

Adjudicator's Determination

Pursuant to the Construction Contracts Act 2004

Adjudication Number	34.15.02
Prescribed Appointor	RICS Dispute Resolution Service.
Adjudicator	Colin Bond (Adjudicator 34)
Applicant:	
Respondent:	
Project:	
Amount to be paid by Respondent	\$61,657.22 including GST
Due Date For Payment	Within 7 days of release of determination
Adjudication Fees Apportionment	Applicant: 0% Respondent: 100%
Date of Determination or Dismissal	22 nd February 2015
Payment Claim	Claimed Amount : \$61,657.22 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 **\$61,657.22** including GST.
 - b. Interest is due on the adjudicated amount at a rate of 9% per annum from 2nd December 2014.
 - c. The respondent is to pay the adjudicated amount to the applicant within 7(seven) days of the date of the determination being released.

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

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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 certified amount in payment claim 13 for the sum of \$61,657.22 (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 2nd December 2014 when the respondent failed to pay the certified amount referenced in paragraph 13 above.
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:

- 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) of the Subcontract, 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, as this retention issue has been raised in the preceding Adjudication matter 34.15.-01, this issue has been addressed in this previous adjudication.

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 was matter 34.15.01. This 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 (34.15.02) relates only to the certified amount as detailed in paragraph 13 above. I consider that the failure to pay the certified amount

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 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 2nd December 2014, therefore, the final date for service for this Application was 2nd March 2015. The further submissions submitted by the respondent on 18th February 2015 at paragraph 5 confirms that on or about 30th January 2015 the respondent received two hard copies of the Adjudication Applications. The applicant contends that service was affected on 27th January 2015. However, for the purposes of this Adjudication both dates are within the prescribed timeframe for submission of the Adjudication Application under the Act.
26. I therefore conclude that the Adjudication Application 34.15.02 has been submitted within 90 days of the payment dispute arising and is therefore a valid Adjudication Application.

Payment Claim

27. 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*].
28. The respondent has not denied receiving the applicant's payment claim on this date.
29. It is common ground that a construction contract exists.
30. 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.
31. 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

32. An adjudication response was served by the respondent in accordance with section 29 of the Act and within the prescribed timeframes.
33. 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 failure to pay the certified amount by the due date for payment on 2nd December 2014 gave rise to a separate and distinct payment dispute as defined in section 8(a) of the Act on that date.
34. 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 is due to be paid under the Contract.

Adjudication Application

35. 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.
36. As stated in paragraph 22 above, I am satisfied that the payment dispute arose on 2nd December 2014 and therefore the 90 day period in relation to when the adjudication application can be submitted has been satisfied.
37. The applicant applied for adjudication of the payment dispute served on respondent by email and dropbox on 27th January 2015 and hard copy on 30th January 2015 and within the time allowed pursuant to section 28(1) of the Act.
38. The application is in writing pursuant to section 28(1)(a) of the Act.
39. The application was served on the respondent pursuant to section 28(1)(b) of the Act.
40. The application was served on RICS Dispute Resolution Service pursuant to section 28(1)(c) (iii) of the Act.
41. I am therefore satisfied that the adjudication application complies with the requirements of section 28 of the Act.

Adjudication Response

42. 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.

43. I am satisfied that the respondent served its response within the timeframes prescribed in the Act.

Reason for the Determination

44. 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

45. The applicant in its adjudication application has provided a copy of the Subcontract Contract Conditions.
46. 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

47. 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 claim comply with the requirements of the Act.
48. As the respondent has previously certified the payment claim amount of \$61,657.22 (incl GST) as \$61,657.22 (incl GST) in its payment certificate dated 28th October 2014 there are no further issues in dispute.

Valuation of works

49. I therefore value the works as per the payment certificate dated 28th October 2014 and I therefore find that the adjudicated amount is **\$61,657.22 (incl GST)**.

Adjudication costs

50. Pursuant to section 36(2) of the Act I determine that the respondent shall bear the costs in relation to this adjudication dispute.
51. The adjudication costs for this determination amount to 15 hours @ \$325.00 plus GST = \$5,362.50 including GST and as stated in paragraph 50 above, is to be paid by the respondent. A tax invoice will be issued accordingly.

Interest Costs

52. I determine that interest is payable on the adjudicated amount in accordance with clause 35(1) (b) of the Act at rate of 9% per annum from the 2nd December 2014.

Confidential information

53. 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