

Adjudicator's Determination

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

Adjudication 18-09-01

(Applicant)

And

(Respondent)

1. I, Brian J Gallagher, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act*, determine that the Adjudicated Amount for the Applicant in respect to the Application served 24 December 2008 is \$2,500.00 including GST.
2. The date payable is 8 December 2008. Interest due and payable to 27 January 2009 is \$36.00 and interest continues to accrue at the rate of \$0.72 per day until payment is made.
3. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

Appointment of Adjudicator

4. I was appointed as Adjudicator by Contractor Accreditation Limited 24 December 2008. The parties were notified of the appointment the same day.
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.
 - 6.1. The provisions of the *Construction Contracts (Security of Payments) Act 2004*.
(as in force 8 January 2008)
 - 6.2. The provisions of the *Interpretation Act*. (as in force 17 May 2007)
 - 6.3. Application from the Applicant dated 20 December 2008.
 - 6.4. Letter of Demand dated 10 November 2008.
 - 6.5. Response from the Respondent dated 8 January 2009.

The Adjudication Application

7. The Adjudication Application was served on the Respondent on 24 December 2008 and consists of the following documents;
 - 7.1. Adjudication Application, and
 - 7.2. 26 Attachments.

The Response

8. The Response to the Application was served on the Adjudicator and the Applicant on 12 January 2009, within the period defined by the Act, and consists of the following documents;
 - 8.1. Response document, and
 - 8.2. 3 Attachments.

Jurisdiction

9. The dispute arises out of a letter of engagement between the parties for the Applicant to provide project management and contract administration services to the Respondent for a fixed fee. The services provided were in relation to the construction of a new residence for the Respondent.
10. The works and arrangements between the parties meet the definitions of construction contract and construction work as defined in Section 6 of the Act. The work is on a site in the Northern Territory and the contract is therefore a construction contract according to the Act.

11. I have had no prior association with either party and hence and no conflicts of interest to declare.
12. The parties have provided no advice of the dispute being “subject of any other order, judgment or other finding”.
13. On the balance of probabilities, I determine the Adjudicator has jurisdiction to adjudicate the dispute in accordance with the Act.

The Payment Claim

14. The payment claim referred to in the Application is dated 10 November 2008. The amount claimed is \$25,575.00 inclusive of GST.
15. The summary details of the 10 November 2008 claim (GST inclusive) are:

Outstanding contract value as awarded	\$11,000.00
Claim for variations	<u>\$14,575.00</u>
Net Claim	\$25,575.00

Issues to be Determined

16. The Applicant presents a final claim for all work as described in the scope of works of the letter of engagement and a claim for additional services provided during the project. The Respondent denies these claims.
17. The parties are reliant upon a fee proposal and an acceptance between them detailing the services to be provided and a fee payment schedule. The Respondent disputes the value claimed as variations and states that timely notification of the variation was not provided.
18. In the event there is a legitimate claim then quantum is to be determined.
19. The due date for the payment of any legitimate claim is to be determined along with any interest due.

Status of the “Payment Dispute”

20. As noted above the contract is confined to a fee proposal and an acceptance. The written elements relate to the initial pricing of the works and since there are no documented conditions of contract the implied provisions in the Act prevail.
21. The Applicant’s “Letter of Demand” dated 10 November 2008 complies in all respects with the requirements of Division 4 of the implied Provisions Schedule in the Act.
22. Under Section 8 of the Act a payment dispute arises if the amount claimed has not been paid when it is due or if the claim has been wholly or partly disputed. Under the implied provisions the Respondent had 14 days to dispute the claim or 28 days to pay

the claim in full. The Respondent provided a written rejection to the Claim dated 14 November 2008.

23. I therefore determine that a Payment Dispute under the Act commenced on 14 November 2008.

Outstanding Contract Value

24. In the Application the Applicant claims the unpaid contract value of \$11,000. The Respondent agrees with this value asserting the amount has been withheld as the full scope of contracted services has not been completed as the Applicant has not secured the Certificate of Occupancy.
25. In his letter dated 26 August 2008 the Applicant provides the Respondent with a detailed list of matters to be resolved by the Respondent in order that the Building Certifier would issue the Certificate of Occupancy.
26. In the Response the Respondent lists a number of things to be resolved with the Applicant in order to finalise the Certificate of Occupancy.
27. From this correspondence it is apparent that neither party is clear on their respective roles and responsibilities in securing the Certificate of Occupancy. The Original Fee proposal from the Applicant uses the words "Gain Certificate of Occupancy". This is in the context of a scope list of professional services and given that the Respondent was engaging the Applicant primarily for his professional and technical expertise in residential building it would be reasonable to assume that the Respondent would secure the Certificate of Occupancy. Such an understanding would extend to include managing the client in so far as it was necessary to secure all the relevant paperwork and signatures required by the Building Certifier. The applicant cannot rely upon a request to the Respondent to provide documentation and argue such request fulfills the terms of the fee proposal.
28. I therefore determine that on the balance of probabilities the Respondent has provided payment for the services provided in accordance with the original fee proposal and is entitled to withhold the amount of \$11,000 until the applicant "gains the Certificate of Occupancy".

Variations

29. The Applicant's claim of \$14,575 for variations is in two parts. \$6,358 is claimed in additional supervision fees and \$8,217 for additional labour.
30. In support of the claim for additional supervision the Applicant lists a series of changes and additions to the building works. The Respondent argues that the Drawings as approved on the Permit to Build were a deliberately agreed compromise by the Respondent and the Applicant to secure the Building Permit upon which the fee proposal for professional services was based. It therefore appears the Applicant

provided a fixed fee for professional services with detailed knowledge of the Respondent's aspirations in the regard to the project. The Applicant has failed to provide any detailed information as to how the additional fees claimed have been calculated. In general terms the Respondent argues that works as constructed, whilst different to works as initially approved, do not constitute a significant change to the works as envisaged potentially possible when the approved drawings were being finalised. It is not directly stated anywhere however it also appears that the Applicant's fee was derived as a percentage of the construction cost and is not a time based fee. The wording of the fee proposal does not define what would constitute a variation or how any variations would be valued. It does not necessarily follow that a variation to the approved construction works would constitute a variation to the project management fee proposal.

31. In relation to the claim for additional labour the Applicant provides no detailed supporting information as to how the value claimed is derived. From information submitted by the Respondent it appears that the Applicant provided labour services himself to complete the core filling requirements on the block work. The Respondent argues that the core filling operation requires close supervision which the Applicant was engaged to provide and that accordingly no additional attendance was involved. The Respondent is prepared to concede that the value of core filling labour provided was equivalent to 100 man-hours at \$25 per hour or \$2,500 including GST.
32. In their respective submissions both parties refer to work done or not done and other services of value which should be taken into account when arriving at a settlement of the dispute. This would ordinarily be the case where such a settlement is determined by mediation. However this is an adjudicated dispute and the adjudicator is authorised to consider only those matters specifically nominated as claimed but not paid.
33. On the balance of probabilities I determine as follows;
 - 33.1. The Applicant has not substantiated the claim for additional supervision and hence the claim for additional supervision fees is denied.
 - 33.2. The Respondent's valuation of core-filling labour represents a reasonable estimate of the value of the work to the Respondent and obviates any necessity to consider the absolute value in the absence of specific contract terms and supporting detail from the Applicant.
 - 33.3. The value of the Applicant's additional labour provided is then \$2,500 including GST.

Adjudicator's Costs

34. Clause 36 (1) of the Act requires the parties to bear their own costs.
35. 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.

36. The submissions from the parties have merit on both sides and are neither frivolous nor vexatious
37. I therefore determine that adjudicator's costs are to be shared equally by the parties.

Interest

38. The Applicant's claim was presented 10 November 2008. Section 6 of the Implied Provisions Schedule under the Act requires payment within 28 days after receiving the payment claim.
39. Section 7 of the Implied Provisions Schedule requires interest on payments for the period between the due date for payment and the actual date of payment. Interest rate is prescribed as that fixed for Rule 35.8 of the Federal Court Rules. This rate is presently 10.5% per annum.
40. On the balance of probabilities I determine as follows;
- 40.1. The payment was due on or before 8 December 2008.
 - 40.2. Interest is accruing at the daily rate of 10.5% of \$2,500 / 365 = \$0.72 per day
 - 40.3. Interest due and payable up to 27 January 2009 is \$36.00

Conclusion

41. As requested I have conducted the adjudication and concluded as follows:
- 41.1. For the reasons set out in the Adjudication, I determine the Adjudicated Amount for the Applicant is \$2,500 including GST.
 - 41.2. The date payable is 8 December 2008. Interest due and payable to 27 January 2009 is \$36.00 and interest continues to accrue at the rate of \$0.72 per day until payment is made.
 - 41.3. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

Brian J Gallagher
NT Registered Adjudicator No 18.
27 January 2009