the payment claim as the Applicant's Change Order Request Number COR #029 dated 16 November 2006 and dealing with it under the contract, the procedures for making a payment claim in section N3.2 of the contract have not been complied with and a payment dispute has not arisen under s.8 of the Act as no money is due and

payable under Application for Progress Payment No. 7 dated 30 October 2006;

31.2 Taking the payment claim as the Applicant's Change Order Request Number COR #029 dated 16 November 2006 and dealing with it under the Act, it does not comply with division 4 of the Act nor is it a valid tax invoice.

32. As the invoice said to be attached to the Applicant's letter dated 17 November 2006 has not been provided, no determination can be made on that document.

## **PART B**

### **The Payment Claim**

33. The payment claim is dated 30 October 2006. The amount claimed is \$321,669.79 including GST.

34. The details of the claim are;

Progress Claim No. 7	\$292,427.08
Subtotal	\$292,427.08
10% GST	\$ 29,242.71
<b>TOTAL (inclusive of GST)</b>	<b>\$321,669.79</b>

### **The Applicant's Supporting Documents**

35. The Applicant's supporting documents are;

35.1 The Applicants Tax Invoice 06-02-05a dated 26 October 2006 for Claim No. 6 together with a two page progress payment application dated 29 September 2006 and the Respondent's Architect's cover letter and Progress Certificate No. 6 dated 25 October 2006;

35.2 The Applicants Tax Invoice 06-02-06 dated 30 October 2006 for Claim No. 7 together with a two page progress payment application dated 30 October 2006 and the Applicant's revised Tax Invoice No. 06-02-06a dated 23 November 2006;

35.3 The Applicants letter dated 22 November 2006 to the Respondent's Architect raising concern that Progress Claim No. 7 had not been processed;

35.4 The Respondent's Architect cover letter dated 22 November 2006 and attached Progress Certificate No. 7 and breakdown of payment;

35.5 Adjudication Application dated 12 December 2006;

### **Response to Payment Claim**

36. The Respondent's Solicitor and Agent disputes that there are any grounds for a claim due to a number of factors, including;

36.1 Incorrect wording on the declaration required to be signed on the Applicant's progress payment application preventing the progress payment application being processed;

36.2 Time for commencement of processing the Applicant's progress payment application ought to be 15 November 2006 being in accordance with the date for submitting progress

claims in item 25 of schedule 1 of the contract;

36.3 the Applicant had available to them other means of disputing the valuation of the progress payment application;

36.4 Notes that Progress Certificate No. 6 as issued by the Respondent's Architect is not in dispute.

### **The Respondent's Supporting Documents**

37. The Respondent's supporting documents are;

37.1 The Applicant's letter dated 22 November 2006;

37.2 Adjudication Response dated 28 December 2006;

37.3 The condition of contract ABIC MW – 1 2003 Major Works Contract.

### **Payment Claim**

38. The Applicant submitted an Application for Progress Payment No. 7 together with tax invoice No. 06-02-06 dated 30 October 2006, in the amount of \$321,669.79 including GST to the Respondent via the Respondent's Architect.

39. The contract allows the Applicant in clause N3.1 to submit *one claim for a progress payment in each month, on or after the date in each month shown in item 25 of schedule 1, unless a different date is agreed in writing between the contractor and owner.*

40. The date given in item 25 of schedule 1 is, *if nothing stated, the 15<sup>th</sup> of the month.*

41. On the balance of probability, it appears that by convention, the Applicant made an application for progress payments near the end of each month; application for progress payment No. 6 dated 29 September 2006, application for progress payment No. 7 dated 30 October 2006, both dates being *after* the 15<sup>th</sup> of the month.

42. Under clause N4.1 of the contract, the Architect must assess a progress payment within 10 business days after receiving a claim for a progress payment.

43. The Applicant expressed concern by letter to the Respondent's Architect dated 22 November 2006 that progress claim No. 7 had not been processed.

44. The Respondent's Architect issued Progress Certificate 07 dated 22 November 2006 in the amount of \$42,998.65 including GST to the Applicant which contained a cover letter, Certificate No 07, a breakdown of the payment value of the certificate together with the Applicant's tax invoice No. 06-02-06 and two page application for progress payment No. 7.

45. Clause R2.3 of the contract provides that, *If a document is delivered, or an error free transmission report is received after 5.00pm the document is to be treated as having been delivered at the beginning of the next working day.*

46. Progress Certificate No. 7 issued by the Respondent's Architect is dated 22 November 2006 with the Applicant receiving it by facsimile transmission on 22 Nov 2006 17 : 34 from 89811445. It is therefore, taken to be received on 23 November 2006.

47. The Applicant submitted a tax invoice No. 06-02-06a dated 23 November 2006, in the amount of \$42,998.65 including GST to the Respondent via the Respondent's Architect.
48. There is a difference of \$278,671.14, including GST, between the Applicant's payment claim of \$321,669.79 including GST, and the amount certified by the Respondent's Architect to be paid by the Respondent of \$42,998.65 including GST.

49. Section 8 of the Act, states;

*A payment dispute arises if –*

*(a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed;*

50. I find that there is a payment dispute under the Act which is simply demonstrated in the above recitals from 38. to 48. inclusive, and accordingly, I have jurisdiction to consider this payment claim.

51. In making this determination, I will take into consideration the following;

51.1 I am not distracted by the incorrect wording of the declaration on the Applicant's Application for Progress Payment as the Respondent has had the opportunity to have it corrected on previous claims.

51.2 The Applicant's Claim No. 6 dated 26 October 2006 and comprising the Respondent's Architect's cover letter and Certificate No. 06 dated 25 October 2006 and the Applicant's two page Application for Progress Payment No. 6 dated 29 September 2006, whilst not forming part of this dispute it is therefore a document that contains information and data that both parties agree to;

51.3 The Applicant's Claim No. 7 dated 30 October 2006 and comprising the Applicant's two page Application for Progress Payment No. 7 dated 30 October 2006.

51.4 The Respondent's Architect's cover letter, Certificate No. 07 and Certificate breakdown all dated 22 November 2006.

51.5 Other documents as required and as noted in recital 6. above, Documents Regarded in Making the Determination.

52. The difference between the Applicant's payment claim and the amount certified to be paid by the Respondent in recital 48. above, is not explained either by the Respondent or the Respondent's Architect.

53. Clause N4.2 of the contract instructs the Architect;

*When assessing a claim for a progress payment the architect must take account of each of the following:*

- *any adjustment to the contract price since any previous assessment*
- *the proportion of the contract price representing the value of the work completed up to and including the day of the claim, making allowance for the cost of rectifying defects*

- *the proportion of the contract price representing the value of materials and equipment delivered to the site for incorporation in the works up to and including the day of the claim, provided title has passed to the contractor*
- *an allowance for cash retention where clause C2 applies*
- *any claim by the owner for a set off of monies due under this contract*
- *the owner's entitlement to liquidated damages, in accordance with clause M11, since any previous certificate, calculated up to the date of the certificate*
- *any other matter to be taken into account in accordance with this contract*
- *GST*

54. Clause N4.3 of the contract instructs the Architect;

*The certificate must identify the amount of GST that has been included and the architect must give written reasons for any difference between the (GST exclusive) amount certified and the (GST exclusive) amount claimed.*

55. The Respondent has not demonstrated any valid reasons for the reversal of some values within Progress Certificate No. 7 nor given any reasons supporting the lower certified value than the value in the Applicant's Application for Progress Payment No. 7, other than, attributing the assessment of the progress claim to that of the Respondent's Architect's certification.
56. On the balance of probability, I find that the Applicant is entitled to receive a substantial portion of the sum claimed in the Applicant's Application for Progress Payment No. 7 dated 30 October 2006.

### **Payment for Claim**

57. The Respondent's Architect has not provided, with Progress Certificate 07, *written reasons for any difference between the (GST exclusive) amount certified and the (GST exclusive) amount claimed by the Applicant.*
58. The Respondent's Architect has not provided an explanation of how an item certified as 100% complete in a previous claim is reduced in value in a subsequent claim.
59. The Applicant contends by email dated 31 October 2006, that the works had reached the Practical Completion stage which supports the percentages claimed in the Application for Progress Payment No. 7, although this is disputed by the Respondent's Architect and is the subject of Part C of this adjudication.
60. In determining the amount to be paid I have regard to the following;
- 60.1 The Applicant's Claim No. 7 dated 30 October 2006;
- 60.2 The Applicant's admission on page 3 of the Application for Appointment of Adjudicator and noting *that part of Progress Claim Number 07 is disputed, namely COR #15 and COR #19, and COR #18 is currently subject to litigation.*

61. The adjudicated amount is;

Applicant's Application for Progress Payment No. 7	
Value of this claim (excluding GST)	\$292,427.08
Deduct disputed variations;	
COR #015	\$ 1,078.00
COR #018 (portion disputed \$112,215.54-\$25,000.00)	\$87,215.54
COR #019	\$ 6,380.00
Total (excluding GST)	\$197,753.54
Deduct amount certified for payment (excluding GST)	<u>(\$ 39,089.68)</u>
Total (excluding GST)	\$ 158,663.86
GST 10%	\$ 15,866.39
<b>TOTAL (inclusive of GST)</b>	<b><u>\$174,530.25</u></b>

62. Item 4 of schedule 1 of the contract, sets a prescribed time for the period of payment of certificates as within 21 days after delivery of the certificate and the tax invoice (if applicable). Payment then is due to be paid no later than 5 February 2007 and being 21 days after the date of determination.

63. I find that interest is to be applied to the outstanding amounts;

63.1 Progress Certificate 07 was issued on 23 November 2006, refer recital 46. above, being 8 business days late, 12 calendar days late;

63.2 The amount determined to be outstanding on Progress Certificate 07 that was issued on 23 November 2006, and determined to be paid no later than 5 February 2007 on 15 January 2007, is 52 calendar days late;

63.3 The interest rate applicable on overdue amounts is stated as 7% per annum in item 27 of schedule 1 of the contract.

64. Interest payable is;

Interest payable on \$197,753.54 plus GST = \$217,528.89	
\$217,528.89 at 7% PA x 12 days	\$ 500.61
Interest payable on \$158,663.86 plus GST = \$174,530.25	
\$174,530.25 at 7% PA x 52 days	\$1,740.52
<b>TOTAL (inclusive of GST)</b>	<b><u>\$2,241.13</u></b>

65. Interest is to be added to the amount adjudicated in recital 61. above and paid together on 5 February 2007.

## **PART C**

### **Return of Security Claim**

66. The written notification by the Applicant that the works have reached Practical Completion was issued on 31 October 2006.

67. The Applicant's request for the return of the bank guarantee, held as security, was made by letter on 23 November 2006.

## **The Applicant's Supporting Documents**

68. The Applicant's supporting documents are;

68.1 Parap Primary School Redevelopment Stage 2B Minutes of Site Meeting 20 dated 8 September 2006;

68.2 The Applicant's emailed letter dated 31 October 2006 to the Respondent's Architect;

68.3 The Respondent's Architect's letter dated 23 November 2006 advising that the works should have reached Practical Completion by 22 November 2006 and advising that the Respondent may impose liquidated damages for late completion;

68.4 The Applicant's letter dated 23 November disputing the Respondent's Architect's letter dated 23 November 2006 and rejecting any claims for liquidated damages.

## **Response to Application for Return of Security**

69. The Respondent's Solicitor and Agent disputes that there are any grounds for the return of the security due to a number of factors, including;

69.1 Doubt surrounding the Applicant's emailed letter dated 31 October 2006 being served correctly or being received by the Respondent's Architect;

69.2 Notification by the Applicant to the Respondent's Architect requesting a practical completion inspection not being made in accordance with section M of the contract;

69.3 A notice of practical completion has not been issued by the Respondent's Architect to the Applicant;

69.4 As no notice of practical completion has been issued to the Applicant, security is not required to be returned, therefore, there is no dispute.

## **The Respondent's Supporting Documents**

70. The Respondent's supporting documents are;

70.1 Adjudication Response dated 28 December 2006;

70.2 The condition of contract ABIC MW – 1 2003 Major Works Contract.

## **Return of Security**

71. Clause C7.1 of the contract states;

*When the architect issues the notice of practical completion, the contractor is entitled to the release of 50% of the value of the security held*

72. By acknowledgement of both parties there are outstanding items of work and deliverables required to achieve practical completion such that this condition has not been met;

73. The Respondent's Architect has not issued a notice of practical completion.

74. There may well be circumstances outside the control of the Applicant that prevents practical

completion being achieved. However, should that be the case, that is not a matter for this adjudication to decide.

75. The Act requires (at s.33(1)) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) -*

*(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 under section 35; and*

*(iii) the date on or before which the amount must be paid or the security must be returned.*

76. Accordingly I determine that no security is presently due to be returned.

### **Costs**

77. I determine that each party pay one half of the cost of the adjudication.

### **Summary**

78. The adjudicated amount is made up of;

78.1 Outstanding balance of Claim No. 7 \$174,530.25 including GST

78.2 Interest payable \$2,241.13 including GST

78.3 Total payable \$176,771.38 including GST

### **Conclusion**

79. For the reasons set out in this determination, I determine that the adjudicated amount is \$176,771.38 inclusive of GST.

80. The date payable is no later than 5 February 2007.

81. There is no security presently due to be returned.

.....  
**Charles H. Wright**  
**Adjudicator**

**15 January 2007**