

Adjudicator's Determination

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

Adjudication 18-09-05

(Applicant)

And

(First Respondent)

And

(Second 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 28 April 2009 is \$23,282.34 including GST.
2. The date payable is 2 February 2009. Interest due and payable to 27 May 2009 is \$1,090.98 and interest continues to accrue at the rate of \$9.57 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 Territory Construction Association SA and NT 28 April 2009.
5. I was appointed as Adjudicator by the Territory Construction Association 1 May 2009. The parties were notified of the appointment 4 May 2009.
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 28 April 2009.
 - 7.4. Response from the First Respondent dated 11 May 2009.
 - 7.5. Applicant's Response to Adjudicator queries dated 22 May 2009.
 - 7.6. First Respondent's Response to Adjudicator queries dated 22 May 2009.

The Adjudication Application

8. The Adjudication Application was served on the Respondent on 28 April 2009 and consists of the following documents;
 - 8.1. Adjudication Application, and
 - 8.2. 22 Attachments.

The Response

9. The Response to the Application was served on the Adjudicator on 12 May 2009, and on the Applicant on 13 May and consists of the following documents;
 - 9.1. Response document, and
 - 9.2. 23 Attachments.
10. Immediately following my appointment I contacted the parties with preliminary advice to confirm modes of communication, principal contacts and critical dates for the response and the adjudication report. That note advised the due date for the Response as 12 May 2009. The parties did not query that assessment. When the Response was eventually submitted to me on 12 May 2009 and to the Applicant on 13 May 2009 the Applicant queried the admissibility of the Response. I advised the parties of my preliminary view that since the Respondent had obtained no

advantage and the Applicant no disadvantage then the Response should be admissible at least under Section 34(1)(b) of the Act.

11. However, since the question of admissibility goes directly to interpretation of the Act, I sought submissions from the parties. The submission from the First Respondent reviewed the date the Application was served and confirmed that as 28 April as indicated above and then determined the ten working period for submission of the response did not in fact expire until 13 May 2009. Either my estimate of 12 May did not allow for the Public Holiday 4 May 2009 or I had incorrectly included the day the Application was served in the count.
12. It is now clear that the Response was served on the Applicant and the Adjudicator as required by Act within the specified timeframe and is therefore admissible for consideration.

Jurisdiction

13. The dispute arises out of a written contract agreement between the parties for the Applicant to construct sheds at two locations for the Respondents.
14. The arrangements between the parties meet the definitions of a construction contract and construction work as defined in Section 6 of the Act. The works are on sites in the Northern Territory and the contract is therefore a construction contract according to the Act.
15. I have previously had business dealings with the First Respondent and no association with either the Applicant or the Second Respondent. The Applicant was advised accordingly and raised no objection to my declaration of no conflict to declare.
16. The parties have provided no advice of the dispute being “subject of any other order, judgment or other finding”.
17. On the balance of probabilities, I determine the Adjudicator has jurisdiction to adjudicate the dispute in accordance with the Act.

The Payment Claim

18. The payment claim referred to in the Application relates to a letter of demand dated 28 January 2009 and sent to the First Respondent on that date. The Applicant asserts the letter included an invoice for payment of the remaining contract amount and copies of invoices for extras previously submitted but not paid. The Respondent claims the invoices were not enclosed with that letter of demand.

19. The summary details of the 28 January 2009 claim (GST inclusive) are:

Outstanding Contract Amount	\$4,878.34
Extra work at Site 1	\$11,869.00
Extra work at Site 2	\$10,910.90
Total	\$27,658.24

20. The Application makes reference to a separate issue relating to \$5,575 withheld by the First Respondent for professional fees to verify structural compliance with the Building Code Australia. The First Respondent has pointed to advice from the Applicant dated 7 September 2008 that this amount has been deducted from monies owing to the shed supplier by agreement. In any event the Adjudication must remain confined to items listed in the disputed payment claim. Since recovery of these professional fees is not listed in the 28 January 2009 claim this item is not properly referred for adjudication and cannot be included in the payment dispute. Accordingly I have not considered it further.

Issues to be Determined

21. The Applicant presents a final claim on the basis of the written agreement between the parties. The First Respondent denies the claim for the following reasons.

- 21.1. First Respondent asserts that the works have not been completed in accordance with the brief discussed between the parties prior to the submission of the quotation and the signing of the contract.
- 21.2. First Respondent asserts that the work claimed by the Applicant as additional is not in fact additional.
- 21.3. First Respondent claims he is entitled to withhold payment until the Certificates of Occupancy is provided by the Applicant

22. In the event there is a legitimate claim then quantum is to be determined.

23. The due date for the payment of any legitimate claim is to be determined along with any interest due.

Status of the "Payment Claim"

24. 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:

Total Price including GST given as \$378,306.00

Clause 3.2 You must pay us the price.

Clause 5.1 Any claim for payment must be in writing

Clause 5.2 You have 5 days to pay us from when a claim is given to you.

Clause 5.3 We will charge you interest at 15% per annum on what is unpaid after then.

25. The Act allows the application of implied provisions in the contract under the particular circumstances. In this matter there is no reliance upon these provisions from either party and I am satisfied with the adequacy of the conditions of contract.
26. The contractual requirements listed above are simply that a claim for payment must be in writing. It is not essential that an invoice be provided.
27. On the balance of probabilities I determine as follows;
 - 27.1. The submission of the letter of demand dated 28 January 2009 satisfies all the contract requirements to constitute a claim under the contract.
 - 27.2. A Payment Dispute under the Act commenced 2 February 2009.

Further Detail on Contract Terms

28. The Applicant relies upon the written terms of the contract to substantiate the entitlement to payment for additional works either not included in the drawings or specifically nominated as the owners' responsibility.
29. The First Respondent relies on a site discussion with the Applicant and the Second Respondent prior to signing the contract. It is alleged that during these discussions the Respondents' requirements were made clear to the Applicant and the Applicant was directed to base his price on those requirements.
30. It is apparent that the parties signed a written contract agreement with significantly different understandings as to their rights and obligations under that contract. Since both parties have extensive experience in the construction industry and history of prior contractual dealings I am of the view that both parties are equally accountable for the lack of clarity in the contract.
 - 30.1. The contract nominates the owner as responsible for "electrical". The Applicant interprets this to mean anything and everything electrical particularly including supply of electrical motors for the roller doors.
 - 30.2. Water connections are also listed as an owner responsibility. The only connection required is to the fire hose reel and "fire requirements" are also listed as owner's responsibility.
31. The Respondents' version of the site discussion can be presumed accurate in so far as defining the sum of all requirements for the shed at Site 1. However based on the written contract agreement it is clear the parties entered into an arrangement which involved a division of responsibility in regard to delivery of the final product.
32. The contract clauses relating to payment at practical completion and rectification of defects are quite unequivocal.

- Clause 18.1* When the work reaches practical completion we will give you a final account.
- Clause 18.2* Within 7 days you must
- Clause 18.2.1* inspect the work together with us
- Clause 18.2.2* write down anything that is defective or incomplete in a Certificate of Practical Completion, and sign it and give it to us and
- Clause 18.2.3* pay the final account in full (that is, with no set off or reduction) by cash or bank cheque.
- Clause 18.3* then we will hand over the work and return possession of the site to you.
- Clause 18.4* So far as we accept responsibility, we must fix the items written in the Certificate of Practical completion within a reasonable time after handover.
- Clause 19.1* We will notify the Building Certifier that the work has reached practical completion so that a Permit to Occupy can be issued.
- Clause 19.2* Your obligation to pay is not subject to a Permit to Occupy issuing for the work.
- Clause 20.1* The work is defective if we failed to do it as required by this contract.
- Clause 20.2* You should give us a written notice of any defective or incomplete parts of the work about 3 months after practical completion. We will then fix them

33. In summary the contract require the principal to authorise practical completion and pay out the full value of the contract with no deductions for any defects. Clauses 29 to 36 detail a three tiered dispute resolution system. I would interpret this to mean the intent of the contract is to require payment in full first and then proceed with dispute resolution in the event that the principal is dissatisfied with any aspect of the work relating to the contract. This is not typical of standard contract agreements but it is the agreement that the parties have signed and the Adjudicator is required to adjudicate on those terms and not seek to conciliate or mediate an agreement between the parties.

34. The contract provisions for variations include inter alia the following;

- Clause 13.2* We can also do a variation under... Clause 16 without your consent.
- Clause 13.5* You will be charged the actual price for the variation including an amount for our margin (which includes overheads) being 20% applied to the cost of that work. You will receive a fair credit for any deleted work.
- Clause 16.1* This clause applies if you are supplying materials for the work.

Site 1

35. The Applicant has billed the Respondents for additional works as detailed on Invoice No 0944 including electric roller door motors, sliding gates, concrete ramps, and steps and posts at PA doors. These works are valued at \$11,869.00
36. The First Respondent does not dispute the value of these works but maintains they should have been included in the original contract.
37. I find the First Respondent's view that the written contract condition which assigns "electrical" to the Respondents excludes supply and installation of electric roller door motors difficult to support. Given that the contract form is Plain English in a minimalist style I would interpret 'electrical' to be provided by the Respondent's as all encompassing unless otherwise stated.
38. I would apply similar rationale to "fire requirements" with the Respondents assertions requiring the Applicant to provide hydraulic design, supply and installation of a fire hydrant, and connection of a fire hose difficult to support. Only supply and installation of PA doors which is a fire requirement is nominated in the written contract as included in the price.
39. Supporting the position above is the quotation no 1441 dated 31 December 2007 which is clearly noted a marked with an asterisk "No electrical or plumbing is in price".
40. The 31 December 2007 quotation is also notated with the comment "Included in quote are all plans, permits and certifications." The normal meaning of this expression would be taken as including all necessary works to obtain certification unless specifically excluded.
41. The Applicant asserts that leveling the site was not included in the contract price. I would respond that the quote did not specifically exclude site leveling and such work is an essential part of obtaining certification therefore it must be deemed to be included. The First Respondent claims 250 tonnes of gravel valued at \$4,375 was supplied to the site and that it was the First Respondent's intention to deduct this amount from the contract but no such deduction has occurred.
42. The First Respondent presents a detailed argument that the shed as supplied at Site 1 is not the shed as contracted. This is specifically in regard to overall size and colour of roof cladding. The First Respondent also points to irregularities in the drawings stamped for building approval noting in particular inconsistencies in dimensions between the floor layout and the roofing layout. These are significant defects which should be included on the Certificate of Practical Completion. It should be also noted that since the Respondents have occupied the shed, notwithstanding the Permit to Occupy is yet to be issued, then the Respondents must accept that practical completion has been achieved and the certificate should have been issued.

43. The First Respondent has withheld 10% of the final payment being \$4,878.34 in retention until the Permit to Occupy is provided. Irrespective of any argument as to who needs to do what to secure the permit the retention of any monies for this purpose clearly contravenes Clause 19.2 of the contract.
44. On the balance of probabilities in relation to Site 1 I determine as follows;
 - 44.1. The defects in relation to colour of cladding and size of the building should be noted on the Certificate of Practical Completion and either fixed by the Applicant or resolved through the Dispute Resolution procedures in the contract as the Adjudicator has no jurisdiction in these matters.
 - 44.2. All differences between the parties in relation to work included or excluded from the contract should be referred and resolved through the Dispute Resolution procedures.
 - 44.3. The First Respondent must comply with the provisions of the contract and release the sum of \$4,878.34 presently held as "retention".
 - 44.4. The First Respondent must comply with provisions of the contract and pay the full amount of \$11,869 as listed on Invoice No. 0944 for additional works.
 - 44.5. The Applicant must comply with the conditions of contract and provide a credit of \$4,375 for material supplied by the First Respondent.

Site 2

45. The Applicant has billed the Respondents for additional works as detailed on Invoice No 0961 including additional structural works and engineer's fees. These works are valued at \$10,910.00
46. The First Respondent does not dispute the value of these works but maintains they are required in order to ensure Building Code compliance.
47. The Applicant is adamant that the works as originally designed and constructed do comply with the Code and that any upgrade required by the First Respondent must constitute a Variation.
48. The First Respondent concedes that even if the shed as originally supplied is code compliant the Applicant ought to have been familiar with the First Respondent's expectations based on previous dealings between the parties.
49. On the balance of probabilities I determine shed as supplied to comply with written terms of contract and hence the additional works are a variation with the amount of \$10,910.00 is due and payable.

Quantum Summary

50. The Applicant's entitlement to payment (including GST) is summarised as:

Para 44.3	\$4,878.34
Para 44.4	\$11,869.00
Para 49	<u>\$10,910.00</u>
Sub Total	\$27,657.34
Less Para 44.5 credit	<u>\$4,375.00</u>
Total Outstanding	\$23,282.34

Adjudicator's Costs

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

52. 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.

53. The submissions from the parties have merit on both sides and are neither frivolous nor vexatious

54. I therefore determine that adjudicator's costs are to be shared equally by the parties.

Interest

55. The Applicant's claim was presented 28 January 2009. Conditions of contract require payment within 5 days after receiving the payment claim.

56. 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.

57. On the balance of probabilities I determine as follows;

57.1. The payment was due on or before 2 February 2009.

57.2. Interest is accruing at the daily rate of 15% of \$23,282.34 / 365 = \$9.57 per day

57.3. Interest due and payable up to 27 May 2009 is \$1,090.98

Conclusion

58. As requested I have conducted the adjudication and concluded as follows:
- 58.1. For the reasons set out in the Adjudication, I determine the Adjudicated Amount for the Applicant is \$23,282.34 including GST.
 - 58.2. The date payable is 2 February 2009. Interest due and payable to 27 May 2009 is \$1,090.98 and interest continues to accrue at the rate of \$9.57 per day until payment is made.
 - 58.3. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

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