

Adjudicator's Determination

Adjudicator Registration Number 17
Identification No: 17-07-02

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

1. I, Charles H. Wright, as the appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act 2004* (the Act), dismiss this application.

Appointment of Adjudicator

2. I was appointed as Adjudicator to determine this dispute by the Territory Construction Association Incorporated on Friday 16 March 2007, and later, by agreement with the parties.

Acceptance of Adjudication Application

3. I confirmed my acceptance as adjudicator in a telephone conference call on Monday 26 March 2007 and recorded in Item 12. of the Minutes of Telephone Conference Call (item 5.10 below refers)

Documents Regarded in Making the Dismissal

4. In making this dismissal I have had regard to the following:
 - 4.1 The provision of the *Construction Contracts (Security of Payments) Act 2004*;
 - 4.2 The Application for Adjudication prepared by the Applicant and dated 13 March 2007 containing a cover letter, letter of Payment Dispute and Sections 1 to 16 inclusive of relevant documents;
 - 4.3 Provisions of the construction contract from which the adjudication arose;
 - 4.4 The Adjudication Response by the Respondent dated 27 March 2007 containing a cover letter and Sections 1 to 6 inclusive of relevant documents received by the Adjudicator by email on Tuesday 27 March 2007 with a hard copy received by post on Friday 30 March 2007;
 - 4.5 A response from the Applicant to the Adjudicator's test email sent and received on 5 April 2007.

Conference with the Parties

5. A telephone conference was held with the parties on Monday 26 March 2007 to deal with formal and procedural matters. The following matters were agreed at the telephone conference;
 - 5.1 The individuals agreed that they had authority to make decisions and bind the parties they represent;
 - 5.2 The parties agreed that the Adjudicator had jurisdiction in this payment dispute;
 - 5.3 The parties agreed to adhere to the proposed timetable for any further responses required;
 - 5.4 The parties agreed that no other adjudication application had been sought;
 - 5.5 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;
 - 5.6 The parties agreed that they were satisfied that no conflict of interested existed between the parties and the Adjudicator;

- 5.7 The Respondent's Solicitor confirmed and agreed that the Adjudication Application was served on the Respondent on or about the 14 March 2007;
- 5.8 It was confirmed and agreed that the Respondent's response would be served on the Applicant, Applicant's Solicitor and Adjudicator by Tuesday 27 March 2007, and all parties agreed to service initially by email on that date followed by a hard copy by post;
- 5.9 Neither party has any objections to the Adjudicator;
- 5.10 The Adjudicator had accepted the appointment on 16 March 2007 and now confirmed the appointment;
- 5.11 Both parties accepted the estimate of the fee and agreed to have the fee allocated as determined by the Adjudicator.

Consideration of the Application

6. 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;*
 - (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 section 35; and*
 - (ii) the date on or before which the amount must be paid or the security must be returned.*

The Adjudication Application

7. The Adjudication Application consists of the following papers;
- 7.1 Application for Adjudicator (1 page) dated 13 March 2007 as a cover letter to one folder containing;

- a) Letter of Payment Dispute dated 13 March 2007 addressed to the Respondent detailing the Background to the dispute and Payment Claim, the subject of this Adjudication and in the closing paragraphs of the letter, instructing the Adjudicator, to;
‘The adjudicator need not go to the substance of the issues behind the final payment claim or the validity or otherwise of any dispute of that amount by the Respondent (name deleted), as such matters are to be addressed by the parties under the dispute resolution provisions of the Contract.

We seek:

1. Immediate payment by the Respondent (name deleted) of the progress claim amount of \$243,707.03; and
 2. Interest on the late payment of this amount from 16 February 2007 (the) under clause 42.9 of the Contract and further and alternatively under the *Construction Contracts (Security of Payments) Act 2004*.
- b) Section 1 to 16 inclusive containing various items of correspondence, a copy of Subcontract Conditions AS 2545 – 1993, and several stated cases on various topics, some associated with the subject of this Adjudication.

The Adjudication Response

8. The Adjudication Response consists of the following papers;
- 8.1 One page cover letter dated 27 March 2007 to one folder containing;
- a) Section 1, seven page Response to the Application for Adjudication;
 - b) Sections 2, 4, 5 and 6 containing stated cases on various topics, some associated with the subject of this Adjudication;
 - c) Section 3 containing the Respondent’s letter dated 16 January 2007 rejecting the Applicant’s Tax Invoice, Invoice No. 8378 dated 12 January 2007.

The Construction Contract for the Purpose of the Act

9. The Act defines a *Construction Contract* (s.5) as:
- 9.1 (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:*

(a) to carry out construction work;

10. The contract is for work on a *site in the Territory*, s.6(1), 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. The subcontract was entered into after 1 July 2005.

11. A *payment dispute* has arisen as defined in s.8(a) of the Act.

Applying for Adjudication

12. In applying for adjudication, section 28. of the Act, requires;

(1) To apply to have a payment dispute adjudicated, a party to the contract must, within 28 days after the dispute arises or, if applicable, within the period provided for by section 39(2)(b) –

(a) prepare a written application for adjudication;

(b) serve it on each other party to the contract;

(c) serve it on –

(i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents – the adjudicator;

*(ii) if the parties to the contract have appointed a prescribed appointer – the appointer;
or*

(iii) otherwise – a prescribed appointer chosen by the party; and

(d) provide any deposit or security for the costs of the adjudication that the adjudicator or prescribed appointer requires under section 46(7) or (8).

(2) The application must –

(a) be prepared in accordance with, and contain the information prescribed by, the Regulations;

(b) state the details of or have attached to it –

(i) the construction contract involved or relevant extracts of it; and

(ii) any payment claim that has given rise to the payments dispute; and

(c) state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.

Dismissal of the Application

13. Under section 33(1)(a)(ii), I dismiss this application for adjudication on the grounds that it has not been served as required under section 28(1) of the Act.

14. In dismissing this application, I have regard to the following;

14.1 The Applicant's letter to the Respondent dated 24 July 2006 being a revised estimate identified as 'Preliminary for discussion';

14.2 The Respondent's letter to the Applicant dated 18 August 2006 being a rejection of the revised estimate;

14.3 The Applicant's letter to the Respondent dated 25 October 2006 being a response to the Respondent's letter dated 18 August 2006 and provided 'Details of Variation No. 6';

14.4 The Respondent's letter to the Applicant dated 10 November 2006 being a rejection of 'Variation No. 6';

- 14.5 The Applicant's letter to the Respondent dated 21 November 2006 being a request by the Applicant to the Respondent to reconsider their position on Variation No. 6;
- 14.6 The Respondent's letter to the Applicant dated 23 November 2006 being a further rejection of Variation No. 6;
- 14.7 The Applicant's correspondence to the Respondent dated 12 January 2007 included a Tax Invoice, Invoice No: 8378, and being a legitimate *payment claim* under the Act;
- 14.8 The Respondent's letter to the Applicant dated 16 January 2007, and provided as Attachment 13 in the Applicant's Application for Adjudication, rejecting Tax Invoice, Invoice No. 8378;
- 14.9 The Applicant's Application for Adjudication is dated 13 March 2007 and was served on the Territory Construction Association Incorporated, being an appointed Appointer, on 14 March 2007 and served on the Respondent on or about the 14 March 2007.
15. Under section 28(1) of the Act, the Applicant '*..must, within 28 days after the dispute arises..;*'
- (a) *prepare a written application for adjudication;*
 - (b) *serve it on each other party to the contract;*
 - (c) *serve it on –*
 - (i) *if the parties to the contract have appointed a registered adjudicator and that adjudicator consents – the adjudicator;*
 - (ii) *if the parties to the contract have appointed a prescribed appointer – the appointer; or*
 - (iii) *otherwise – a prescribed appointer chosen by the party; and*

16. I find;

- 16.1 The dispute arose on 16 January 2007;
- 16.2 The date for serving the Application for Adjudication would therefore be on or before 13 February 2007;
- 16.3 The Application for Adjudication is dated 13 March 2007;
- 16.4 The actual date the Application was served by the Applicant on the Respondent is not relevant being outside the prescribed time.

Costs

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

Conclusion

18. For the reasons set out above, I dismiss this Application for Adjudication.

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Charles H. Wright
Adjudicator

11 April 2007