

Adjudicator's Determination

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

Adjudication 18.11.01

1. I, Brian J Gallagher, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act*, dismiss the Application, served 25 March 2011, under Section 33(1)(a)(ii) of the Act.
2. The Adjudicator's costs are to be shared equally between the parties.

Appointment of Adjudicator

3. The Applicant served the Adjudication Application on the Law Society Northern Territory, 25 March 2011.
4. I was appointed as Adjudicator by the Law Society Northern Territory, 25 March 2011. The parties were notified of the appointment by the Law Society that same day.
5. The Adjudicator has been properly appointed in accordance with the *Construction Contracts (Security of Payments) Act*.

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) (as in force 24 June 2009)*.
 - 6.2. The provisions of the *Interpretation Act (as in force 1 March 2011)*.
 - 6.3. Application from the Applicant dated 25 March 2011.
 - 6.4. Response from the Respondent dated 8 April 2011.

Documents Disregarded in Making the Determination

7. The Applicant made an unsolicited submission 15 April 2011 and the Respondent replied 20 April 2011. Since the parties are required to make full and complete submissions with the Application and the Response I have set aside these unsolicited submissions and not considered them further.

The Adjudication Application

8. The Adjudication Application was served on the Respondent 25 March 2011 and consists of the following documents;
 - 8.1. Adjudication Application, and
 - 8.2. 31 Attachments of supporting documentation.

The Response

9. The Adjudication Response was served on the Applicant and the Adjudicator 8 April 2011 and consists of the following documents;
- 9.1. Respondent's reply to the Application, and
 - 9.2. 15 Attachments of supporting documentation.

Jurisdiction

10. The parties agree the following;
- 10.1. A contract for construction work in the Northern Territory exists between the parties and is subject to the *Construction Contracts (Security of Payments) Act*.
 - 10.2. The parties are satisfied that the Adjudicator's statements of no conflict to declare are reasonable within the meaning of the Act.
11. The parties advise no information on the dispute being "subject of any other order, judgment or other finding".
12. The Respondent disputes jurisdiction on the following counts.
- 12.1. It is contended that Application refers to a payment claim which is a repeat of two earlier payment claims and accordingly is not eligible for adjudication and has not been submitted within the time prescribed by the Act.
 - 12.2. It is contended that the matter is of such complexity that it ought to be dismissed
 - 12.3. It is contended that the Application has not been prepared in accordance with Section 28 of the Act in that the actual Respondents are not correctly referenced and also that the actual Respondents have not been properly served.

Payment Claim 23 August 2010

13. The Payment Claim presented to the Respondent 15 February 2011 summarises as follows:

Total of all invoices previously presented for payment.	\$1,158,738.77
Invoice 127 for period 26/11/10 – 15/12/10	\$293,526.20
Less previous payments made	<u>\$1,022,875.02</u>
Amount claimed as due.	\$429,389.95

Contract between the parties.

14. The Applicant asserts there is no signed written contract between the parties and hence the contract consists of the implied provisions in the Act and written rate submissions which have been used and accepted by the Respondent to make payments.
15. The Respondent contends that the Applicant has proceeded with the provision of services based on an order, from one member of the alliance, clearly marked with the note "Standard alliance contract terms and conditions will apply. Copy to be provided within 1 week for signing."
16. The Respondent is unable to provide a signed copy of the contract saying that with changes in personnel it has been mislaid. The Applicant is adamant no contract was ever signed although a copy was marked up with proposed changes and returned to the Respondent. The Respondent has provided a copy of this marked up document and argues the changes were accepted and agreed by all parties.
17. On the balance of probabilities I am satisfied that the parties intended to formalise a contract agreement and that even though there is no substantive evidence of execution of documents the intent is sufficient to define the terms of the agreement between them.
18. It is important to determine a position in relation to the contract agreement because it serves to clarify the question of jurisdiction in relation to the validity of the payment claim.

Contested Jurisdiction – The Payment Claim

19. The Respondent asserts the payment claim submitted 15 February is a repeat claim and hence 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.
20. The conditions of contract describe how payment claims are to be submitted and therefore the implied provisions of the Act do not apply.
21. The "Payment" Clause 16.1 in the conditions of contract states:
 - (a) *The Respondent is pay the Subcontractor the Subcontractor Price (less any retention payable under clause 5(a)).*
 - (b) *At the times for payment stated in clause 1, the Subcontractor must give the Respondent's Representative a payment claim which must include:*
 - (i) *the amount of the Subcontract Price and other costs or amounts the Respondent has agreed or determined are payable to the Subcontractor under the Subcontract;*

- (ii) *details of the part of the Subcontract Works carried out in the period to which the payment claim relates;*
 - (iii) *the amount claimed by the Subcontractor for that part of the Subcontract Works completed;*
 - (iv) *any amounts previously paid; and*
 - (v) *the total claimed.*
- (c) *Within 21 days of receipt of the payment claim, the Respondent must issue a payment statement to the Subcontractor and the Respondent which must set out:*
- (i) *the payment claim to which it relates;*
 - (ii) *the value of the work carried out by the Subcontractor in accordance with the Subcontract as at the date of the payment claim;*
 - (iii) *the amount already paid to the Subcontractor;*
 - (iv) *any amount the Respondent is entitled to retain, deduct, withhold or set-off under the Subcontract;*
 - (v) *the amount (if any) which the Respondent proposes to pay the Subcontractor on account of the Subcontract Price and otherwise under the Subcontract; and*
 - (vi) *if the amount to be paid is less than the claimed amount, the reason why the amount is less, including any reason for retaining, deducting, withholding or setting-off where relevant.*
- (d) *Subject to clause 16.2, the Respondent must pay the amount set out in the payment statement within 14 days of issuing the payment statement.*

22. A valid payment claim under the Act must be a valid payment claim under the terms of the contract between the parties or where the contract does not specify how payment claims are to be made then under the implied provisions of the Act.
23. Up to 30 November 2011 the Applicant submitted 13 invoices for payment. All except for the last were paid in full by the Respondent. The last was part paid at approximately 62% of the invoiced amount. Each of these submitted invoices complies with the payment provision of the contract clause 16.1 (b) (i), (ii) and (iii) inclusive. None of these invoices comply with the provisions of clause 16.1 (b) (iv) and (v).
24. The Payment Claim dated 15 February 2011 complies in every respect with the provisions of clause 16.1. As such it is not a repeat claim and is therefore the only legitimate claim under the contract and the Act. If it was possible to build a substantive argument that the original invoices are in fact legitimate claims I am mindful of the comments of Olsson AJ in *K & J Burns Electrical Pty Ltd v GRD Group Pty Ltd & Anor [2011] NTCA*.

25. "[260] Whilst I respectfully accept that the manner in which s 8 sets out to define what constitutes a payment dispute does not make any provision for the retriggering, by a repeat claim, of a payment dispute in respect of a payment claim that had been made earlier, as to which 90 day limit has expired, nevertheless, it does not prohibit such a practical situation arising if such a situation is expressly stipulated for by the relevant construction contract"
26. According to the provisions of Clause 16.1, upon receipt of the payment claim, the Respondent had 21 days to issue a payment statement, and then 14 days to make the payment. That is a total period of 35 days in which to pay. The Respondent provided a written reply to the claim 4 March 2011. A formal payment dispute commenced either on that date or the later due date for payment 22 March. Both dates are well within the 90 day period for Applications to be served.
27. In relation to the various jurisdictional issues surrounding the payment claim I am satisfied I have jurisdiction to proceed with determination.

Contested Jurisdiction – Complexity

28. The Respondent argues that if the Adjudicator determines that the Respondent's standard terms and conditions of contract do not apply then the Adjudicator should dismiss the Application because of complexities involved in determining the nature of the parties' rights and obligations.
29. Since I support the Respondent's assertions that their standard terms and conditions as amended do apply I find no reason to dismiss on the basis of complexity.

Contested Jurisdiction – Service of Application

30. The Respondent argues that if the Adjudicator determines that the Respondent's standard terms and conditions of contract do not apply then the Adjudicator should dismiss the Application because it was not separately served on each member of the alliance.
31. Whilst I have accepted that the Respondent's standard terms and conditions do apply, the only documentation provided is a copy of the contract form with handwritten annotations made by the Applicant. In that document the "Formal Agreement" page names the 3 members of the alliance and nominates a single address for the group. The signature block has provision for one signature as representative for and on behalf of the alliance. However since the form is blank that individual is not named.

32. If there was a signed copy of the document available for reference with the alliance representative clearly nominated then I would be inclined to accept service of an application to that representative at the address listed as sufficient to constitute service of documents as defined in the *Interpretation Act*. Whilst the Application was served at the address nominated in the contract the question of the duly authorised representative of the parties remains open.
33. Alternatively, if the standard terms and conditions of the alliance do not apply then the contract must be between the Applicant and the alliance member that issued the initial order and accepted the first seven invoices for payment. However the Application was not directly served on that party at their normal place of business.
34. This is a question of interpretation of the law and since it goes directly to the question of jurisdiction I cannot err on this point. On either construction of who comprises the parties to the contract, the Application has not been served in accordance with the Act. I find there is sufficient doubt in relation to this question for me to dismiss the Application under Section 33(1)(a)(ii) and provide the Applicant with the option to seek a Section 60 review.

Adjudicator's Costs

35. Clause 36 (1) of the Act requires the parties to bear their own costs.
36. 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.
37. I am satisfied that the submissions from both parties present substantive argument and that neither party has been frivolous or vexatious.
38. I therefore determine that adjudicator's costs are to be shared equally by the parties.

Conclusions

39. For the reasons set out in the Adjudication, I determine as follows;
- 39.1. The Application is dismissed under Section 33(1)(a)(ii) of the Act.
- 39.2. The Adjudicator's costs are to be paid shared equally by the parties.

Brian J Gallagher

**NT Registered Adjudicator No 18.
27 April 2011**

