

## **Adjudicator's Determination**

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

**Adjudication 18-07-03**

**(Claimant)**

And

**(Respondent)**

1. I, Brian J Gallagher, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act*, determine that application for adjudication between the parties is dismissed.
2. The parties legal and preparation costs are not awarded.
3. The Applicant shall bear 100% of the Adjudicator's costs.

## Appointment of Adjudicator

4. I was appointed as Adjudicator to determine this matter following discussion with the Housing Industry Association 1 August 2007 and the parties were notified by letter dated 8 August 2007.
5. The Adjudicator has been properly appointed in accordance with the *Construction Contracts (Security of Payments) Act 2004*.

## Documents Regarded in Making the Determination

6. In making the determination I have had regard to the following.
  - The provisions of the *Construction Contracts (Security of Payments) Act 2004*.
  - The Application for Adjudication received by the Housing Industry Association (HIA) 25 July 2007.
  - HIA Plain Language Northern Territory Building Contract

## Legislative Requirements

7. The Act at Section 33 requires that;
  - (1) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) –*
    - (a) *dismiss the application without making a determination of its merits if –*
      - (i) *the contract concerned is not a construction contract;*
      - (ii) *the application has not been prepared and served in accordance with section 28;*
      - (iii) *an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or*
      - (iv) *satisfied it is not possible to fairly make a determination –*
        - (A) *because of the complexity of the matter; or*
        - (B) *because the prescribed time or any extension of it is not sufficient for another reason; or*

## The Adjudication Application

8. The adjudication application consists of the following documents;
  - Application document dated 25 July 2007;
  - 21 Exhibits attached to the application which seek to support and clarify the claim.

## Jurisdiction

9. The Act defines a “Construction Contract” at Section 5(1)(a);
  - (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;*
10. The Act defines “Construction Work” at Section 6(1)(c) to include;
  - (1) *Construction work is any of the following work on a site in the Territory:*

*(c) constructing the whole or a part of any civil works, or a building or structure, that forms or will form (whether permanently or not and whether or not in the Territory), part of land or the seabed (whether above or below it);*

11. The Claimant's letter to the Respondent dated 5 June 2007 (Exhibit 15 in the Application) is clear evidence of a 'payment dispute' between the parties as defined by the Act.
12. I have had no prior association with either the Claimant or the Respondent and no conflict of interest with either party to declare.
13. The contract is for work on a site in the Northern Territory and is a contract undertaking construction work as defined in Section 6 of the Act. The contract was based on a written acceptance of a quotation with reference to HIA Northern Territory Building Contract.
14. The quotation was accepted by email dated 6 December 2007 and a letter of acceptance was executed on or around 15 March 2007.

### **Validity of Application**

15. The Act defines the time period for raising a dispute at Section 28(1);
  - (1) *To apply to have a payment dispute adjudicated, a party to the contract must, within 28 days after the dispute arises or, if applicable, within the period provided for by section 39(2)(b)-*
    - (a) *prepare a written application for adjudication;*
    - (b) *serve it on each other party to the contract*
16. Clause 5 of the Northern Territory Building Contract provides the relevant requirements for payment under the contract as follows;
  - 5.2 *The owner has 5 days to pay the builder from when the claim is given to the owner.*
  - 5.4 *If the owner disputes a claim the owner has 5 days to tell the builder from when the claim is given to the owner.*
17. The Applicant submitted its Progress Claim No. 2 to the owner dated 21 May 2007 in the amount of \$38,329.50. (Exhibit 13)
18. By agreement between the parties an amended Progress Claim No. 2 was issued 28 May 2007 in the amount of \$37,770.50. (Exhibit 14)
19. The Applicant notified the Respondent of failure to honour an agreement to pay the amended Progress Claim in a letter dated 5 June 2007 (Exhibit 15). I take this document as evidence of acknowledgement of the commencement of a payment dispute.

20. The Application should have been served on the parties within 28 days of that date or not later than 3 July 2007. The application was served on the Prescribed Appointer 25 July 2007 or 22 days beyond the expiry date as defined by the Act.
21. I therefore determine the Application has not been properly served as required by the Section 28 of the Act.

### **Dismissal of Application**

22. Under Section 33 of the Act the Adjudicator, having determined that the Application has not been prepared and served in accordance with Section 28 of the Act, must dismiss the application without making a determination of its merits.
23. I therefore dismiss the application and proceed only with a determination on costs.

### **Costs**

24. Clause 36 (1) of the Act requires the parties to bear their own costs.
25. Clause 36 (2) of the Act empowers the adjudicator to award costs if he is satisfied that the submissions of a party are unfounded or that the conduct of a party is frivolous or vexatious.
26. I am satisfied that by lodging an Application 22 days beyond the admissible date the Applicant has lodged an application which is unfounded under the Act.
27. I therefore determine that;
  - The parties legal and preparation costs are not awarded and are to be borne by the Parties.
  - The applicant shall bear all of the Adjudicators costs.

### **Conclusion**

28. I have concluded as follows:
  - The application is dismissed.
  - The parties legal and preparation costs are not awarded.
  - The Applicant shall bear 100% of the Adjudicator's costs.

Brian J Gallagher  
**NT Registered Adjudicator No 18.**  
**10 August 2007**