

## **Adjudicator's Determination**

Adjudicator Registration Number 17  
Identification No: 17.08.02

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

#### **(Applicant)**

Contact Details

And

#### **(Respondent)**

Contact Details

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 18 July 2008 is \$57,226.22 inclusive of interest and GST and payable by the Respondent to the Applicant.
2. The date payable is no later than 5 September 2008.
3. No security is due to be returned.

#### **Appointment of Adjudicator**

4. I was appointed as Adjudicator to determine this dispute by Contractor Accreditation Limited on Thursday 24 July 2008 and accepted the appointment on Monday 28 July 2008, which was later confirmed by agreement with the parties.

## **Acceptance of Adjudication Application**

5. I confirmed my acceptance as Adjudicator in a telephone conference call on Monday 11 August 2008 and recorded in Item 12. of the Minutes of Telephone Conference Call (item 7.11 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 Application dated 18 July 2008;
  - 6.3 Attachments 1 to 13 inclusive submitted with and forming part of the Applicant's Application dated 18 July 2008;
  - 6.4 Payments claim 06-03-006 dated 21 April 2008 to which the Application relates;
  - 6.5 The Respondent's Response dated 7 August 2008.

## **Conference with the Parties**

7. A telephone conference was held with the parties on Monday 11 August 2008 to deal with formal and procedural matters. There were certain issues regarding the availability of the Respondent that prevented the telephone conference taking place on Friday 8 August 2008. 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 Applicant confirmed that the Adjudication Application was correctly served on the Respondent and the Appointer on Friday 18 July 2008;
  - 7.8 It was confirmed and agreed by the parties that the Respondent's Response was required to be served by the 8 August 2008, as stated by the Appointer in his letter to the Applicant and Respondent dated 29 July 2008, although the date should have been within ten (10) working days of 18 July 2008 which would have been 5 August 2008;
  - 7.9 As the date for serving the Response had passed, the Adjudicator acknowledged that he had been served by ordinary post with a copy of the Response having received it on Friday 8 August 2008. The Applicant advised that he had not been served with the Response with the

Adjudicator ordering the Respondent to do so by the close of business that day, 11 August 2008.

7.10 Neither party had any objections to the Adjudicator's appointment;

7.11 The Adjudicator confirmed acceptance of the appointment made on 24 July 2008;

7.12 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 22 August 2008.

## **The Adjudication Application**

10. The Adjudication Application consists of the following papers:

10.1 Application for Appointment of Adjudicator (9 pages) detailing the dispute between the Applicant and the Respondent, which includes the following;

(a) List of Attachments (1 page);

(b) Attachment 1 to 13 inclusive.

## **The Adjudication Response**

11. The Respondent's Response was received by the Adjudicator within the time imposed by the Appointer but outside the prescribed time in the Act. The Response fails to comply with section 29 of the Act, in particular;

11.1 Section 29,

*(1) Within 10 working days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on -*

*(a) the applicant and on any other party that has been served with the application; and*

*(b) the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointer on which the application was served under section 28(1)(c).*

*(2) The response 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, any rejection or dispute of the payment claim that has given rise to the 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.*

11.2 Section 7. of the Regulations,

*For section 29(2)(a) of the Act, a response to an application for adjudication must, in addition to the other information required by section 29(2) of the Act, contain -*

*(a) the name and contact details of the appointed adjudicator or prescribed appointer;*

*(b) the applicant's name and contact details; and*

*(c) the respondent's name and contact details.*

11.3 As the Response fails to comply with the Act, in particular section 29(1)(a) and section 29(2)(a) I find that I am unable to accept the Response as provided and set it aside without referring to it.

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

12. 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;*

13. 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.

14. The extent of the written contract consists of the following;

14.1 The Applicant's estimated cost of carrying out certain works;

14.2 The Respondent's acceptance of the Applicant's tender.

### **Implied Provisions**

15. Implied Provisions:

15.1 The Applicant relies on the Implied Conditions of the Act, including;

- (i) Part 2: Division 2, sections 17 and 18;
- (ii) Schedule: Division 2;
- (iii) Schedule: Division 3;
- (iv) Schedule: Division 5;
- (v) Schedule: Division 6.

### **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.

### **The Payment Claim**

17. The payment claim, the subject of this Adjudication, is Tax Invoice, Invoice No.: 06-03-006 dated 21 April 2008 for the sum of \$54,173.90 inclusive of GST, referred in the Application as Claim 5.

18. The details of the three page payment claim are;

Invoice from: the Applicant  
Invoice to: the Respondent  
Invoice No.: 06-03-006  
Date: 21 April 2008  
Page 1 Summary, Item 1 Claim 5, Pages 2 and 3 description of the amounts claimed

|                               |                    |
|-------------------------------|--------------------|
| Total                         | \$49,249.00        |
| GST                           | \$4,924.90         |
| <b>Claim Inclusive of GST</b> | <b>\$54,173.90</b> |

### **The Applicant's Supporting Documentation**

19. The Applicant's supporting documents are;

19.1 Adjudication Application dated 18 July 2008;

- 19.2 the Applicant's Estimate for the works dated 9 December 2008;
- 19.3 The Respondent's letter awarding the Applicant the work date 19 December 2008;
- 19.4 Tax Invoice, Invoice No.: 06-03-006 dated 21 April 2008;
- 19.5 Reference to a verbal discussion between the Applicant and the Respondent on 6 December 2008;
- 19.6 Reference to a verbal discussion between the Applicant and the Respondent on 12 December 2008;
- 19.7 Reference to a verbal discussion between the Applicant and the Respondent on 10 April 2008.

### **Response to Payment Claim**

20. As mentioned in recital 11. above, the Respondent's Response is set aside.

### **Payment Claim**

21. The Payment Claim is Tax Invoice, Invoice No.: 06-03-006, dated 21 April 2008 in the sum of \$54,173.90 inclusive of GST;
22. The implied provisions of the Act for making payment claims, require at Schedule: Division 4, section 5;

#### ***Content of claim for payment***

*(1) A payment claim under this contract must -*

- (a) be in writing;*
- (b) be addressed to the party to which the claim is made;*
- (c) state the name of the claimant;*
- (d) state the date of the claim;*
- (e) state the amount claimed;*
- (f) for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim;*
- (g) for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim;*
- (h) be signed by the claimant; and*
- (i) be given to the party to which the claim is made.*

23. I find that Tax Invoice, Invoice No.: 06-03-006 is a valid claim under the Act.

24. The implied provision of the Act for responding to payment claims, require at Schedule: Division 5, section 6;

***Responding to payment claim by notice of dispute or payment***

*(1) This clause applies if -*

*(a) a party receives a payment claim under this contract; and*

*(b) the party –*

*(i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or*

*(ii) disputes the whole or part of the claim.*

*(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.*

*(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.*

25. The Applicant's invoice 06-03-006 dated 21 April 2008 was not disputed in accordance with Schedule: Division 5, section 6(2)(a) nor paid in accordance with Schedule: Division 5, section 6(2)(b).

26. The Application for Adjudication was served on the 18 July 2008 which is within the prescribed time of 90 days in section 28(1) of the Act.
27. Accordingly, I have jurisdiction to consider the payment claim.
28. 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.*
29. The Applicant submitted a written 'estimate' to carry out various construction works on 9 December 2005 for the sum of \$936,979.00 including GST.
30. The Respondent accepted the Applicant's 'tender' in writing on 19 December 2005. The written acceptance contained the comment that the Respondent wished to discuss some items to arrive at a 'final tender amount' with the 'final plans and building certificate' being provided by the Respondent's designers.
31. The Applicant proceeded with the work and submitted payment Claim 1 for the GST inclusive sum of \$400,572.00 on 4 May 2006, which was paid in full by the Respondent on the 19 May 2006. It is noted that the 'Contract Sum' used to calculate payment Claim 1 was the Applicant's 'estimate' total, unamended, together with three variations.
32. The Applicant continued with the work and submitted payment Claim 2 for the GST inclusive sum of \$618,432.00 dated 26 October 2006. The Applicant contends that the Respondent provided by facsimile on 28 November 2006 advice that they would 'Pay \$550,000 withhold \$68,432'. The Respondent provided no other details why portion of payment Claim 2 was being withheld and gave no notification of there being a payment dispute. Payment Claim 2 used the unamended 'estimate' sum as the 'Contract Sum' together with nine variations. This payment Claim is not the subject of, nor will it be considered, in this Adjudication.
33. The Applicant completed the work in December 2006 and sought payment for the outstanding balance of payment Claim 2 by negotiating with the Respondent during the period December 2006 to February 2008.
34. The Applicant submitted payment Claim 3 for the GST inclusive sum of \$67,321.10 on 13 February 2008. Payment Claim 3 used the unamended 'estimate' sum as the 'Contract Sum' together with twelve variations. This payment Claim 3 was not paid nor was it disputed and is not the subject of, nor will it be considered, in this adjudication.
35. By the Applicant's admission, item 12, 13 and 14 of the Adjudication Application refers, the Respondent, in a meeting with the Applicant to discuss the outstanding payments on the 10 April 2008, presented the Applicant with an undated list of alleged 'defects', refused to pay the total outstanding sum, without any reason being recorded, and offered the Applicant the sum of \$30,000.00 in settlement of the dispute.
36. In a five page undated document, the Applicant appears to have satisfactorily replied to each alleged 'defect' in the list provided by the Respondent with a reasonable explanation.



37. The Applicant submitted payment Claim 4 for the GST inclusive sum of \$36,600.00 on 10 April 2008. Payment Claim 4 used the unamended 'estimate' sum as the 'Contract Sum' together with thirteen variations. This payment Claim 4 was not paid nor was it disputed and is not the subject of, nor will it be considered, in this adjudication.
38. The Applicant substituted payment Claim 4 with payment Claim 5 for the GST inclusive sum of \$54,173.90 on 21 April 2008. Payment Claim 5 used the unamended 'estimate' sum as the 'Contract Sum' together with fifteen variations. This payment Claim 5 was not paid nor was it disputed, and it is the subject of this adjudication.
39. On the balance of probability, I find the following;
- 1) The Applicant submitted an 'estimate' of costs and not a 'tender'. This is supported on the basis of the Respondent's letter of award admitting that the drawings and documentation needed to be finalised. On that basis, it is reasonable to expect variations to occur;
  - 2) Variations occurred during the conduct of the works and have been presented in each one of the Applicant's payment claims;
  - 3) The Applicant advised the Respondent of variations during progress of the works;
  - 4) The Applicant advised the Respondent of delays being experienced during progress of the works;
  - 5) The Respondent has had an extended period in which to dispute the payment claims prior to the Applicant applying to have the dispute adjudicated.
  - 6) Tax Invoice, Invoice No.: 06-03-006 dated 21 April 2008, being Claim 5, is a valid payment claim;
  - 7) The Applicant has an entitlement to be paid in accordance with section 17 and at Schedule: Division 2 of the Act;
  - 8) The Applicant has an entitlement to make claims for progress payments *at any time after the contractor has performed any of its obligations* in accordance with section 18 and at Schedule: Division 3 of the Act.
40. For all the reasons set out above, I determine that Tax Invoice, Invoice No.: 06-03-006 dated 21 April 2008, being Claim 5, be paid.

### **Payment for Claim**

41. In determining the amount to be paid I have regard to the following;
- 41.1 Tax Invoice, Invoice No.: 06-03-006 dated 21 April 2008;
  - 41.2 Application/Certificate for Progress Payment No. 5 attached to and forming part of Invoice No.: 06-03-006 describing the work to which the payment claim relates;
  - 41.3 Application/Certificate for Progress Payment No. 4 (taken as being 5) attached to and forming part of Invoice No.: 06-03-006 and being a schedule of variations to which the payment claim relates.

42. The adjudicated amount is;

|  |                    |
|--|--------------------|
| Tax Invoice, Invoice No.: 06-03-006 Claim inclusive of GST   | \$54,173.90        |
| Adjustment for 'Reconciliation of Plumbing' variation<br>Refer Change Order Request Number COR-002 dated 11 April 2008<br>Total \$3,830.42 taken to variation schedule as \$2,091.29 excluding GST |                    |
| Adjustment addition \$3,830.42 - \$2,300.42 (\$2,091.29 + GST \$209.13)  | \$1,530.00         |
| <b>TOTAL (inclusive of GST)</b>  | <b>\$55,703.90</b> |

43. Interest is payable as required in Schedule: Division 6, section 7 and at the rate fixed from time to time for section 85 of the *Supreme Court Act* currently set at 10.5% per annum.

44. Interest payable is;

|   |                   |
|---|-------------------|
| Interest payable on \$55,703.90 from 19 May 2008 to 22 August 2008<br>\$55,703.90 at 10.5% PA / 365 x 95 days | \$1,522.32        |
| <b>TOTAL (inclusive of GST)</b>   | <b>\$1,522.32</b> |

45. Interest is to be added to the amount adjudicated in recital 42. above and paid together on or before 5 September 2008.

### Costs

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

### Summary

47. The adjudicated amount is made up of;

|  |                           |
|--|---------------------------|
| 47.1 Payment Claim Invoice No.: 06-03-006 as amended above \$55,703.90 including GST |                           |
| 47.2 Interest payable  | \$1,522.32 including GST  |
| 47.3 Total payable   | \$57,226.22 including GST |

### Conclusion

48. For the reasons set out in this determination, I determine that the adjudicated amount is \$57,226.22 inclusive of GST.

49. The date payable is no later than 5 September 2008.



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

**22 August 2008**