

Adjudicator's Determination

Pursuant to the Northern Territory of Australia Construction Contracts (Security of Payments) Act 2004

Adjudication CJC.14.01

(APPLICANT)

And

(Respondent)

Adjudicator Decision

1. I, Jaswant S. Deo, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act*, determine on 4 July 2014 that the amount to be paid by the respondent to the applicant is \$ 7,545.00 plus GST. The amount of \$ 7,545.00 plus GST is payable immediately.
2. The parties legal and preparation costs are not awarded.
3. The parties shall equally share the costs of the lodgment fee.

Appointment of Adjudicator

4. I was appointed as Adjudicator by Community Justice Centre (CJC) to determine this dispute on 10 June 2014 and the parties notified on the 10 June 2014.

Application and Response

5. The applicant served its application on CJC on the 10 June 2014 which CJC undertook to serve the respondent on behalf of the applicant by registered post on 11 June 2014.
6. The respondent served its written response to CJC and the applicant on 20 June 2014. The service was effected within ten (10) working days after receipt by it of the applicant's written application. In doing so, the respondent complied with its obligations under s.29(1)(a) and (b) of the *Construction Contracts (Security of Payments) Act*.

Conflict Of Interest

7. I have no material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen or in any party to the contract. This absence of material personal interest was declared to the parties via email on the 10 June 2014 and no objection was given by either party to such declaration.

Submissions from Parties

8. Following my appointment as adjudicator, I received from CJC by e-mail documents prepared by the Applicant containing: the application which comprised of 7 attachments on the 10 June 2014.
9. On 24 June 2014 I received from CJC a file prepared by the Respondent containing 8 pages along with annexure A to K.
10. On 24 June 2014 I received a 2 page email along with a statutory declaration from the applicant in response to the Respondent's documents.

Background

11. On or about 31 March 2014 the Applicant and Respondent entered into a Consultancy Agreement whereby the applicant was to provide Professional Services in the form of Engineering Surveying on the [redacted] project.
12. Duration of the contract was for the period 31 March 2014 to 10 October 2014.

13. On or about 2 May 2014, the applicant sent an email to the respondent advising withdrawing its services by the 9 May 2014. The reason for withdrawal was that the applicant contends that it was engaged on a full time basis and that the respondent had an 'in-house' surveyor carrying out most of the works which in the applicants own words is against the spirit of the agreement.
14. The respondent denies employing an 'in-house' surveyor or engaging the applicant on a full time basis. The contract was based on schedule of rates and confirms that the services provided by the applicant were on an 'as required' basis.
15. The applicant submitted a Tax Invoice number 7840 which constitutes the Payment Claim number 1 for the sum of \$ 7,275.00 plus GST for services rendered for the month of April 2014. The date of the Tax Invoice is 30 April 2014 and was emailed on the 6 May 2014.
16. The applicant submitted another Tax Invoice number 7847 which constitutes the Payment Claim number 2 for the sum of \$ 270.00 plus GST as the second and final invoice for services rendered. The date of the Tax Invoice is 20 May 2014 and was emailed on 21 May 2014.
17. The respondent contends that due to the applicants' withdrawal of its services, this constitutes a repudiation and a breach of contract and is claiming a sum of \$ 28,793.15 plus GST for costs incurred.

Clarification Sought from Parties

18. On 30 June 2014 I requested further information from the applicant to support their claims in the form of Quotes, Contract and Notices sent to respondent.
19. I received a response on 30 June 2014 from the applicant. The response included the Quote the applicant sent to respondent prior to entering into contract and the Notice of withdrawal of services by the applicant to the respondent in the form of an email. The applicant did not send a copy of the contract but stated that the contract is exactly the same as what was sent by the respondent.

Contract

20. It is common ground that the Applicant and the Respondent entered into a contract for consultancy works on or around 31 March 2014.
21. The contract relevant to the dispute is:

- Consultancy Agreement No. 8048U800 – [project] Stage 2B5.

22. The contract is for consultancy work for professional services executed in the Northern Territory and is consequently a construction contract under s.5 of the *Construction Contracts (Security of Payment) Act*.

Jurisdiction

23. Considering the many contentions from parties relating to the dispute, I must first determine if I have jurisdiction to adjudicate.

24. Jurisdiction is determined by the following factors:

- a). That the adjudicator be appointed by the Director of Community Justice Centre in accordance with s.20 of the *Community Justice Centre Act* and s.28(1) of the *Construction Contracts (Security of Payment) Act*.
- b). That the works be a “site in the Northern Territory”.
- c). That there is a payment dispute, as given in s.8 of the *Construction Contracts (Security of Payment) Act* and s.20 (2)(a) of the *Community Justice Centre Act*.
- d). That the applicant applying for adjudication be a party to the contract as defined in s.27 of the *Construction Contracts (Security of Payment) Act*, noting the exceptions under sub clauses (a) and (b).
- e). That the application for adjudication be made within 90 days after the dispute arises, as defined under s.28 (1) of the *Construction Contracts (Security of Payment) Act*.
- f). That the matter relates to “construction work”, as given in the definition of this term, s6 of the *Construction Contracts (Security of Payment) Act*.

With respect to the specific facts of this case, I deal below with each of the issues in points a) to f) above:

- a). The manner of appointment has been dealt with above. The Application has been satisfactorily served in accordance with the requirements of s.28(1) *Construction Contracts (Security of Payment) Act* and s.20 of the *Community Justice Centre Act* which state that the amount of the payment claim for the dispute is less than \$10,000.00.

- b). The site is within the Northern Territory.
- c). There is a payment dispute within the meaning of the Act. And the payment claim for the dispute is less than \$10,000.00.
- d). The Applicant is a Party to the contract.
- e). The application for adjudication was made on 10 June 2014, which was within 90 days after the dispute arose.
- f). The matter related to the supply of Engineering Surveying Services for the site and the work clearly falls under the definition of “construction work”

Finally neither party has raised any suggestion that there exists any judgment or other finding about the dispute that is the subject of the application.

Except for Item (17) above, where the respondent is claiming a sum of \$28,793.15 plus GST which I do not have jurisdiction in accordance with s20 of the *Community Justice Centre Act*, I am satisfied that I have jurisdiction to adjudicate on the applicant’s claim.

- 25. I can only rely on the submissions provided to me by both the Applicant and Respondent.

Validity of Application and Merits of the Claim

- 26. In order to establish if a payment dispute exist in accordance with s8 of the *Construction Contracts (Security of Payment) Act*, I must ascertain if a payment claim has been submitted by the Applicant.
- 27. I am satisfied that a payment dispute exist and that Payment Claims 1 and 2 in the form of Invoices 7840 and 7847 respectively have been submitted by the applicant.
- 28. The applicant contends that Tax Invoices 7840 and 7847 are for works carried out in accordance with the contract.
- 29. Since there is no written provision in the contract about when and how a party must respond to a payment claim and by when a payment must be made, I rely on s.20 of the *Construction Contracts (Security of Payment) Act*, which implies into a contract certain provisions relating to responding to and paying payment claims. That section says:

The provisions in the schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:

- (a) when and how a party must respond to a payment claim made by another party;*
- (b) by when a payment must be made.*

30. The provisions of Division 5 of the schedule are therefore implied into the contract, which states:

Division 5 Responding to payment claims

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 of 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.*

31. By subclause (2) the respondent had 14 days from receipt of the notices to dispute them, failing which it had 28 days from receipt to pay them. Remembering that Division 5 is implied into the contract as a contractual term, the amounts claimed were 'due to be paid under the contract' 28 days after receipt by the respondent.
32. In my view, the respondent's failure to give notice of dispute within 14 days after the payment claims 1 and 2 in the form of Tax Invoices 7840 and 7847, or pay the amount claimed within 28 days thereafter has the effect that the amount is due and payable under the terms of cl 6(2) of Division 5, which by virtue of s.20 is a contractual term.
33. Even in the absence of this provision I would have found that the amount of the Payment Claims 1 and 2 in the form of Tax Invoices 7840 and 7847 were due by the respondent to the applicant. This is because the applicant has provided evidence, in the form of the claim, that the work was done and the claim made, while the respondent acknowledged in their submission that the amounts claimed were legitimate and that there were intending to off-set that claim against cost incurred by the respondent.
34. I therefore find that on the merits and on the balance of probabilities payment claims 1 and 2 in the form of Tax Invoices 7840 and 7847 amounting to a total of \$ 7,545.00 plus GST is payable to the applicant.

Determination

35. In accordance with s.38(1) of the *Construction Contracts (Security of Payment) Act* I determine that the amount to be paid by the respondent to the applicant is \$ 7,545.00 plus GST.
36. The sum of \$ 7,545.00 plus GST is payable immediately.

Costs

37. I determine that:
- The parties legal and preparation costs are not awarded and are to be borne by the Parties.
 - The parties shall equally share the cost of the lodgment fees.

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Jaswant S Deo
Adjudicator

4 July 2014