

## **Adjudicator's Determination**

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

#### **Adjudication 18.10.04**

·  
**(Applicant)**

And

·  
**(Respondent)**

1. I, Brian J Gallagher, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act*, dismiss the Application, served 1 December 2010, under Section 33(1)(a)(ii) of the Act.
2. The Adjudicator's costs are to be paid entirely by the Applicant.

## Appointment of Adjudicator

3. The Applicant served the Adjudication Application on the Institute of Arbitrators and Mediators Australia, 1 December 2010.
4. I was appointed as Adjudicator by the Institute of Arbitrators and Mediators Australia 3 December 2010. The parties were notified of the appointment by the Institute that 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 (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 1 December 2010.
  - 6.4. Response from the Respondent dated 14 December 2010.
  - 6.5. The 8 December 2010 reply, from the Applicant, to the Adjudicator's request for a submission in relation to admissibility of the Application under Section 28 of the Act.

## The Adjudication Application

7. The Adjudication Application was served on the Respondent 1 December 2010 and consists of the following documents;
  - 7.1. Adjudication Application, and
  - 7.2. 13 attachments of supporting documentation.

## The Response

8. The Adjudication Response was served on the Applicant and the Adjudicator 15 December 2010 and consists of the following documents;
  - 8.1. Respondent's reply to the Application, and
  - 8.2. 5 attachments of supporting documentation.

## Jurisdiction

9. The parties agree the following;
- 9.1. A contract for construction work in the Northern Territory exists between the parties and is subject to the *Construction Contracts (Security of Payments) Act 2004*.
- 9.2. The parties are satisfied that the Adjudicator's statements of no conflict to declare are reasonable within the meaning of the Act.
10. The parties advise no information on the dispute being "subject of any other order, judgment or other finding".
11. The Respondent disputes jurisdiction on the following counts.
- 11.1. It is contended that no valid payment claim exists and hence no payment dispute under the Act exists.
- 11.2. It is contended that Application has not been submitted within the time prescribed by the Act.
- 11.3. It is contended that the Application has not been prepared in accordance with Section 28 of the Act.

## Payment Claim 23 August 2010

12. The Payment Claim presented to the Respondent 23 August 2010 summarises the claim as follows:

Provision of an extra 610 lineal metres of footpath.	\$58,675.32
Additional costs to remove existing footpath.	<u>\$73,344.15</u>
<b>Amount claimed including GST</b>	<b>\$132,019.47</b>

## Contested Jurisdiction

13. The Respondent asserts the payment claim submitted 23 August 2010 is not a valid payment claim under the Act and therefore there can be no valid payment dispute under the Act and the adjudicator has no jurisdiction to consider the matter.
14. The conditions of contract describe how payment claims are to be submitted and therefore the implied provisions of the Act do not apply.

15. The “Payment Claims” Clause 12.4 in the conditions of contract states:

*The Subcontractor must give the Managing Contractor’s Representative claims for payment on account of the Subcontract Price and any other amounts payable by the Managing contractor to the Subcontractor under the Subcontract:*

*(a) at the times stated, or upon completion of the milestones described, in the Subcontract Particulars.*

*(b) within the times required by clauses 12.11 and 12.13;*

*(c) in the format and containing the information the Managing Contractor reasonably requires;*

*(d) which include the evidence reasonably required by the Managing Contractor’s Representative of the value of work completed in accordance with the Subcontract and the amount claimed; and*

*(e) which are based on the Cost Schedule or the Schedule of Rates to the extent these are relevant.*

*The Subcontractor cannot include in any payment claim under this clause 12.4, a Claim which is barred by Clause 16.5.*

16. Clause 16.5 “Time Bar” states:

*If the Subcontractor fails to comply with clauses 16.1, 16.2, 16.3 or 16.4:*

*(a) the Managing Contractor will not be liable (in so far as it is possible to exclude such liability) upon any Claim by the Subcontractor; and*

*(b) the Subcontractor will be absolutely barred from making any claim against the Managing Contractor arising out of, or in any way in connection with, the relevant Direction or fact, matter or thing (as the case may be) to which clause 16.1 or 16.2 applies.*

17. Clause 16.1 relates to Notice of Variation and requires that where the Subcontractor is given a Direction by the Managing Contractor which the Subcontractor considers to be a variation under the contract then the subcontractor must:

*(a) provide written notice within 3 days of receiving the direction and prior to commencing work; and*

*(b) within a further 14 days submit the details of the claim as per Clause 16.3(b); and*

*(c) continue to execute the subcontractor’s Activities including any Direction issued under clause 16.1.*

18. Clause 16.2 relates to Notices of other Claims and is not applicable to the matter under consideration.

19. Clause 16.3 (b) requires the written notice of the claim to include;

*(i) detailed particulars concerning the Direction or other fact, matter or thing upon which the claim is based;*

*(ii) the legal basis for the claim, whether based on a term of the Subcontract or otherwise, and if based on a term of the Subcontract, clearly identifying the specific term;*

- (iii) the facts relied upon in support of the Claim in sufficient detail to permit verification; and*
- (iv) details of the amount claimed and how it is calculated.*

20. Clause 16.4 relates to Continuing Events and is not applicable to the matter under consideration.

21. Clause 1.1 states that 'Claim' includes any claim for;

- (i) an increase in the Subcontract Price,
- (ii) payment of money, or
- (iii) an extension of time.

22. Clause 11.1 "Variation Requests" requires

*Within 14 days of the receipt of a "Variation Price Request" the Subcontractor must provide the Managing Contractor's Representative with a written notice in which the subcontractor sets out;*

- (a) the adjustment to the Subcontract Price to carry out the proposed Variation; and*
- (b) the effect the proposed Variation will have on the then approved program, including each Date for Practical Completion*

23. Clause 15.1 "Disputes" requires that disputes or differences between the parties must be determined in accordance with clause 15 and,

*Where such a dispute or difference arises, either party may give a notice in writing to the Managing contractor's Representative and the other party specifying;*

- (a) the dispute or difference;*
- (b) particulars of the party's reasons for being dissatisfied; and*
- (c) the position which the party believes is correct.*

24. Clause 15.12 requires that unless the dispute or difference relates to a direction under a clause nominated in the Contract Particulars (and there are none so nominated) then;

*The dispute or difference is to be referred to the Executive Negotiators who must:*

- (i) meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference; and*
- (ii) if they cannot resolve the dispute or difference, endeavour to agree upon a procedure to resolve the dispute or difference.*

25. The sequence of events appears to be as follows:

- Applicant submits tender 10 July 2008
- Respondent accepts Applicant's tender via letter 23 July 2008
- Respondent issues purchase order dated 1 August 2008
- Applicant and Respondent execute formal contract agreement 11 August 2008
- Applicant becomes aware of "additional footpath work" 26 February 2009

- Respondent issues request for pricing “footpath work” 17 March 2009
- Applicant submits VR36 in relation to “additional footpath work” 16 October 2009
- Certificate of Practical Completion dated 24 September 2009 issued to Applicant 15 January 2010
- Respondent advises determination on VR36 as “request denied” 20 May 2010
- Applicant disputes the “content and value of the Respondent’s determination” and seeks advice on “the procedure to claim and recover the amount without delay” 3 June 2010.
- Respondent reiterates “it has been determined these variations are not accepted” 10 June 2010.
- Respondent seeks notice of dispute under Clause 15.1 if Applicant is “still pursuing these variations” 7 July 2010
- Applicant lodges the Payment Claim, in relation to works quoted on VR36, 23 August 2010
- Respondent rejects the Payment Claim on the basis that the Respondent has not complied with Clause 16.3 and is therefore barred from claiming under clause 16.5, 3 September 2010.

26. Since the Claim relates to a Respondent’s Direction which the Applicant believes to be a Variation then the Applicant need only comply with clause 16.3 in so far as how the details of the claim are provided. The Payment Claim presented 23 August 2010 clearly meets these requirements and hence the Payment claim cannot be time barred for the reasons argued by the Respondent.
27. There is a considerable period between the Applicant becoming aware of the possible Variation on 26 February 2009 and submitting VR 36 on 16 October 2009. Considered in isolation this exceeds the required notification period of 17 days as given in clause 16.1 and hence barred by clause 16.5.
28. The Respondent’s “Request for Variation” in relation to “Footpath Work” dated 17 March 2009 could be construed as a response to Applicant’s verbal notification of “Additional Footpath work” 26 February 2009. Neither party is clear on this point. If that were the case then the Applicant was required to respond under Clause 11.1 within 14 days. If VR 36 is a response to that request it is well beyond that allowed period. Be that as it may there are no specified actions in the event of default of this notification provision and Clause 16 does not relate to any variation requests in Clause 11.
29. More significantly the action of the Respondent to formally reply to VR 36, 20 May 2010, some 7 months after its submission indicates an acceptance of the validity of the right to claim even though there was complete rejection of the claim itself. This notion is further substantiated by the basis of claim dismissal given by Respondent as the works claimed as a variation were included in the tendered scope of work and hence covered by the Applicant’s lump sum price for the works.

30. The Applicant's notice of 3 June 2010 is sufficient for recognition as a notice under Clause 15.1 as the term "may" implies discretion rather than compulsion particularly given the request for advice on how to resolve the matter. On no construction post that date could the Respondent's actions be construed as "meeting and undertaking genuine and good faith negotiations with a view to resolve the dispute" as required by clause 15.12.
31. I conclude then that up to the Respondent's formal dismissal of VR 36, 20 May 2010, no time bars are in place and that even if the sequence and relevance of events are differently construed any potential time bars have been waived by the Respondent by virtue of its notices provided under the contract. Beyond 3 June 2010 there are no relevant time bars as the matter is the subject of a notified dispute.
32. The Respondent also seeks to deny the validity of the Payment Claim on the basis that it relates to work the subject of an unapproved variation request and as such is not work that gives rise to an amount payable under the contract or constitute work completed under the contract.
33. With all due respect this is a nonsensical argument when the reason for rejecting the variation is given as the work was included in the tendered scope and hence the tendered price and must by definition then be work completed under the contract and give rise to an amount payable under the contract and as such warrant inclusion in a Payment Claim.
34. The dispute is not about whether the work was done or whether it was required to be done. The dispute relates solely to the manner and quantum of payment.
35. To further clarify the matter I consider VR 36 is a Claim under the contract but it is not a payment claim. It is a claim for an increase in the Subcontract price. The payment claim is the claim submitted 23 August 2010 and rejected by the Respondent 3 September 2010. Hence a payment dispute under the Act commenced on 3 September 2010 and the 90 day submission period expired on 2 December 2010. The Application dated 1 December 2010 has been submitted within the time limits
36. The Respondent also asserts that the payment claim is a repeat claim and as such is not in accordance with the Act. In point of fact the payment claim is a claim for payment subject to authorisation of the defined work to be a variation under the contract. As such it is an initial claim. If the work is determined to be included in the contract scope as tendered and priced then the variation is null and the variation claim would become a repeated claim and on both foundations the Application would fail. Since the status of the variation claim is a crucial matter for determination the validity of the payment claim and the subsequent Section 8 payment dispute must be taken as legitimate until a determination of the merits finds otherwise.

37. The parties agree that the Application includes some documentation which is illegible and that the document presented for the Adjudicator included the Conditions of Subcontract whilst the copy of the Application served on the Respondent excluded the contract documentation. When notified of this by the Respondent the Adjudicator called for submissions from the parties in relation to Section 28 admissibility.
38. The Applicant subsequently provided electronic copy of its attachments and argued that since the Respondent had signed the contract it was reasonably presumed that the Respondent already had the document referred to but omitted from the documents served on the Respondent.
39. The Respondent argues this is a clear breach of Section 28(2)(b)(i) which requires, *“The application must state the details of or have attached to it the construction contract involved or relevant extracts of it”* and Section 28(3) requiring *“state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication”*.
40. As noted above this particular dispute stems from a disagreement between the parties as to the specific works included in the contract scope of works as let. It was therefore imperative that the Applicant presents its version of the contract documentation and provide the Respondent with the opportunity to confirm or deny such submission. The simple fact remains that the Applicant served two different versions of the Application. Accordingly I find I must support the Respondent’s assertion that this is a fundamental failure to comply with Section 28 and I have no alternative to dismissing the application under Section 33(1)(a)(ii) without proceeding to a consideration of the merits.

### **Adjudicator’s Costs**

41. Clause 36 (1) of the Act requires the parties to bear their own costs.
42. 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.
43. I am satisfied that the Application was not properly served under Section 28 of the Act and it must therefore be concluded that the Applicant’s submission is unfounded.
44. I therefore determine that adjudicator’s costs are to be paid entirely by the Applicant.



## Conclusions

45. For the reasons set out in the Adjudication, I determine as follows;

45.1. The Application is dismissed under Section 33(1)(a)(ii) of the Act.

45.2. The Adjudicator's costs are to be paid entirely by the Applicant.

Brian J Gallagher

**NT Registered Adjudicator No 18.**

**30 December 2010**