Report of a decision of a registered adjudicator
Decision No 07.24.01

Section 54(1) *Construction Contracts (Security of Payments) Act 2004*

On 25 July 2024, Dean Ellis, an adjudicator registered under the *Construction Contracts (Security of Payments) Act 2004*, determined an application for adjudication (No 07.24.01).

The adjudicator determined that

- the amount payable by the respondent to the applicant is nil; and
- the parties pay the costs of the determination in equal shares.

Summary

This adjudication arises out of the construction of a new building project by the government of the Northern Territory, which was the 'Principal' on the Project. The respondent was the main consultant and the applicant was a sub consultant to the respondent.

The applicant entered into a contract with the respondent (contract) and the respondent was to pay it $109,350 (excluding GST).

The applicant seeks payment of $135,895 (excluding GST). It contends that the scope of work under the contract was substantially varied. The respondent disputed that it was obliged to pay the amount claimed.

For the reasons given below, I am satisfied that the claimant's invoice was a 'payment claim'. However, I am not satisfied that the scope of the claimant's work varied and accordingly, I assess the amount payable as '$nil'.

The due date for the determination was 29 August 2024.

The issues

Three issues arise:

1. what were the terms of the contract between the parties?
2. was there a 'payment claim' within the scope of that expression in the Act?
3. was the contract varied, and, if so, to much money was the applicant entitled?

Background

The Project was a public tender conducted by the NT government. The respondent became aware of the Project and invited the applicant to be a sub-consultant on it.

The respondent provided relevant documents regarding the project to the applicant including a Request for Quotation (RFQ) and the conditions of the contract.

The respondent provided relevant documents to the applicant by email dated 8 April 2022.2 The email stated:

The project (Stage 1) requires the design, contract documentation and construction phase services for the proposed project. The documents provided to the applicant included the Request for Quotation prepared by the NT government (RFQ) and the Conditions of Contract (Conditions). These documents set out terms of the contract that would apply between the NT government and the successful tenderer.

The Response Schedules included a document which was described in its footer as pricing information. The applicant provided a response to the respondent, which it called a 'Fee Proposal' (Proposal) using the Quotation – Quotation form.4

At the bottom of page 1, there is a space to put in 'LUMP SUM AMOUNT FOR THIS CONSULTANCY …'. The application inserted '$109.350'.5

The applicant got an email from the respondent on 10 November 2022.6 The email informed the applicant that 'we' are the successful team for the project, referring to the applicant, the respondent, and other sub consultants.

The email went on to say that this email is an acceptance of your fees as supplied in the original tender.

On 5 April 2024, the applicant requested a variation to increase the price.

The applicant filled in the pricing information which it called a "fee proposal" by inserting a LUMP SUM AMOUNT FOR THIS CONSULTANCY of $109.350.

The form stated that:

The "Total Lump Sum Amount" forms part of the Contract. The individual "Rate" or "Extended Amount" entered against items in this schedule do not form part of the Contract.

However this Lump Sum Price Breakdown Schedule may be used for tender assessment, as a basis for progress payments/assessment of claims for variations.

In the proposal the applicant inserted categories of employees and hours of extended rates for each employee. The extended rates added up to $108, 350.

The applicant was advised via email from the respondent that they were the successful tender. The email went on to say that:

This email is an acceptance of your fees as supplied in the original tender. We will reach out individually with sub-consultancy agreements for a back-to-back with the NTG contract. A copy of the conditions of contract relevant to the project is included in the RFQ and available online.

The respondent did not provide the applicant with a sub consultancy agreement before work started on the project.

The applicant requested a variation on price;

The respondent did not sign that variation;

The applicant submitted 100% design complete documents;

The applicant submitted an invoice seeking payment of an addition $135,895 (the invoice);

By letter dated the respondent denied that it was liable to pay the amount claimed.

What were the terms of the contract?

The terms of the contract found in the following documents:

- the email and the documents provided with it including the Conditions and the RFQ;
- the applicant's response; and
- the respondent's email advising of the successful team for the project.

Was there a payment claim?

Section 7A of the Act defines a 'payment claim' to mean a claim made 'under a construction contract'.

The respondent contended that the invoice was not made 'under' a construction contract because it was a 'quantum meruit' claim.

There are, relevantly, two types of claim described as 'quantum meruit' claims in Australian law. One is where there is an actual contract to carry out work but the contract does not specify the price for the work. In such circumstances, the court will imply a contractual obligation to pay what the work is worth.

The other situation is where there is no contract on foot but where one party carries out work to the benefit of the other in circumstances where it is unjust for the second party to retain the benefit without paying for it. This type of 'quantum meruit' claim is founded on principles of unjust enrichment, not contract. A claim based on unjust enrichment is not a claim in contract and cannot be the subject of a 'payment claim' under a construction contract. A claim based on a contract which does not specify a price for the work (or does not specify a price for particular work) may be a 'payment claim' within s 7A of the Act.

The issue is, therefore, whether the invoice is based on the contract or on 'non-contractual unjust enrichment'.

The relevant payment claim was made and rejected. A payment dispute arose on rejection. The application was made within 55 business days after that. The application was prepared and served in accordance with the Act. No other person or entity has made a determination in respect of the subject matter of the adjudication.

The respondent argued, in effect, that without a specific contractual direction (or permission), there was no ‘variation’ and a contractual claim could not be made. It argued that the claim for additional compensation arose either by way of a ‘quantum.

Clause 25 of the conditions stated:

25. Variations

The Principal may, by written notice during the currency of the Contract, direct or permit the Consultant to vary the scope or nature of the Services including the program without prejudice to the Contract. Any resultant adjustment to the fee payable to the Consultant shall be negotiated and agreed by the parties.

Clause 25 deals with variations by written notice from the principal before the changed work is carried out.

Clause 25 does not deal with the situation where the conduct of the principal brings about a change to the scope or nature of the services, but no specific variation instruction is provided beforehand.

Reading the contract as a whole, clause 25 is not intended as a comprehensive code of the circumstance in which the consultant might be able to assert that the contract had been varied. Ordinarily, a consultant would be entitled paid for additional work done. This entitlement should not be excluded in the absence of clear words in the contract. Accordingly, it is implicit in the contract as a whole that applicant would be paid reasonable additional remuneration for additional work, if there was a change in the nature or scope of the work for which principal was responsible or which occurred with the involvement of the principal. A claim asserting such an entitlement is, in my opinion, a claim made ‘under’ the contract and is a ‘payment claim’ within s 7A of the Act.

The invoice is claim for a variation which occurred without a formal direction. However, it is still a contract-based claim and is a ‘payment claim’ for the purposes of the Act. The Act applies to the dispute between the parties.

Section 33(1)(a) of the Act

I digress to deal with the operation of s 33A of the Act. That section requires me to dismiss an application without considering the merits, if I am satisfied of certain things.

The services provided by the applicant are services related to construction work within the meaning of s 7 of the Act. The Act does not require that such services be provided on site, or that such services be provided directly to the principal of a project.

The matter is not too complex to determine within the time available.

The matter should not be dismissed under s 33(1)(a) of the Act. I now return to the merits.

Was the scope varied?

The respondent raised two arguments in relation to the merits of the payment claim.

First, the respondent contended that there was no 'variation' and no entitlement to payment unless there was an agreement that the contract had been varied.

I do not accept this contention. Whether there was a variation or not is a question of fact. It may be resolved between the parties under the dispute resolution clause. However, the existence of a variation is a matter which arises independently of the dispute resolution clause. If there was a variation, then the lack of agreement or acknowledgment from the respondent does not vitiate the claim. It is necessary for me to consider whether there was variation as part of the adjudication process. If I find that there was a variation, I must then determine the value of the variation. I note that any finding I make would not bind the parties if they pursued dispute resolution under the contract or litigation.

The respondent's second argument was that the scope of work did not change.

The applicant contended that there was a change to the scope of the work because the cost of the project greatly exceeded the initial estimate of the costs.

The applicant's claim for an additional fee was based on a percentage of the project cost. It said that pricing work as a percentage of the project cost is a common method of pricing. I note that the original design included percentage-based pricing as one of the available pricing options. I accept that a percentage fee is a common pricing mechanism. It is not, of course, the only pricing mechanism commonly used. Hourly rates are also common.

The respondent contended that the scope of the works under the contract had not changed. The respondent's argument was that the scope of the work was defined by the information in the tender documents about the work to be done rather than the budget figure given for it.

The tender documents contained plans and diagrams showing the structure and work, although these were of a general nature.

While the RFQ and the invoice did identify the project budget, there was substantial information about the structures that the parties were required to design.

The applicant did not point to any respects in which the physical structures as designed were different from the structures identified in the RFQ and supporting information.

The applicant did not identify any ways in which the structures changed between the RFQ phase and the final design. It did not analyse any differences between the 'as planned' and 'as built' structures in terms of relative complexity, just overall costs.

In this context, I do not accept that difference between the budget price and the actual cost resulted in additional work for the applicant. I accept that there was no change to the structures comprising the Project and consequently, no change to the scope of the work.

Another difficulty for the applicant is that the Proposal justified the applicant's price by reference to the hours required by specified personnel in connection with the matter. It did not price the job based on percentage of the cost of the works. The claimant did not seek to justify its claim by reference to the additional hours worked, except in a general way. It did not, for example, identify the total hours work in connection with the Project as compared to the hours in the Proposal.

In the circumstances, I am not satisfied that the discrepancy between the price for the work and its budget resulted in a change to the scope of the works. If there was a variation, I have not been provided with sufficient information to put a value on that additional work.

I assess the amount payable as '$nil.

Costs

The usual rule is that each party bear its own costs. There is nothing in the conduct of the parties which causes me to exercise my powers under s 36(2) of the Act

***This determination has been edited in line with the requirements under the Construction Contracts (Security of Payments) Act 2004 and the issues identified as confidential by the adjudicator in their determination.**

Erin McAuley

Construction Contracts Registrar