

**IN THE MATTER OF an application for Adjudication pursuant to the
Construction Contracts (Security of Payments) Act (NT)**

ADJUDICATORS DETERMINATION

Adjudication Identification Number: 43.15.01

Adjudicator: Neil Kirkpatrick

Address: C/- Construction Expert Services
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Applicant: [Redacted]

Respondent: [Redacted]

Date of Adjudication Claim: 24 July 2015

In respect of the application for adjudication made by the Applicant on 26 June 2015 pursuant to the *Construction Contracts (Security of Payments) Act (NT)* ("**Act**"), I make the following determination:

1. The adjudicator dismisses the application pursuant to section 33(1)(a)(ii) of the Act.

The reasons for my determination are annexed as Schedule 1 (Pages 2 - 10).

A list of information that, because of its confidential nature, is not suitable for publication by the Registrar is annexed as Schedule 2 (Page 11).

Date: 24 July 2015

Neil Kirkpatrick
Registered Adjudicator No. 43

Schedule 1: Reasons for Determination

“Applicant”

- v -

“Respondent”

Summary

1. The Applicant entered into a contract with [*one of the Respondents and another party forming a joint venture*] under which the Applicant was obliged to undertake structural engineering design and associated services to a construction site, [*Redacted*] in the Northern Territories (“**Contract**”). The Applicant submitted payment claim No. 25 under the Contract on 19 February 2015 in the sum of \$261,397.40¹. [*The joint venture parties*] partially rejected the payment claim on 5 March 2015 and subsequently failed to pay the whole amount of the payment claim by 31 March 2015². The Applicant subsequently made this application for adjudication on 26 June 2015.

2. I consider that:
 - a) The Contract was a “construction contract” to which the Act applies;
 - b) A “payment dispute” arose on 5 March 2015 pursuant to s.8(a)(i) of the Act, when the payment claim³ was partially rejected;
 - c) The application did not comply with s.28 of the Act; and
 - d) Pursuant to s.33(1)(a)(ii) of the Act the application must be dismissed.

The Issues

3. The following issues arise under the application:
 - a) were the parties to the Contract served the application for adjudication pursuant to s.28(1)(b) of the Act?

 - b) was the application for adjudication served within time pursuant to s.28(1) of the Act?

¹ Sums of money referred to in these reasons include GST.

² Refer to the letter of intent agreed between the parties, Tab 2 of application that states payment shall be made at the end of the month following the month in which a payment claim is made.

³ Refer to paragraph 61 and tab 14 of the response documents a copy of which was provided by the Applicant under its further submissions pursuant to s.34(2)(a) on 17 July 2015

- c) If the answer to these questions is yes, how much money is the Respondent obliged to pay the Applicant?

Procedural Matters

Appointment of Adjudicator

4. By notice dated 29 June 2015 the Institute of Arbitrators and Mediators ("**Prescribed Appointer**") appointed me adjudicator for the purpose of determining the payment dispute, which I confirmed in my letter to the parties dated 30 June 2015 ("**Letter**").

Application and Response

5. The Prescribed Appointer recorded that the Applicant served its written application on 26 June 2015. The application comprised of a formal application together with attachments in "Tab 1" to "Tab 27" within one volume.
6. The Respondent was, in the event that it was served with the application on the day that the Applicant served it on the Prescribed Appointer, required to serve a written response on the Applicant and on the adjudicator within 10 business days following the date of service, which I calculated to be by 10 July 2015.
7. In my Letter, I requested the Applicant advise me in writing by 3 July 2015 on what date the application was served on the Respondent and for the Respondent to raise any issues in relation to the date of service as soon as possible thereafter.
8. By email on 1 July 2015, the Applicant advised me that the application was served by courier on the Respondent on 26 June 2015. The Respondent did not raise an objection to this date and in the absence of contradictory advice I accept that the application was served on the Respondent on 26 June 2015, the same date as the application was served on the Prescribed Appointer.
9. The Respondent served its written response on the Applicant and on me by email and by hand delivery on 10 July 2015. The response was contained within one volume including a formal response together with attachments in "Tab 1" to "Tab 14"

10. From the foregoing, and from my review of the response, I accept that the Respondent has complied with its obligations under s.29(1) and s.29(2) of the Act by serving its written response on the Applicant and on the appointed adjudicator within ten business days after being served the Applicant's written application.

Conflict of Interest

11. From my review of the written application, I formed the view that I had no material personal interest in the payment dispute concerned or in the construction contract under which the dispute had arisen or in any party to the Contract. This absence of material personal interest was declared to the parties in my Letter and no objection was received.

Letter to the Parties

12. In my Letter, I requested that the parties advise me in writing as to whether there had been any order, judgment or other finding by an arbitrator or other person or court or other body about the dispute that is the subject of the application. Neither party made a submission on this issue, in the absence of contradictory advice, I accept that there has been no order, judgment, or other finding made about the dispute the subject of the application.

13. I will now consider the issues that have arisen in turn.

Were the parties to the Contract served the application for adjudication?

14. The Respondent argued that the application was not served on the correct parties to the contract that made up a joint venture called [Redacted] and considered that if the parties to the Contract are not served an application pursuant to s.28(1)(b) of the Act, I was obliged to dismiss the application pursuant to s.33(1)(a)(ii).

15. By email on 13 July 2015, the Applicant raised a submission with regard to service of the application on the parties to the Contract contending that service of the application was made on the correct parties to the Contract.

16. The Respondent contended that the Applicant's submission was unsolicited, I formed the view that further submissions should be allowed on the matter

because of the ongoing contractual negotiations apparent between the parties and the jurisdictional issues surrounding correct service of documents.

17. By letter dated 13 July 2015, I asked the Applicant to make its submissions no later than 3.00pm 14 July 2015 and for the Respondent to make any responsive submissions by 1.00pm 15 July 2015.

18. The Applicant contended that a letter of intent dated 12 April 2012⁴ together with the draft terms for consultancy agreement and documents associated with the provision of a fee proposal formed the basis of the Contract between the parties⁵ but that the Contract documents did not identify the relevant parties to the Contract, being the joint venture parties responsible for the construction of the project connected to the payment dispute. The Applicant submitted that it did not know relevant contact details for the parties to the Contract around the date the Contract was entered into.

19. The Applicant further argued that a revised consultancy agreement raised by the Respondent and received on or around 19 December 2014⁶ named the parties to the Contract as each being part of [*the joint venture*] which was advised to be as follows:

- a) [*JV1*]; and
- b) [*a second entity*]

20. The Respondent however argued that the relevant parties to the contract were on show at page one of the document titled "*fee proposal*" attached to the letter of intent forming the Contract and that negotiations were never concluded surrounding the revised consultancy agreement issued on 19 December 2014 further, the Respondent submitted that the [*2nd*] entity [*redacted*] was not registered until 22 March 2013 and that the Contract was made on 12 April 2012 and accordingly it was not possible for [*the second entity*] to be a party to the Contract as it was not a company incorporated under the *Corporations Act 2001* until 22 March 2013. The Respondent further argued that payment certificates issued under the Contract included the correct names of the parties to the Contract as follows:

⁴ Refer to tab 2 of the application and tab 1 of the response.

⁵ Refer paragraphs 35 (a) – (e) and paragraph 36 of the application.

⁶ Provided on 14 July 2015 under the Applicants further submissions pursuant to s.34(2)(a) request.

- a) [JV1]; and
- b) [JV2].

21. I have carefully considered all the documents submitted under the application and response including the further submissions made by the parties and consider that the application was not served on a correct party to the Contract. This is because [the 2nd entity] was served where [JV2] should have been served as a party to the Contract.

22. There was common ground between the parties with regard to the documents forming the Contract, both agreed that the letter of intent and attachments dated 12 April 2012 formed the basis of the Contract. At page 23 of the fee proposal document attached to the letter of intent, the parties to the joint venture and the Contract were identified as being those set out at paragraph 20 (a) and (b) above being [JV1 & JV2].

23. I note that at Tab 1 of the application the letter attached by the Applicant dated 24 February 2015 raised in order to terminate the Contract was addressed to [JV1 & JV2] and refers to the letter of intent dated 12 April 2012 as the basis of the Contract between the parties and I am satisfied that [JV2] was known by the Applicant as a party to the Contract.

24. Therefore, I find that:

- a) The application for adjudication was not served in accordance with s.28(1)(b) of the Act as it was not served on a party to the Contract, [Redacted].

Was the application for adjudication served within time?

25. The Applicant argued that a payment dispute arose on 1 April 2015, the day following the date the payment claim should have been paid under the Contract and accordingly, the application was served within the time limit pursuant to

s.28(1) of the Act. The Applicant contended that the 90 day time limit for the payment dispute should be calculated from the 1 April 2015⁷.

26. Following a review of the application and response I formed the view that further submissions should be sought because of the nature of the dispute surrounding the Contract between the parties and the calculated dates and timing for the payment dispute made by the Applicant under the Contract.

27. I also formed the view that submissions should be sought because of the current wording of s.8 of the Act and the Applicants submissions with regard to the *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor (2012) 21 NTLR 139* where the Applicant quoted the following:

In my opinion, the correct construction of s 8(a) is that the due date for payment under the contract is the only date on which a payment dispute may arise. That is the date at which the existence of the relevant fact (non-payment, rejection or dispute) is to be ascertained in order for the statutory definition to be satisfied. Therefore, even though there may be a rejection or dispute prior to the due date for payment, the "payment dispute" does not arise until the due date for payment.

28. The Applicant submitted that s.8 of the Act should be read as identifying two separate limbs allowing two triggers for a payment dispute where a payment dispute could arise out of the same payment claim when:

- a) a payment claim was disputed in whole or in part pursuant to s.8(a)(i);
and
- b) at a later date when the payment claim was subsequently not paid in full pursuant to s.8(a)(ii)

29. The Applicant contended that s.8 contained two triggers to a payment dispute that could arise as follows⁸:

- a) *The first is if the claim was rejected (even if it had not yet become due); and*
- b) *The second is if the claim was not paid on time (even if there had not been a formal rejection).*

⁷ Refer to paragraphs 55 – 52 of the Application.

⁸ Refer to paragraph 8 of Applicants submissions received on 17 July 2015 pursuant to s.34(2)(a) request.

30. In support of its submissions the Applicant contended that the explanatory statement⁹ in respect of amendments made to s.8 of the Act supported its submissions for providing two triggers that commenced a dispute against the same payment claim where the first statutory trigger becomes enlivened at the stage of the rejection of a payment claim or at a later stage, after rejection when both statutory triggers are enlivened when the same payment claim is rejected and not paid in full¹⁰.
31. The Respondent argued that the payment dispute commenced once the payment claim had been rejected or wholly or partly disputed pursuant to s.8(a)(i) submitting that the payment dispute arose on 5 March 2015 upon enlivening s.8(a)(i) of the Act and accordingly the application for adjudication was served outside the 90 day limit pursuant to s.28(1) of the Act¹¹.
32. I have carefully considered the application and response together with the further submissions made by the parties and have formed the view that the application was served out of time because I do not consider that s.8 of the Act provides for the second trigger as described by the Applicant in connection with this payment dispute.
33. If a payment dispute involved both the rejection of a payment claim and the subsequent non-payment of the same payment claim, in my view, this scenario involves the same disputed payment claim that enlivened s.8(a)(i) in the first instance and embraces the same payment dispute. The subsequent non-payment of the rejected amount widens the scope of the dispute but would not create a separate or independent dispute as contended by the Applicant.
34. The requirements for responding to a payment claim are set out at clauses 14.5 of the consultancy agreement attached to the letter of intent as follows:

14.5 Subject to clause 14.7, within 14 days of receiving the payment claim and any information required under clause 14.4 the Project Manager must assess the payment claim and issue a payment certificate setting out the amount which the Project Manager considers to be due in respect of the payment claim.

⁹ Refer to the Statute Law Revision Bill 2014: http://www.austlii.edu.au/au/legis/nt/bill_es/slr2014266/es.html

¹⁰ Refer to para. 7-9 of the Applicants submissions received on 17 July 2015 pursuant to s.34(2)(a) request.

¹¹ Refer to para. 5 of the Respondents received on 17 July 2015 pursuant to s.34(2)(a) request.

35. The payment claim¹² was submitted on 19 February 2015, the subsequent response to the payment claim partially rejecting the amount claimed was received by the Applicant on 5 March 2015.

36. The 90 day time limit for the application for adjudication to be made in connection with this payment dispute was therefore triggered under s8(a)(i) the application should have been made within 90 days from the date the payment claim was rejected, that date was 5 March 2015¹³.

37. I find that:

- a) A payment dispute arose on 5 March 2015, being the date the payment claim was partially rejected pursuant to s.8(a)(i) of the Act.
- b) The application for adjudication was made out of time pursuant to s.28(1) of the Act.

Adjudicator's Functions

38. S.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; or*
 - (ii) *the application has not been prepared and served in accordance with section 28; 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, judgment or other finding about the dispute that is the subject of the application;*

Determination and Reasoning

39. From the foregoing, pursuant to s.33(1)(a)(ii) of the Act, the application is dismissed for the following reasons:

¹² Copy of the payment claim was requested from the Applicant pursuant to s.34(2)(a) request which was received on 17 July 2015.

¹³ Refer to attachment at tab 14 of the response.

- a. The application for adjudication was not served on a party to the Contract, [JV2], pursuant to s.28(1)(b) of the Act.
- b. The Applicant did not serve the application for adjudication until 26 June 2015, the latest date for service of the application pursuant to s.28(1) of the Act was 3 June 2015.

Costs of Adjudication

40. From my reading of s.36(1), s.36(2), s.46(5) and s.46(6) of the Act, the adjudicator's authority to decide that one party must pay some or all of the other party's costs of the adjudication is limited to the costs of an adjudication as defined in s.46(1A)(a) and s.46(1A)(b) of the Act. From these, the costs of adjudication do not include a nomination fee that may be levied by a prescribed appointer.
41. The parties raised substantiated reasons in support of their respective positions in connection with the payment dispute, whilst I did not agree with the Applicants contentions with regard to the timing of the application pursuant to s.8 of the Act or the parties served the application I am satisfied that considered submissions were made.
42. Accordingly, I find there is no basis for a determination under s.36(2) because of frivolous or vexatious conduct by either one party or the other and consider that there is no basis for a determination under s.36(2) of the Act or to depart from the usual principle that costs of the adjudication be met equally under s.46(5) of the Act.
43. I therefore determine that the parties must pay the costs of the adjudication in equal share.

Date: 24 July 2015

Neil Kirkpatrick
Registered Adjudicator No. 43

Schedule 2: Confidential Information

The following information should remain confidential:

- (1) The names of the parties and their representatives; and
- (2) The name and location of the project and the works.

Date: 24 July 2015

Neil Kirkpatrick
Registered Adjudicator No. 43