

Adjudicator's Determination

Pursuant to the Construction Contracts Act 2004

Adjudication Number	34.15.01
Prescribed Appointor	RICS Dispute Resolution Service.
Adjudicator	Colin Bond (Adjudicator 34)
Applicant:	
Respondent:	
Project:	
Amount to be paid by Respondent	Nil
Due Date For Payment	N/A
Adjudication Fees Apportionment	Applicant: 100% Respondent: 0%
Date of Determination or Dismissal	22 nd February 2015
Payment Claim	Claimed Amount : \$112,741.28 including GST Dated : 25 th October 2014
Notice of Dispute / Response to Payment Claim	Dated: 28 th October 2014
Adjudication Application	Dated: 23 rd January 2015, served on respondent by email and dropbox on 27 th January 2015 and hard copy on 30 th January 2015
Adjudicator Acceptance	Dated: 30 th January 2015
Adjudication Response	Dated: 10 th February 2015

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The Determination or Dismissal

1. I, Colin Bond, Registered Adjudicator Number 34, as the Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act* (the Act), for the reasons set out in this determination, determine that:
 - a. The amount to be paid by the respondent to the applicant is **Nil** including GST.
 - b. Interest is not applicable.
 - c. Due date for payment is not applicable.

Background

2. The application arises from an unpaid certified amount of a payment claim made by the applicant on the respondent in respect of construction work carried out under a contract between the parties for the provision, supply and installation of structural steel and associated works at [*the project site*].

Appointment

3. The applicant served its adjudication application on the RICS Dispute Resolution Service, a Prescribed Appointor under the Act, pursuant to section 28(1)(c)(iii) of the Act.
4. The adjudication application was referred to me as adjudicator on 30th January 2015 by the RICS Dispute Resolution Service pursuant to section 30(1)(a) of the Act.
5. The RICS Dispute Resolution Service served a notice of my acceptance of the appointment on the claimant and the respondent on 30th January 2015.

Material

6. The following material was provided to me:
 - Adjudication Application dated 23rd January 2015, served on respondent by email and dropbox on 27th January 2015 and hard copy on 30th January 2015
 - Adjudication Response dated 10th February 2015
7. On 4th February 2015 pursuant to section 34(2)(a) of the Act I requested further submissions from the parties. The following responses were received:

- The applicant's further submission dated 6th February 2015
 - The respondent's further submission dated 6th February 2015
8. On 15th February 2015 pursuant to section 34(2)(a) of the Act I requested further submissions from the parties in respect of the service of the adjudication application on the respondent. The following responses were received:
- The applicant's further submission dated 17th February 2015
 - The respondent's further submission dated 18th February 2015

Jurisdiction

9. The work executed under the construction contract is 'construction work' as defined under section 6(1) of the Act.
10. The construction contract was entered into after the commencement of the Act pursuant to section 9(1) of the Act.
11. The applicant is a party who, under the construction contract concerned and under which a payment dispute has occurred, is entitled to apply to have the dispute adjudicated pursuant to section 27 of the Act.
12. The respondent in its Adjudication Response has raised the following jurisdictional issues for consideration.

Payment Claim 13 does not comply with the Subcontract

13. This adjudication application relates to the October variation dispute amount in payment claim 13 for the sum of \$112,741.28 (incl GST), which was due for payment in accordance with clause 37.1 of the Subcontract within 35 days after receipt of the Superintendent's certificate i.e. 35 days from 28th October 2014 which is 2nd December 2014 (contrary to the applicant's due date for payment of 30th November 2014).
14. I therefore consider that a payment dispute as defined in Section 8(a) of the Act arose on 28th October 2014 when the respondent served its payment certificate PC13 on the applicant, which disputed the full variation amount.
15. The respondent rejects the validity of the adjudication application by stating that the payment claim does not comply with the mandatory conditions of the Subcontract in relation to the preparation of payment claims, in the following respects:

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- a. The applicant has not made any allowance for retention
 - b. The applicant has claimed for works and materials not yet included in the Subcontract works
 - c. The applicant has not provided details of the value of authorised variations valued by the Subcontract Superintendent
 - d. The applicant has not provided evidence of its conformance with the respondent's Quality and Safety Systems
16. I have reviewed clause 37(2), the submissions provided by both the applicant and respondent, including Annexure D of the adjudication application ("a bundle of documents relating to previous payment claims submitted by the applicant on the project").
 17. I am satisfied that the format of these payment claims is consistent with payment claim 13 and therefore the respondent is prevented from relying upon the strict compliance of clause 37(2) as concluded in the NSW Court of Appeal in *Update Constructions*.
 18. On the specific issue of Retention the respondent does raise the further related point that one of the Bank Guarantees provided by the applicant expired on 30th June 2014 and another on 30th November 2014 and therefore in the respondent's view the applicant should have deducted \$21,212.00 from the payment claim.
 19. Further to a review of 37(1) and 37(2) of the Subcontract conditions and as no evidence was raised in relation to retention surrounding the expiration of the Bank Guarantee by the respondent prior to the date of payment claim 13 and not then raised in the payment certificate, I do not concur that failure to deduct retention is destructive to the applicant's right to bring an Adjudication Application under the Act in relation to the payment claim.
 20. However, I conclude that as one of the Bank Guarantees had expired at the time payment claim 13 was issued that retention should have been deducted. I have considered this when assessing the Adjudicated amount.

There cannot be more than one payment dispute arising in respect of the same single payment claim for the purposes of the Act

21. It is the respondent's position that only one payment dispute can arise for any given payment claim and, consequently, only one of the Adjudication Applications can be maintained in relation to the payment dispute. It is only the document received by the respondent first in time that is capable of being a valid Adjudication Application which is this matter 34.15.01. The Adjudication Application 34-15-02 is the second application in respect of the same payment claim and must be invalid.
22. On review of all the documentation and as stated in paragraph 1.3 of the Adjudication Application, I agree that this adjudication application 34.15.01 relates only to the October variation dispute and adjudication application 34.15.02 relates only to the certified amount. I consider that the failure to pay the certified amount (34.15.02) by the due date for payment on

2nd December 2014 gave rise to a payment dispute as defined in section 8(a) of the Act on that date. Whereas the payment dispute for this adjudication number 34.15.01 arose on 28th October 2014 because of separate disputed amounts as identified in the Payment Certificate dated 28th October 2014.

23. Therefore I consider that two distinct and separate payment disputes have arisen under the Act and that the applicant is entitled to submit two distinct and separate Adjudication Applications.

The applicant failed to serve Adjudication Application within 90 days of the payment dispute arising

24. The respondent has stated in its response that the applicant has failed to serve the Adjudication Application pursuant to section 28 of the Act within 90 days of the payment dispute arising as it failed to serve a full copy of the Application on the respondent on or before 27th January 2015.
25. As described above in paragraph 22 the payment dispute for this Adjudication Application arose on 28th October 2014, therefore, the final date for service for this Application was 27th January 2015. The applicant contends that service was affected on 27th January 2015 by email and dropbox.
26. On 4th February 2015, I requested submissions from the applicant for confirmation of when, where and how the respondent was served with the Adjudication Application. On 6th February 2015, the applicant provided evidence of service on 27th January 2015. On 6th February 2015, the respondent also confirmed that it be afforded the opportunity to respond to the applicant's evidence in relation to this issue in its Adjudication Response.
27. On 15th February 2015 after receiving the Adjudication Response, I then requested further submissions on this issue from both parties, which were received on the 17th and 18th February 2015 respectively.
28. I have reviewed all the submissions and documentation relating to the service of the Adjudication Application and I am satisfied that the Adjudication Application was served on 27th January 2015 in accordance with the Act and within the prescribed timeframe for the purposes of the Act.
29. I therefore conclude that the Adjudication Application 34.15.01 has been submitted within 90 days of the payment dispute arising and is therefore a valid Adjudication Application.

Payment Claim

30. The applicant served the respondent a copy of its Payment Claim 13 on 25th October 2014 in respect of construction work carried out under a contract between the parties for the provision, supply and installation of structural steel and associated works at [*the project site*].

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31. The respondent has not denied receiving the applicant's payment claim on this date.
 32. It is common ground that a construction contract exists.
 33. The respondent does however state in its adjudication response that the adjudicator does not have jurisdiction to determine the payment claim made by the applicant for a number of reasons that have been addressed in the jurisdiction section above.
 34. I am satisfied that the payment claim is valid for the purposes of the Act and do not consider it to have been issued outside the provisions of the contract.

Notice of Dispute / Response to Payment Claim

35. An adjudication response was served by the respondent in accordance with section 29 of the Act and within the prescribed timeframes.
36. The respondent does however state in its adjudication response that the adjudicator does not have jurisdiction to determine the payment claim as there were not two separate disputes. However, this has been addressed in the jurisdiction section at paragraph 22 in that the disputed variation amount identified in the payment certificate issued on 28th October 2014 gave rise to a separate and distinct payment dispute as defined in section 8(a) of the Act on that date.
37. Therefore, pursuant to section 8(a) of the Act, the dispute is taken to have arisen on the day the amount claimed in a payment claim was disputed as identified on the payment certificate.

Adjudication Application

38. Section 28(1) of the Act provides for the applicant to apply for adjudication of a payment dispute within 90 days after the dispute arises.
39. As stated in paragraph 22 above, I am satisfied that the payment dispute arose on 28th October 2014 and therefore the 90 day period in relation to when the adjudication application can be submitted has been satisfied.
40. As addressed in paragraphs 25-29 in jurisdiction above, I am satisfied that the applicant applied for adjudication of the payment dispute within the time allowed pursuant to section 28(1) of the Act.
41. The application is in writing pursuant to section 28(1)(a) of the Act.
42. The application was served on the respondent pursuant to section 28(1)(b) of the Act.

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43. The application was served on RICS Dispute Resolution Service pursuant to section 28(1)(c) (iii) of the Act.
44. I am therefore satisfied that the adjudication application complies with the requirements of section 28 of the Act.

Adjudication Response

45. Pursuant to section 29(1) of the Act the respondent has 10 working days after the date on which it is served with an application for adjudication in which to prepare and serve its written response on the adjudicator and the applicant.
46. I am satisfied that the respondent served its response within the timeframes prescribed in the Act.

Reason for the Determination

47. In making this determination I have had regard to the following matters, pursuant to section 34 of the Act:
- the application and its attachments; and
 - the further written submissions validly made by the parties.

Contract

48. The applicant in its adjudication application has provided a copy of the Subcontract Contract Conditions.
49. It is common ground that a Construction Contract exists between the parties for the provision, supply and installation of structural steel and associated works at [*the project site*].

Issues in Dispute

50. As discussed above the respondent has disputed the validity of the adjudication application and payment claim for reasons as detailed in the Adjudication Response. I have addressed these issues above and I am satisfied that both the adjudication application and payment claims comply with the requirements of the Act.
51. The following variations were claimed in the payment claim and not approved in the payment certificate:
- a. Variation G – extra plates

- b. Variation H – sunblade supply
- c. Variation I – wall frame steel

Relevant Contractual Provisions

- 52. The respondent rejects the validity of the Variations by stating that they do not comply with 36.1 and 36.2 of the Subcontract.
- 53. I have reviewed clause 36 of the Subcontract, the submissions provided by both the applicant and respondent, including Annexures H, I and J of the Adjudication Application (“a bundle of documents relating to the approval of variation claims D, E and F”).
- 54. I am satisfied that the format of Variation claims G, H and I is consistent with previous Variation claims (D, E and F) claimed and previously paid by the respondent. Therefore the respondent is prevented from relying upon the strict compliance of clause 36 as concluded in the NSW Court of Appeal in *Update Constructions*.
- 55. However, I address the merits of each individual Variation claimed as follows.

Variation G – extra plates

- 56. Annexure K of the Adjudication Application includes a one page fax dated 29th September 2014 from the applicant to the respondent stating that it had to manufacture 20 additional plates at a variation cost of \$1,173.00.
- 57. I concur with the respondent’s view in paragraph 8.6 of the Adjudication Response that the applicant has failed to provide any evidence to support entitlement to or quantum of this variation claim.
- 58. **Therefore, I value Variation G as NIL.**

Variation H – sunblade supply

- 59. Annexure L of the Adjudication Application is a bundle of documents which includes drawings, invoices and correspondence regarding the supply of the sunblades on the project in the sum of variation cost \$14,067.66. The applicant states that the sunblades are architectural steel and are not part of the scope of works. They have handwritten this comment on Structural Services Building and Elevations Sheet 2 drawing S04-11 revision 3 reviewed 7th October 2013.
- 60. Within the Letter of Award 6th November 2013 attachment G lists the drawings and specifications issued for construction and S04-11 revision 3 is listed as item number 180, which forms part of the Subcontract. The sunblades are clearly shown on this Structural Services Building and Elevations drawing.

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61. Within paragraph 9.17 of the Adjudication Response, the respondent states that “the applicant has not provided any basis upon which it unilaterally deemed an element on the structural drawings to be ‘architectural steel’. [*The respondent*] submits that such action is a transparent attempt to manufacture a variation claim”.
62. I am satisfied that no evidence exists to demonstrate that the sunshades are in addition to the original scope of works for the supply and installation of structural steel and I therefore value this **variation H as NIL.**

Variation I – wall frame steel

63. Annexure M of the Adjudication Application is a bundle of documents which includes drawings, tables and correspondence regarding the additional steel for the wall frame on the project. In summary, the applicant states that the respondent and its consultants have increased the total wall frame steel quantity from 12.36 tonnes to 28.83 tonnes at a rate of \$5,153.33 per tonne, which equates to a total variation of \$85,751.41.
64. Within paragraph 10.15 of the Adjudication Response, the respondent states that the bundle of documents within Annexure M of the Adjudication Application includes relevant Subcontract drawings and a series of shop drawing revisions, which on the face cannot be directly related to Subcontract drawings. The respondent has no knowledge of the location of the purported additional stud wall framing being claimed by the applicant. The two tables purporting to represent the applicant’s tender allowance and the actual quantity of steel provided, both of which the applicant asserts have been prepared from a Tekla model, has not been included in the Adjudication Application.
65. The respondent further states that the adjudicator cannot be satisfied that the respondent amended the stud wall design resulting in additional work or of the quantity of the additional steel being asserted by the applicant. The applicant has made a mere assertion about the alleged quantity of additional steel. The claim is prepared on a global basis. The additional quantities alleged by the applicant could have easily arisen from its own errors in its original take-off or waste during manufacture. The tonnage may include steel for other works. Mere assertion by the applicant is not enough to discharge its onus of proof.
66. Having reviewed all the relevant documentation, I am not satisfied that the applicant has indeed demonstrated an entitlement to this variation. I concur with the respondent’s view that the applicant has failed to demonstrate any entitlement to be reimbursed for the alleged additional tonnage in accordance with the terms of the Subcontract.
67. **Therefore, I value Variation G as NIL.**

Valuation of works

68. I therefore value the works as per the payment certificate dated 28th October 2014 as follows:

<i>Item</i>	<i>Amount Claimed</i>	<i>Adjudicated Amount</i>
Variation G – extra plates	\$1,173.00	Nil
Variation H - sunblades	\$14,067.66	Nil
Variation I – wall frame steel	\$85,751.41	Nil
Less Retention -\$21,212.00		Nil
Total	\$102,492.07	Nil
GST	\$10,249.21	Nil
Adjudicated Amount	\$112,741.28	Nil

69. In the case of *Alliance Contracting Pty Ltd v James* [2014] Justice Beech rejected Alliance's submissions and upheld the adjudicator's decision. His Honour found that the adjudicator's power is confined to accepting or rejecting a payment claim, not awarding counter-claims. In these circumstances, the merits of the counter-claim will be considered in determining whether the respondent is liable to make a payment in respect of the payment claim but the counter-claim is not subsumed into the payment dispute arising from Alliance's rejection of the claim. The counter-claim itself gives rise to a separate payment claim. The counter-claim must be rejected, in order to give rise to a separate payment dispute, before the respondent can recover the amount of the counter-claim via the CCA process.
70. Whilst I acknowledge that the Alliance decision was a case in Western Australia, the WA and NT Acts are virtually identical. I therefore consider that the deduction of retention has relevance to the Alliance decision in that my jurisdiction in this matter is confined to accepting or rejecting the payment claim and not awarding counter-claims. As the adjudicated amount was already Nil then the deduction of retention would have resulted in a counter-claim.
71. Accordingly I therefore find that the adjudicated amount is **Nil**.

Adjudication costs

72. Pursuant to section 36(2) of the Act I determine that the applicant shall bear the costs in relation to this adjudication dispute Act.
73. The adjudication costs for this determination amount to 18 hours @ \$325.00 plus GST = \$6,435.00 including GST and as stated in paragraph 72 above, is to be paid by the applicant. A tax invoice will be issued accordingly.

Interest Costs

74. I determine that interest is not applicable.

Confidential information

75. Pursuant to section 38(e) identify the following information, that because of its confidential nature, is not suitable for publication by the Registrar under section 54 of the Act:
- a. The identity of the parties.
 - b. The identity and location of the project.



Signed:

Colin Bond – Registered Adjudicator No. 34

Dated: 22nd February 2015