DETERMINATION NO. 06.20.03

ADJUDICATOR'S DETERMINATION

CONSTRUCTION CONTRACTS
(SECURITY OF PAYMENT)
ACT 2004
(NORTHERN TERRITORY)

IN THE MATTER OF AN ADJUDICATION BETWEEN:

[redacted]

APPLICANT

And

[redacted]

RESPONDENT

BY

GRAHAM ANSTEE-BROOK

ADJUDICATOR

ISSUED: 15 October 2020

RESOLUTION INSTITUTE NO. : 81253

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1. DETAILS OF PARTIES

APPLICANT:
[Redacted]

AND

RESPONDENT
[Redacted]

ADJUDICATOR
Graham Anstee-Brook
42 Minora Road
DALKEITH WA 6009
Email: graham.ansteebrook@aurecongroup.com

Tel: 0412 288 554

2. ADJUDICATOR'S DETERMINATION

I Graham Ivan Anstee-Brook the appointed adjudicator in the matter of the payment dispute between [*the Applicant*] and [*the Respondent*] determine that:

2.1. The Respondent must pay the Applicant the sum of $503,854.39 plus GST by 22 October 2020

2.2. The Respondent must pay the Applicant interest of $12,197.92 by 22 October 2020 plus further interest of $112.00 per day from 16 October 2020 to date of payment of $503,854.39.

2.3. The Respondent must pay the Applicant in respect of the Adjudicator's costs the sum of $9,370.00 by 22 October 2020.

_____

Graham Anstee-Brook
Adjudicator

3. ENGAGEMENT

3.1. The Applicant and the Respondent entered into a contract dated 9 May 2017 (**the Contract**) in relation to electrical services at the [*site name redacted*] Project in the Northern Territory (the **Project**).

4. APPOINTMENT OF ADJUDICATOR

4.1. On 28 August 2020 the Applicant served an application for adjudication (**the Application**) on the Institute of Arbitrators & Mediators (**Resolution Institute**) and the Respondent.

4.2. On 2 September 2020 I was appointed adjudicator by the Resolution Institute pursuant to section 30(1) of the *Construction Contracts (Security of Payments) Act 2004* (**CCA**).

4.3. I accepted the appointment as adjudicator and wrote to the Applicant and Respondent on 2 September 2020.

5. CONFLICT OF INTEREST

5.1. I have no material personal interest in the payment dispute or in the Contract under which the dispute has arisen.

5.2. I see no reason to disqualify myself pursuant to Section 31 of the CCA.

6. DISMISSAL UNDER SECTION 33(1)(a) OF THE CCA

6.1. I am obliged to dismiss the Application without making a determination on the merits depending on my findings of fact relating to section 33(1)(a)(i) to (iv) of the CCA. I am obliged to consider each of the subsections to determine whether I am obliged to dismiss the Application without making a determination on the merits. *Moroney Anor and Murray River North Pty Ltd* [2008] WASAT 111 at [82].

Section 33(1) provides as follows:

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; or

(ii) the application has not been prepared and served in accordance with section 28; or

(iia) the dispute that is the subject of the application is also the subject of another application that has not been dismissed or determined; or

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgement or other finding about the dispute the subject of the application; or

(iv) satisfied that 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 any other reasons; or

7. CONSTRUCTION CONTRACT

7.1. If the contract between the parties is not a construction contract I must dismiss the Application.

7.2. Section 6(1) of the CCA relevantly defines *construction work* as:

…any of the following work on a site in the Territory –

…(c) construction the whole of part of any civil works or a building or structure that forms of will for whether permanently or not and whether in the Territory or not part of land or the seabed whether above or below it;

(d) fixing or installation on or in anything referred to 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, sensitisation, irrigation, telecommunications, air-conditioning, heating, ventilation, fire protection, cleaning, the security of the thing or the safety of people; and

(ii) lifts, escalators, insulation, furniture and furnishings

… (f) any work that is preparatory to necessary for an integral part of or for the completion of any work mentioned in…(c), (d)… including :

(i) site or earthworks.

7.3. Under the Contract the Applicant was required to construct permanent and temporary sewer works, buildings or structures and fix and install electrical fittings.

7.4. I am satisfied that the Contract is a construction contract.

8. APPLICATION PREPARED IN ACCORDANCE WITH SECTION 28 OF THE CCA

8.1. To satisfy the requirements of section 28 of the CCA:

8.1.1. within 65 working days after a payment dispute arises the Applicant must prepare a written application for adjudication, serve the application on the other party to the contract and on a Prescribed Appointer

8.1.2. the Applicant must if the parties to the contract have appointed a Prescribed Appointer serve the application for adjudication on that Prescribed Appointer.

8.2. On 15 May 2020 the Applicant issued Progress Claim No. 37 **(Progress Claim)** and on 29 May 2020 the Respondent issued a Payment Statement in response **(Payment Response)**.

8.3. A payment dispute pursuant to the CCA arose on 30 May 2020. The Applicant has been brought within time.

8.4. I am satisfied that the Application otherwise satisfies the requirements of the section 28 of the CCA other than for the question of service on the Prescribed Appointer.

9. NO PAYMENT CLAIM

9.1. The Respondent contends that there was no valid payment claim and if there is no valid payment claim there can be no payment dispute.

9.2. The Respondent relies on *K&J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* [2011] NTCA1

Section 7A of the CCA provides that *a payment claim means a claim under a construction contract*. The Respondent's position is that by these words there must be strict compliance with the Contract and if that is not done then there can be no payment claim.

9.3. The Applicant contends that given the courts findings in *ABB Australia Pty Ltd v CH2 M Hill Australia Pty Ltd & Others No. 2* [2017] NTSC11 the decision in *Burns* has been distinguished and that the circumstances in *ABB* are all but identical to the circumstances in this Application.

9.4. In *ABB* the contractor submitted what was purported to be a payment claim and the principal issued a payment statement assessing the payment claim. The principal did not respond by rejecting the payment claim as not being properly submitted which following *ABB* would have resulted in there being no payment dispute as there would have been no assessment of the payment claim.

9.5. As in *ABB* the Contract at clause 12.5 provides that the Respondent must pay the Applicant the amount as set out in the payment response issued under clause 12.4 of the Contract. Clause 12.4 of the Contract provides that the Respondent's representative must within the timeframe provided issue a payment statement assessing the payment claim to determine what amount may or may not be due or payable.

It seems to me that it cannot now be argued by the Respondent that because no amount was determined to be due and payable that the Respondent can argue that the payment claim was not valid and accordingly there is no payment dispute. If the Respondent's representative had issued a payment statement pursuant to which an amount was payable then it could hardly be said by the Respondent that no amount should be paid because the payment claim was invalid.

9.6. I am not persuaded by the arguments put forward by the Respondent and adopt the position of the Applicant that the decision in *ABB* supports the Applicant and I find that by reason of the Respondent issuing a response which assessed the payment claim a payment dispute has arisen.

10. COMPLEXITY OF THE CLAIM

10.1. The Respondent contends that the Application should be dismissed without making determination of the merits pursuant to section 33(1)(a)(iv) of the CCA. This subsection provides that an adjudicator must dismiss an application if:

(iv) [the adjudicator is] *satisfied that it is not possible to fairly make a determination:*

(A) because of the complexity of the matter; or

10.2. The Respondent cites Southwood J, in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA4 at [33].

The statutory criteria set out in s33(1)(a)(i)-(iv) [of the Act] are of such a nature that the satisfaction of the adjudicator as to whether they have been fulfilled or not must be both reasonable and founded upon a correct understanding of the law. A reasonable and legal correct state of satisfaction is a necessary jurisdictional fact. If such a jurisdictional fact does not exist an adjudicator would be acting in excess of jurisdiction if he made a determination of the application on the merits. The adjudicator cannot give himself jurisdiction by erroneously deciding that the fact or events exists.

The Respondent further relies on the decision in *K&J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) NTCA1 at [57].

when considering if it is possible to fairly make a determination an adjudicator is required to consider the complexity of the matter and the time in which he or she is required to make a decision.

Whilst under the CCA an adjudicator generally has 10 working days to make a determination in this instance an extension was granted to make the determination.

10.3. The Applicant argues that the Application is not so complex as to attract the provisions of section s33(1)(a)(iv) as the *application only concerns 3 Application Items* however the Respondent responds to this allegation to the effect that the application requires analysis of:

10.3.1. 12 dates of Completion across 11 stages of Subcontract Work

10.3.2. 125 separate alleged acts of prevention including notices of delay and extension of time

10.3.3. the progress of the Applicant's works was over 3 years and accordingly consideration must be given to any delays caused by the Applicant including:

- delays to completion of design work
- late procurement by the applicant of materials and equipment
- inadequate site management
- insufficient direct labour resources
- inability to attract and retain experienced personnel
- failure to coordinate the works
- poor Contract administration

10.4. Whilst the principles articulated by both parties are sound by reason of my determination in relation to the expert's reports I decline to invoke the provisions of section 33(1)(a)(iv) of the CCA.

11. EXPERTS REPORTS

11.1. As part of the Application and Response respectively the Applicant and Respondent rely on expert reports by [*redacted*] (A report) and [*redacted*] (B report).

11.2. The A report makes reference to the SCL Delay and Disruption Protocol edition 2 February 2017 Protocol issued by the Society of Construction Law. By reference to the Protocol the A report uses the *effect and cause* analysis methodology which compares an As-Planned program with the As-Built program. The B report takes no issue with this methodology however the B report takes issue with the A report on the bases that the A report has relied upon inaccurate information shown in the Baseline Program used by the A report.

11.3. The foundation of the A report is what as described therein as the Baseline Program.

11.4. The A report at paragraph 1.2.3 states that the Baseline Program is the program of the Applicant's activities that was provided to the Respondent.

11.5. The A report casts doubt upon the validity of the Baseline Program. The A report identifies the Baseline Program as *this program has been provided to me in Prima Vera P6 format – file reference 200866 [redacted] R8000 baseline program Rev 6.*

The B report raises concerns in that that this report has no reference date and therefore there is a question mark as to when this program was prepared. By way of example the B report refers to the typical weekly report submitted by the Applicant which is identified by *200866-[redacted] – R8000 Facilities. Rev _ 6. WE180304.* This report is stated by the B report as a report for the week ending 18 March 2018.

11.6. The statutory declaration of [*MB*] a construction manager employed by the Respondent states that the Baseline Program contains a number of deficiencies.

11.6.1. the durations and logic differed from the head contract Contractor's Program;

11.6.2. it contained Dates for Completion for various stages that differed from the Contract. The preceding activities to each of the Stage Completion Dates were incorrect;

11.6.3. procurement activities for key plant and equipment was not included;

11.6.4. key design activities were not provided;

11.6.5. it did not include or account for co-ordination for other trade subcontractors.

11.7. At paragraph 1.4.6 of the A report the As-Built Program is identified as the program of 19 July 2020. The report states *most of these additional delay activities are linked to the planned activities they impacted. In the <u>main</u> these delay activities fall into 2 categories:*

(i) Variation Works…and
(ii) Other delay events…

In this paragraph the A report further states that the program status update of 19 July 2020 *provides a <u>relatively</u> detailed As-Built program [**emphasis added**].*

Whilst the A Report suggests that the delays identified in the report were as a result of actions by the Respondent there is terminology which suggests that there may have been other causes of delay. For example the use of the words *main* and *relatively* do not give confidence that all of the causes of delay were causes by the Respondent.

11.8. At paragraph 6.3.2.1 of the B report issue is taken with the A report in relation to the assessment of extensions of time on a number of basis relevantly that the analysis has not been carried out in accordance with the Contract and industry practice regarding delay analysis.

11.8.1. no interrogation of the recommencement date in the As-Built program to assess accuracy;

11.8.2. no assessment as to whether the alleged delay was beyond the reasonable control of the Applicant as required by clause 7(b) of the Contract;

11.8.3. no assessment as to whether the alleged delay actually prevented the Applicant from achieving completion as required by clause 10.7(c) of the Contract. The A report merely assumed that for example in relation to the delay to the Stage T04 works the delay was caused by the relocation of personnel;

11.8.4. no apparent checking of contemporaneous programs at the time of the alleged delays to ascertain whether the delay actually delayed the Applicant;

11.8.5. no analysis of whether the Applicant contributed to the delays as required by clause 10.9(a) of the Contract;

11.8.6. no analysis as to whether the Applicant failed to take steps necessary both to preclude the causes of the delay and to avoid or minimise the consequence thereof as required by clause 10.9(b) of the Contract.

11.9. Further the B report states that the Project records have been analysed and they do not support the reliance by A on the As-Built program to identify start and finish dates.

11.10. The concerns raised by B at paragraph 6.3.2.1 referred to in paragraph 11.8 are raised in the B report in relation to all of the delay claims by the Applicant as supported by the A report.

CONCURRENCY

11.11. The B report raises a number of instances where the B report states that a number of the delays were not caused by the Respondent but by the Applicant.

11.12. One example of this is in relation to the [*specific equipment redacted*] in relation to the second delay: Relocation of T04 resources to T17.

11.13. The B report states that based on the Applicant's planned man hours for the installation of the [*equipment*], the work was to start the week commencing 19 November 2019. [*The equipment*] did not arrive on the site until late June 2019 and delivery continued until late September 2019. This was substantially after the Completion Date of 14 June 2019. The conclusion of the B report is that the [*equipment*] was some 8 to 10 months late.

11.14. The lateness of the [*equipment*] was not taken into account by the A report.

The B report raises numerous other instances where delays were caused by the Applicant but were not taken into account by the A report in the assessment of claims for extensions of time.

To the extent of the concurrency of delays caused by the Applicant and Respondent, the Applicant is not entitled to an extension of time.

11.15. Whilst both reports are in themselves persuasive on a balance of probabilities given the doubts raised by the B report in relation to the A report I am not persuaded that the Applicant is entitled to the extensions of time claimed.

11.16. As further support for my view that the Applicant is not entitled to the extensions of time claimed the Respondent in the response has included statutory declarations from [*MB*] and [*AH*].

These two statutory declarations catalogue a litany of events regarding the Applicant's actions which delayed the Applicant in performing the work it was required to carry out.

[*MB*] provides a number of examples at [45] of his statutory declaration and also attaches correspondence from a number of the Respondent's other subcontractors regarding the failure of the Applicant to coordinate work on site which caused delays.

11.17. All of this information reinforces my view regarding the Applicant causing delays concurrent with delays caused by the Respondent which appear to be matters that were not taken into account in the A Report.

11.18. The amounts claimed by the Applicant are reliant upon the extensions of time and as I determine that the Applicant on the balance of probability is not entitled to extensions of time the monetary claims must fail.

12. LIQUIDATED DAMAGES

12.1. The assessment by the Respondent in its response to the Applicant's Payment Claim that an amount of $2,492,901.33 (PS038) is due and payable by way of liquidated damages by the Applicant is based on the provisions of clause 13.7 of the Contract.

> *13.7 If the Date of Completion of the Subcontract Works or a Stage has not occurred by the Date for Completion for the Subcontract Works or the Stage, the Subcontractor must pay liquidated damages at the rates specified in the Subcontract Particulars for every day after the Date for*

Completion until the Date of Completion or the Subcontract is terminated, whichever is first.

12.2. The Respondent in the response deals with the entitlement to liquidated damages at paragraphs 6, 24 and 65 of the Response submissions. The thrust of these paragraphs is directed to contentions that the Applicant is not entitled to extensions of time by reason of:

12.2.1. the A report which relies on inaccurate information and the failure to properly take into account actual events that causes delays;

12.2.2. a failure to establish a link between the alleged events and the many delays caused by the Applicant which have not been taken into account;

In my view the proper analysis in relation to the Respondent's entitlement to impose liquidated damages is not by an attempt to prove that the Applicant is not entitled to extensions of time, but by proof that the Applicant did not comply with its contractual obligations in relation to completion dates.

12.3. In support of the Respondent's position in relation to completion dates the Respondent in the Response submissions does no more than insert tables at paragraphs 6.2.5, 65.2.5 and 65.2.8 which provide for dates of completion as determined by the Respondent and by extrapolation the amount of liquidated damages payable.

12.4. In my view that is not sufficient to persuade me that the Applicant did not meet the contractual completion dates.

12.5. Just as the Respondent has used the B report to argue that the A report does not support the extensions of time claimed by the Applicant, the B report could have contained an analysis of when the Applicant completed the works to support the Respondent's claims in relation to liquidated damages.

12.6. The B report is detailed in relation to each of the delay events and claims for extensions of time claimed by the Applicant but is extremely limited in relation to its support of the Respondent's position regarding completion dates.

For example in relation to the assessment of delays to the [*improvements*] – the only comment in the B report is at [472]:

472 My assessment of the alleged critical delays to Stage T04 works and the resultant extended Date for Completion is provided below.

What follows is a table with 4 columns being Item, Description, A Assessment and B Assessment. The assessment in [472] by B is 45 days where as the A Assessment is 374 days.

There is no analysis or justification of how the 45 day extension of time has been calculated by B.

12.7. In relation to the other claims for extensions of time by the Applicant the B report at [528], [584], [610], [717], [775], [892], [967], [1037], and [1189] repeats what I have described as being the content of [472].

12.8. The onus to prove that the Applicant did not meet the contractual completion dates is on the Respondent and on a balance of probabilities I am not persuaded that the Respondent has discharged that onus and accordingly I find that the Respondent is not entitled to apply liquidated damages.

13. LIABILITY TO PAY

13.1. At paragraph 4 of the Applicant's submissions the Applicant contends that if a determination is made that the Applicant is not entitled to any of the amounts claimed in relation to Items VR294 and 303 and the Respondent is not entitled to apply liquidated damages then by reason of the assessment made by the Respondent in the Payment Response the amount payable by the Respondent to the Applicant is $503,854.37.

My calculation of the Payment Response results in a figure of $503,854.39.

13.2. I have determined that the Applicant is not entitled to any payment and that the Respondent is not entitled to apply liquidated damages and accordingly given the Respondent's assessment in the payment response I determine that the Respondent must pay the Applicant $503,854.39 plus GST.

14. INTEREST

14.1. Section 35 of the CCA provides that an adjudicator is entitled to determine that interest is paid if a party to a payment dispute is liable to make a payment. If the amount is overdue under the construction contract the payment of interest must be in accordance with the contract.

14.2. The Respondent at paragraphs 67 and 69 of the Response submissions has usefully provided submissions in relation to interest.

14.3. The Contract provides for payment of interest by reference to the greater of the Australian Taxation Office sourced General Interest Charge Rate and the rate prescribed by the CCA.

14.4. The greater interest rate is that of the Australian Taxation Office which is 7.89%.

14.5. I determine that the Respondent must pay the Applicant interest on $503,854.39 at the rate of 7.89% calculated from 26 June 2020 to 15 October 2020 in the sum of $12,197.82 plus further interest of $108.91 per day from 16 October 2020 to date of payment of $503,854.39.

15. COSTS

15.1. Both parties have made submissions in relation to costs as provided for in section 36(2) of the CCA. I am not satisfied that either party *incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or*

unfounded submissions by, another party and make no order under section 36 of the CCA.

16. ADJUDICATOR'S COSTS

16.1. An Adjudicator is entitled to payment pursuant to Section 46(1A) and that the parties to the dispute pursuant to Section 46(4) are jointly and severally liable to pay such costs.

16.2. I determine that the parties each pay half the Adjudicator's costs.

16.3. The Applicant provided a deposit of $20,000.00 for the Adjudicator's fees and disbursements and the Respondent is required to pay the Applicant half of the Adjudicator's fees and disbursements.

16.4. The Adjudicator's fees and disbursements are $18,740.00 and accordingly I determine that the Respondent must pay the Applicant $9,370.00.