

Adjudicator's Determination

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

Adjudication 18-09-04

(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 15 April 2009 is \$118,234.50 including GST.
2. The date payable is 29 January 2009. Interest due and payable to 6 May 2009 is \$4,713.23 and interest continues to accrue at the rate of \$48.59 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. The Applicant served the Adjudication Application on the Housing Industry Association SA and NT 15 April 2009.
5. I was appointed as Adjudicator by the Housing Industry Association 17 April 2009. The parties were notified of the appointment the same day.
6. The Adjudicator has been properly appointed in accordance with the *Construction Contracts (Security of Payments) Act 2004*.

Documents Regarded in Making the Determination

7. In making the determination I have had regard to the following.
 - 7.1. The provisions of the Construction Contracts (Security of Payments) Act 2004. (as in force 8 January 2008);
 - 7.2. The provisions of the Interpretation Act. (as in force 17 May 2007);
 - 7.3. Application from the Applicant dated 14 April 2009;
 - 7.4. Response from the Respondent dated 24 April 2009;
 - 7.5. Applicant's Response to Adjudicator queries dated 29 April 2009; and
 - 7.6. Respondent's Response to Adjudicator queries dated 29 April 2009.

The Adjudication Application

8. The Adjudication Application was served on the Respondent on 24 December 2008 and consists of the following documents;
 - 8.1. Adjudication Application; and
 - 8.2. 3 Attachments.

The Response

9. 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;
 - 9.1. Response document, and
 - 9.2. 6 Attachments.

Jurisdiction

10. The dispute arises out of a written contract agreement between the parties for the Applicant to build a residence for the Respondent.

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

The Payment Claim

15. The payment claim referred to in the Application is a resubmission of an invoice dated 11 January 2009. The Applicant asserts the invoice was resubmitted to the Respondent by email 23 January 2009. The Respondent claims the invoice was resubmitted 24 January 2009. Neither party presents documentary evidence to support their position on the actual date of re-issue. There is however firm agreement that the invoice was re-issued and as such would constitute a presentation in writing. For the purposes of the Adjudication I take the later date proffered by the Applicant since it diminishes any potential liability to the Applicant who has failed to substantiate his assertion when it ought to have been within his capacity to do so.
16. The summary details of the 24 January 2009 claim (GST inclusive) are:

Progress Claim for Lockup at (location of new residence)	\$118,234.50
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17. The Application makes reference to a separate claim, dated 10 March 2009, for interest on late payments which the parties agree has not been paid. However at Paragraph 24 of the Application it is clear that the Applicant is only seeking interest entitlement as required under the Act in relation to the 24 January 2009 claim. I interpret this to mean that the 10 March 2009 claim is not referred for adjudication and accordingly I have not considered it further.

Issues to be Determined

18. The Applicant presents a progress claim on the basis of stages defined in the written agreement between the parties. The Respondent denies the claim for the following reasons.
 - 18.1. Respondent asserts that the claim submitted 24 January 2009 does not meet the requirements for a claim as defined in the Act; and

- 18.2. Respondent asserts that the terms of the contract between the parties are such that the total value of work completed cannot exceed the total value of work paid in progress claims.
19. In the event there is a legitimate claim then quantum is to be determined.
20. The due date for the payment of any legitimate claim is to be determined along with any interest due.

Status of the "Payment Claim"

21. The written contract between the parties is based on the Housing Industry Association pro forma Plain Language Northern Territory Building Contract. Defined payment terms are:
 - 21.1. total price including GST given as \$788,230;
 - 21.2. estimated value of Prime Costed Items given as \$37,000;
 - 21.3. clause 3.2 You must pay us the price;
 - 21.4. clause 3.3 You must pay it in installments at substantial completion of the following stages of the work:
 6. Lock-up Stage 15% of price payable \$118,234.50;
 - 21.5. clause 5.1 Any claim for payment must be in writing;
 - 21.6. clause 5.2 You have 5 days to pay us from when a claim is given to you;
 - 21.7. clause 5.3 We will charge you interest at 15% per annum on what is unpaid after then;
 - 21.8. clause 6.1 Some parts of the work have been "prime costed";
 - 21.9. clause 6.2 This means the price includes estimated sums for these items because their actual price is not yet known;
 - 21.10. clause 6.5 Once the actual price of a prime costed item is known , you will be charged that price including an amount for our margin (which includes overheads) being 20% applied to the cost of that item;
 - 21.11. clause 37.3 All notices must be given to the other party;
 - 21.12. clause 37.3 Notices can be given in person; and
 - 21.13. clause 37.4 Notices can also be left at the other party's last known address.
22. The Act allows the application of implied provisions in the contract under the following circumstances.
 - 22.1. section 17 allows application of the Schedule, Division 2 if the contract does not have written provisions as to how the claim is to be valued;
 - 22.2. section 18 allows application of the Schedule, Division 3 if the contract does not have written provisions enabling progress payments; and

- 22.3. section 19 allows application of the Schedule, Division 4 if the contract does not have written provisions about how a party must make a claim to another party for payment.
23. The parties acknowledge that Progress Claims 1 to 5 were submitted at the stages of work as defined in the contract. The Respondent accepted each of these claims and made the payments to the Applicant even if somewhat later than as required by the contract. There is no substantive difference to the manner in which Progress Claim 6 is presented in comparison to the earlier claims.
24. The Applicant seeks to supplement the contract conditions with the implied provisions of the Act particularly in relation to written provision as how a claim should be made. The Respondent argues that Sections 17,18 and 19 are basic yes/no tests of application. That is the Act does not require a contract to include all the elements of the implied provisions. It simply requires some provision to be made.
25. On the balance of probabilities I determine as follows;
- 25.1. the provisions for payment in the contract agreement are sufficient to negate the application of the implied terms of the Act. The submission of the invoice 24 January 2009 satisfies all the contract requirements to constitute a claim under the contract;
- 25.2. if that view is incorrect then by virtue of its conduct in treating Progress Claims 1 to 5 the Applicant has established that the submission of the invoice 24 January 2009 satisfies all the contract requirements to constitute a claim under the contract; and
- 25.3. a payment dispute under the Act commenced on 29 January 2009.

Contract Terms

26. The Applicant relies upon the written terms of the contract to substantiate the entitlement to payment of Progress Claim No 6. In particular it is argued that sole trigger for a progress claim is the achievement of a defined stage of the works and the value of that stage of the works is defined in contract. The fact that the progressive amount paid then becomes 95% of the total price is not a consideration under the defined terms.
27. The Respondent relies on a discussion with the Applicant prior to signing the contract and provides a sworn statement to the effect that the parties agreed the value of progress payments would not exceed the value of work done. A further statement is provided by an expert witness suggesting that the value of work complete to date is in the vicinity of 60%. This evidence was submitted at the request of the Adjudicator inviting both parties to make submissions on any verbal agreements established in conjunction with the contract.
28. In response to the Adjudicator's request the Applicant provides a sworn statement denying any verbal agreements in respect of progress claims.

29. The Applicant also relies upon the Advisory Notice attached to the Contract. The notice states at paragraph 9 “Progress payments should not be made in advance of the performance of the building work to which the demand relates”. However paragraph 3 states “Most important, check to see that the work you want your builder to do has been fully and accurately set out in the contract. Do not rely upon verbal promises or agreements.” Additionally the Advisory Notice is prefaced with the note – This does not form part of the contract.
30. The submissions of the parties enter into some discussion concerning the definition of the term “Lock-up Stage” since it is not directly defined within the contract. The most simple definition from the Victorian Building Commission is “that stage of the works where you need a key to enter the building” seems to encapsulate the various definitions submitted by the parties . There is also agreement between the parties that the Applicant has achieved Lock-up Stage.
31. In essence then the Respondent is requesting the Adjudicator to vary the terms of the contract on the basis that the terms of the contract are not fair and reasonable. The merits of that assertion fall into the realm of mediation and negotiation which are clearly beyond the authority of the Adjudicator under the Act
32. I therefore determine that on the balance of probabilities the Applicant has completed the works to the stage defined in the progress claim schedule and is entitled to payment in accordance with the terms of the contract.

Adjudicator’s Costs

33. Clause 36 (1) of the Act requires the parties to bear their own costs.
34. 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.
35. The submissions from the parties have merit on both sides and are neither frivolous nor vexatious
36. I therefore determine that adjudicator’s costs are to be shared equally by the parties.

Interest

37. The Applicant’s claim was presented 24 January 2009. The conditions of contract require payment within 5 days after receiving the payment claim.
38. The conditions of contract provide for interest on payments for the period between the due date for payment and the actual date of payment at 15% per annum.
39. On the balance of probabilities I determine as follows;
- 39.1. the payment was due on or before 29 January 2009;

- 39.2. interest is accruing at the daily rate of 15% of $\$118,234.5 / 365 = \48.59 per day; and
- 39.3. interest due and payable up to 11 May 2009 is \$4,956.13.

Conclusion

40. As requested I have conducted the adjudication and concluded as follows:
 - 40.1. For the reasons set out in the Adjudication, I determine the Adjudicated Amount for the Applicant is \$118,234.50 including GST;
 - 40.2. The date payable is 29 January 2009. Interest due and payable to 6 May 2009 is \$4,713.23 and interest continues to accrue at the rate of \$48.59 per day until payment is made.
 - 40.3. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

Brian J Gallagher
NT Registered Adjudicator No 18.
6 May 2009