

## **Adjudicator's Determination**

Adjudicator Registration Number 17  
Identification No: 17.08.01

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

**(Applicant)**

And

**(Respondent)**

1. 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 30 May 2008 is \$1,206.66 inclusive of GST and payable by the Applicant to the Respondent.
2. The date payable is no later than 28 July 2008.
3. No security is due to be returned.

#### **Appointment of Adjudicator**

4. I was appointed as Adjudicator to determine this dispute by the Northern Territory Law Society on Friday 6 June 2008, and later, by agreement with the parties.

## **Acceptance of Adjudication Application**

5. I confirmed my acceptance as adjudicator in a telephone conference call on Thursday 12 June 2008 and recorded in Item 12. of the Minutes of Telephone Conference Call (item 7.10 below refers)

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

6. In making this determination I have had regard to the following:
  - 6.1 The provision of the Construction Contracts (Security of Payments) Act 2004;
  - 6.2 The Applicant's original quotation Q184/07 dated 28 September 2007;
  - 6.3 The Applicant's revised quotation Q184/07 dated 24 October 2007;
  - 6.4 Payments claims #1276 and #1277 both dated 22 February 2008 to which the application relates;
  - 6.5 Submissions from the Applicant dated 30 May 2008 submitted with the Adjudication Application;
  - 6.6 Submissions from the Respondent dated 16 June 2008 forming the Response.

## **Conference with the Parties**

7. A telephone conference was held with the parties on Thursday 12 June 2008 to deal with formal and procedural matters. The following matters were agreed at the telephone conference;
  - 7.1 The individuals agreed that they had authority to make decisions and bind the parties they represent;
  - 7.2 The parties agreed that the Adjudicator had jurisdiction in this payment dispute;
  - 7.3 The parties agreed to adhere to the proposed timetable for any further responses required;
  - 7.4 The parties agreed that no other Adjudication Application had been sought;
  - 7.5 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;
  - 7.6 The parties agreed that they were satisfied that no conflict of interested existed between the parties and the Adjudicator;
  - 7.7 The Respondent's Solicitor confirmed and agreed that the Adjudication Application was correctly served on the Respondent on 30 May 2008;
  - 7.8 It was confirmed and agreed that the Respondent's Response is required to be served by 16 June 2008;
  - 7.9 Neither party has any objections to the Adjudicator's Appointment;
  - 7.10 The Adjudicator confirmed acceptance of the appointment made on 6 June 2008;

7.11 Both parties accepted the estimate of the fee and agreed to have the fee allocated as determined by the Adjudicator.

### **Determination**

8. 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.*

9. 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;

*(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*

*(b) otherwise – 10 working days after the last date on which a response is required to be served under section 29(1).*

My determination is therefore required by 30 June 2008 taking into account excluded days within Darwin.

### **The Adjudication Application**

10. The adjudication application consists of the following papers:

10.1 Cover letter (1 page) dated 30 May 2008 enclosing Application for Adjudication of Payment Dispute (8 pages) dated 29 May 2008 and detailing the dispute between the Applicant and the Respondent, which includes the following:

(a) Index of Attachments to the Application for Adjudication;

(b) Various items of correspondence from the Applicant to the Respondent;

(c) Various items of correspondence from the Respondent to the Applicant;

(d) Various copies of the Applicant's suppliers and subcontractor's invoices.

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

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

*(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;*

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 disputed by the Respondent;

13.2 Payment claims had been submitted by the Applicant and have not been paid.

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

14.1 The Applicant was invited to submit a quotation for the concrete civil works by the Respondent;

14.2 The parties entered into an agreement for the construction works the subject of the Applicant's revised quotation Q184/07;

14.3 The terms of the agreement were partly written, partly oral and partly implied;

14.4 The Respondent paid the Applicant a 10% deposit as required by the Applicant's revised quotation, prior to the Applicant commencing the work;

14.5 The Applicant commenced the work in early November (2007);

14.6 On or about 15 January 2008 the Respondent requested varied works;

14.7 The Applicant agreed to perform the variation to the works;

14.8 The Applicant continued to perform work to Variation No. 1 (disputed as a Variation) and Variation No. 2.

### **Implied Provisions**

15. Implied Provisions;

15.1 The Applicant relies on Part 2 and Part 3 of the Act, including;

(i) Schedule: Division 2, sections 2(1) and (2);

(ii) Schedule; Division 3, section 3;

(iii) Schedule: Division 5, section 6.

15.2 The remaining implied conditions are considered relevant to this adjudication.

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

16. 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 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 arising from the construction Contract and being the subject of this determination.

### Separation of Issues

17. I find that there are two separate issues for determination that will be dealt with in the following manner:

17.1 **PART A** – A payment claim for additional works invoiced by the Applicant dated 22 February 2008, Tax Invoice # 1276 refers, and re-issued as Tax Invoice # 1280 dated 3 April 2008.

17.2 **PART B** – A payment claim for additional works invoiced by the Applicant dated 22 February 2008, Tax Invoice # 1277 refers, and re-issued as Tax Invoice #1279 dated 3 April 2008.

### PART A

#### The Payment Claim

18. The first payment claim is dated 22 February 2008 and is Tax Invoice # 1276 in the amount of \$37,733.85 inclusive of GST.

19. The details of the claim are;

Invoice #: 1276

Re: Extras  
The invoice is itemised.

Subtotal	\$34,303.50
GST	\$ 3,430.35
<b>TOTAL (inclusive of GST)</b>	<b>\$37,733.85</b>

20. The second payment claim is dated 3 April 2008 and is Tax Invoice # 1280 in the identical amount of \$37,733.85 inclusive of GST.

21. The details of the claim are;

Invoice #: 1280

Re: Extras  
The invoice is itemised.

Subtotal	\$34,303.50
GST	\$ 3,430.35
<b>TOTAL (inclusive of GST)</b>	<b>\$37,733.85</b>

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

22. The Applicant's supporting documents are;
- 22.1 Adjudication Application dated 30 May 2008;
  - 22.2 Revised Quotation Q184/07 dated 24 October 2007;
  - 22.3 Reference to a verbal discussion between the Applicant and the Respondent on or about the 19 November 2007 in which the Respondent supplied revised drawings that varied the Applicant's Works referred to as Variation No. 1.

## **Response to Payment Claim**

23. The Applicant submitted an initial quotation, Q184/07 dated 28 September 2007. Subsequent to receipt of the initial quotation, the Respondent varied the work and supplied revised drawings to the Applicant in order to revise the quotation. The revised quotation, Q184/07 dated 24 October 2007, was accepted by the Respondent and formed the basis of the Agreement. The revised quotation includes the extras referred to invoices 1276 and 1280 as part of the Works.

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

24. The Respondent's supporting documents are;
- 24.1 Adjudication Response dated 16 June 2008;
  - 24.2 Applicant's initial quotation Q184/07 dated 28 September 2008;
  - 24.3 Drawings S02 Rev. B and S03 Rev. B both dated 2 March 2007;
  - 24.4 Drawings S02 Rev. D and S03 Rev. C both dated 16 October 2007.

## **Payment Claim**

25. The Payment Claim is taken to be the Applicant's Tax Invoice # 1276 dated 22 February 2008 in the sum of \$37,733.85 inclusive of GST;
26. The implied conditions of the contract for responding to payment claims, require at Schedule: Division 5, section 6(2);

*The party must –*

*(a) within 14 days after receiving the payment claim –*

- (i) give the claimant a notice of dispute; and*
- (ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or*

*(b) within 28 days after receiving the payment claim, pay the whole of the amount of the claim.*

27. On 13 March 2008 the Respondent advised the Applicant that they 'were unable to pay for any final works until the job is completed' and request additional information for the Applicant to support the claim.
28. The Applicant issued Tax Invoice # 1280 dated 3 April 2008 in the identical sum of that to Tax Invoice # 1267 and being \$37,733.85 inclusive of GST to the Respondent.
29. The Applicant issued on the 8 April 2008, supplier's and subcontractor's invoice in support of the payment claim.
30. On 10 April 2008, the Respondent requested further information from the Applicant to support the Applicant's payment claim.
31. Further supporting material was provided by the Applicant to the Respondent on 14 April 2008.
32. The Respondent advised the Applicant by letter dated 24 April 2008 that a dispute had arisen with respect to Invoices 1276 and 1277.
33. Schedule: Division 5, section 6 of the Act, requires;
  - (3) *The notice of dispute must –*
    - (a) *be in writing;*
    - (b) *be addressed to the claimant;*
    - (c) *state the name of the party giving the notice;*
    - (d) *state the date of the notice;*
    - (e) *identify the claim to which the notice relates;*
    - (f) *if the claim is being rejected under subclause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract;*
    - (g) *if the claim is being disputed under subclause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reason for disputing it; and*
    - (h) *be signed by the party giving the notice.*
34. The Respondent's letter dated 24 April 2008 is taken as a *Notice of Dispute*.
35. The Application for Adjudication was served on the 30 May 2008 which is within the prescribed time of 90 days in section 28(1) of the Act.
36. Accordingly, I have jurisdiction to consider the payment claim.
37. 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.*

38. The Applicant had submitted an initial quotation Q184/07 dated 28 September 2008 in the sum of \$96,086.10 inclusive of GST.
39. Drawings S02 and S03 were revised with S02 Rev. D and S03 Rev. C clearly showing the "Extras". These revised drawings are dated 16 October 2008 and pre-date the Applicant's revised quotation dated 24 October 2008.
40. The Applicant submitted a revised quotation Q184/07 dated 24 October 2008 in the sum of \$101,036.10 inclusive of GST.
41. There are no other changes on drawings S02 between Rev. B and Rev. D and drawing S03 Rev. B and Rev. C other than the "Extras"
42. On the balance of probability, I find that the Applicant's revised quotation Q184/07 dated 24 October 2008 in the sum of \$101,036.10 inclusive of GST was based on drawings S02 Rev. D and S03 Rev. C that included the extra work forming the Applicant's payment claim in Tax Invoice # 1276 dated 22 February 2008 and referred to as Variation No. 1.

### **Payment for Claim**

43. There is no money required to be paid by the Respondent to the Applicant with respect to payment claim Tax Invoice # 1276 dated 22 February 2008.
44. For all the same reasons given in the above recital, there is no money required to be paid by the Respondent to the Applicant with respect to payment claim Tax Invoice # 1280 dated 3 April 2008.

### **PART B**

#### **The Payment Claim**

45. The first payment claim is dated 22 February 2008 and is Tax Invoice # 1277 in the amount of \$30,643.25 inclusive of GST.
46. The details of the claim are;

Invoice #: 1277

Re: Extras on Rear Access Ramp and Stairs

The Invoice is itemised.

Subtotal	\$27,857.50
10% GST	\$ 2,785.75
<b>TOTAL (inclusive of GST)</b>	<b>\$30,643.25</b>

47. The second payment claim is dated 3 April 2008 and is Tax Invoice # 1279 in the amount of \$34,967.76 inclusive of GST.



48. The details of the claim are;

Invoice #: 1279

Re: Extras on Rear Access Ramp and Stairs

The Invoice is itemised.

Subtotal	\$31,788.87
10% GST	\$ 3,178.89
<b>TOTAL (inclusive of GST)</b>	<b>\$34,967.76</b>

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

49. The Applicant's supporting documents are;

49.1 Adjudication Application dated 30 May 200;

49.2 Reference to a verbal discussion between the Applicant and Respondent on or about 15 January 2008 at which point the Respondent's Consulting Engineer provided further revised drawings referred to as Variation No. 2.

### **Response to Payment Claim**

50. The Respondent accepts that the work, the subject of payment claim Tax Invoice # 1277 and # 1279 is extra work but disputes the value.

51. The Respondent submits that in discussions on the extra work with the Applicant, the Respondent was to be advised if the value of the extra work was likely to exceed \$10,000.00.

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

52. The Respondent's supporting documents are;

52.1 Adjudication Response dated 16 June 2008;

52.2 An assessment prepare by the Respondent's Consulting Engineer of the value of the extra work, undated;

52.3 Drawing S03 Rev. D, noting Rev. C dated 16 October 2007 and Rev. D undated;

52.4 New drawing S05 Rev. A dated 18 December 2006;

52.5 New drawing S06 Rev. A undated.

### **Payment Claim**

53. The Payment Claim is taken to be the Applicant's Tax Invoice # 1277 dated 22 February 2008 in the sum of \$30,643.25 inclusive of GST.

54. The implied conditions of the contract for responding to payment claims, require at Schedule: Division 5, section 6(2);

*The party must –*

*(a) within 14 days after receiving the payment claim –*

*(i) give the claimant a notice of dispute; and*

*(ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or*

*(b) within 28 days after receiving the payment claim, pay the whole of the amount of the claim.*

55. On 13 March 2008 the Respondent advised the Applicant that they ‘were unable to pay for any final works until the job is completed’ and request additional information for the Applicant to support the claim.

56. The Applicant issued Tax Invoice # 1279 dated 3 April 2008 in the sum of \$34,967.76 inclusive of GST to the Respondent.

57. The Applicant issued on the 8 April 2008, supplier’s and subcontractor’s invoice in support of the payment claim.

58. On 10 April 2008, the Respondent requested further information from the Applicant to support the Applicant’s payment claim.

59. Further supporting material was provided by the Applicant to the Respondent on 14 April 2008.

60. The Respondent advised the Applicant by letter dated 24 April 2008 that a dispute had arisen with respect to Invoices 1276 and 1277.

61. Schedule: Division 5, section 6 of the Act, requires;

*(3) The notice of dispute must –*

*(a) be in writing;*

*(b) be addressed to the claimant;*

*(c) state the name of the party giving the notice;*

*(d) state the date of the notice;*

*(e) identify the claim to which the notice relates;*

*(f) if the claim is being rejected under subclause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract;*

*(g) if the claim is being disputed under subclause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reason for disputing it; and*

- (h) *be signed by the party giving the notice.*
62. The Respondents letter dated 24 April 2008 is taken as a *Notice of Dispute*.
63. The Application for Adjudication was served on the 30 May 2008 which is within the prescribed time of 90 days in section 28(1) of the Act.
64. Accordingly, I have jurisdiction to consider the payment claim.
65. 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.*
66. The Respondent issued revised drawings to the Applicant for the purpose of constructing the rear stair and ramp to the amended detail on or about the 15 January 2008.
67. The Respondent claims that a discussion took place with the Applicant ‘in about November 2007’, some time before the issue of the revised drawings for the rear stair and ramp work in January 2008, requesting the Applicant to advise the Respondent if the cost of the extra work were to exceed \$10,000.
68. The Applicant values the extra work in Tax Invoice # 1277 dated 22 February 2008 at \$30,643.25 inclusive of GST with the 3 April 2008 Tax Invoice # 1279 valuing this work at \$34,967.76 inclusive of GST.
69. The Respondent’s Consulting Engineer values this work at \$17,328.00. As this assessment is silent on GST, GST is deemed to be included. This assessment also values the uncompleted work at approximately \$8,000.00 in total with GST deemed included.
70. Tax Invoices # 1277 and # 1279 are both in the form of the Applicant’s Tax Invoice # 1257 dated 23 November 2007 and previously paid by the Respondent.
71. On the balance of probability, I find the following:
- 71.1 The amended rear stair and ramp constitutes a variation;
- 71.2 A conversation between the Respondent and Applicant placing an obligation on the Applicant to advise the Respondent if variation works exceeded \$10,000.00 may have taken place but it is not documented and taking place some time before the issue of the rear stairs and ramp amended drawings being issued, leads me to disregard this point.
- 71.3 The Notice of Dispute issued by the Respondent on 24 April 2008 is in respect of Invoice 1277; Invoice 1276 being dealt with in Part A above.

71.4 Having regard to the quantum of the work required in the rear stair and ramp variation, Variation No. 2, the timing of the instruction coming some two months into the project and having regard for the work being undertaken during the 'wet' season, I determine that the value of the work is as claimed by the Applicant in the disputed invoice 1277 and being \$30,643.25 inclusive of GST.

### Payment for Claim

72. In determining the amount to be paid I have regard to the following;

72.1 The Applicant's quotation Q184/07 dated 24 October 2007;

72.2 The Applicant's Tax invoice # 1277 dated 22 February 2008;

72.3 Previous payments made by the Respondent to the Applicant contained in Item 10. of the Respondent's Response;

72.4 Further payment received by the Applicant noted in Item 37. of the Applicant's Application.

73. The adjudicated amount is;

Revised quotation Q184/07 dated 24 October 2008 (incl. GST)	\$101,036.10
Tax Invoice # 1277 dated 22 February 2008 (incl. GST)	\$ 30,643.25
<b>Total (including GST)</b>	<b>\$131,679.35</b>
Deduct previously paid amount including GST:	
30 October 2007	\$10,103.61
12 December 2007	\$20,000.00
6 January 2008	\$40,000.00
12 March 2008	\$30,923.49
16 May 2008	\$23,838.10
	(\$124,865.20)
Deduct uncompleted work (including GST)	(\$8,000.00)
<b>TOTAL (inclusive of GST)</b>	<b>(\$1,185.85)</b>

74. For the avoidance of doubt, the Applicant owes the Respondent \$1,185.85 plus interest calculated below.

75. Interest is payable as required in Schedule: Division 6, section 7.

76. Interest payable is;

Interest payable on \$1,185.85 from 1 May 2008 to 30 June 2008	
\$1,185.85 at 10.5% PA x 36 days	\$20.81
<b>TOTAL (inclusive of GST)</b>	<b>\$20.81</b>

77. Interest is to be added to the amount adjudicated in recital 73. above and paid together on or before 28 July 2008.

**Costs**

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

**Summary**

79. The adjudicated amount is made up of;

79.1 Overpayment	\$1,185.85 including GST
79.2 Interest payable	\$20.81 including GST
79.3 Total payable	\$1,206.66 including GST

**Conclusion**

80. For the reasons set out in this determination, I determine that the adjudicated amount is \$1,206.66 inclusive of GST.

81. The date payable is no later than 28 July 2008.



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

**30 June 2008**