

ADJUDICATOR'S DETERMINATION

Pursuant to the

*Construction Contracts (Security of Payments) Act 2005
Northern Territory of Australia (Act)*

Applicant (A)

Director (AD)

Operations Manager (AOM)

Respondent (R)

General Manager (RGM)

Project Manager (RPM)

Respondent's
Superintendent (RS)

**Adjudication
Number: 19.07.01
Date 5/4/2007**

I, John Brears, as the appointed Adjudicator pursuant to the (*Act*), determine that the adjudicated amount in respect to the Adjudication Application served on the 6 February 2007 is \$127,095.88.

1. The date payable is on or before 12 April 2007.

Appointment of Adjudicator

2. I was offered and accepted the appointment as Adjudicator to determine this matter by The Territory Construction Association on the 7 February 2007.

Notification of the Appointment of Adjudicator and Teleconference

4. I notified both parties by letter on 9 February 2007 that I had been appointed as Adjudicator and I held a teleconference with both parties on the 13 February 2007.

Teleconference

5. A teleconference was held at 10.00am on Tuesday the 13th of February 2007.

- 5.1. I advised that from the “*Notice of Dispute*” and attached documentation I had concluded (R) and (A) had entered into a “*Construction Contract*” as defined under the (*Act*) Section 5 (1).

Neither party disagreed.

- 5.2 I also concluded that the construction work was carried out in the Northern Territory as defined in the (*Act*) Section 6 (1).

Neither party disagreed.

- 5.3 I further concluded that a payment dispute had arisen as defined in the (*Act*) Section 8.

Neither party disagreed.

- 5.4 I advised about 10 years ago I was employed as a Project Manager with a construction company that had engaged (A) as a subcontractor to carry out the fabrication and erection of structural steel work on a large building project in Darwin. Since that time I had no commercial dealings with (A). I advised that I had never had any commercial dealings with (R).

Neither party objected to my appointment as Adjudicator or raised any grounds of conflict of interest as defined in the (*Act*) section 31 (1).

5.5 I requested that both parties nominate to me in writing, one person who was to be the point of contact for all correspondence and contact between the Adjudicator and both parties.

5.6 I advised that the (R) had 10 working days from the lodgement of the Adjudication Application to serve a response (ref (*Act*) clause 29 (1)).

The Adjudicator then had 10 working days after the service of the response to make a determination (*Act* – clause 33 (1)).

5.7 I advised my published fees for carrying out the Adjudication were \$180.00 per hour plus GST.

Neither party objected to these fees.

I asked both parties to deposit \$5000.00 each with the executive officer of the TCA within 48 hours. This money would be held in the TCA fund until the Adjudicator had made a determination and directed how these monies were to be dispersed.

5.8 The (R) confirmed that they had received a copy of the Adjudication Application.

Documents regarded in making the determination

6 In making this determination I have had regard to the following:

6.1 The provisions of the *Construction Contracts (Security of Payments) Act 2005*.

6.2 The Construction Contract AS4000-1997.

6.3 The Administration Manual for AS 4000 - 1997

6.4 The Adjudication Application consisting of two lever arch file containing the notice of dispute and request to appoint an Adjudicator (10 pages) and the following sections (1 to 22) described as follows on the index page

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11	Communications and Supporting Claims by (A) – delay & Delay Costs	22	Abigroup Contractors Pty Ltd Algons Engineering P/I

- 6.5 The Response consisting of one lever arch file containing the “Response by the Respondent” (20 pages) followed by Annexures 1 to 7, which relate to specific paragraphs in the (A) “*Notice of Dispute*”, as follows

Annexure Number	Applicant’s “ <i>Notice of Dispute</i> ” Paragraph Number
1	3
2	5
3	7
4	8
5	8
6	14
7	27

Determination

7. The (*Act*) requires in section 33 (1) (b) that the Adjudicator must

“determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or return any security and, if so, determine

—

- (i) the amount to be paid, or security to be returned, and any interest payable on it under section 35; and*
- (ii) the date on or before which the amount must be paid or the security must be returned.”*

8. The “*Notice of Dispute*” (6/2/2007) relates to two contracts between (A) and (R) namely

- (1) Contract Number 104100-005 (005)
- (2) Contract Number 104100-006 (006)

The “*Notice of Dispute*” concerns progress certificates issued by the (RS) under the two contracts (005 and 006) on 9 January 2007. These progress certificates were issued in response to the (A) two progress claims both numbered 8 and dated 21 December 2006.

At the request of (A) and with the agreement of (R), I will consider both contracts in the one Adjudication.

On 21 December 2006 the construction works in both contracts were not complete, however at the request of (R) and with the agreement of (A), I will confine my Adjudication to the contract period up to and including 21 December 2006. I will consider any correspondence provided to me after that date, but only so far as it relates to the contract period under consideration.

9. The Adjudication relates to a payment dispute.

(A) has submitted progress claims for work carried out up to 21/12/2006.

(RS) has issued progress certificates, on 9/1/2007, certifying a lesser amount than that claimed by (A).

To assess the dispute I have considered the history of the following parts of the contracts, and the actions of certain parties.

- (1) Contract Period and Extensions of Time.
- (2) The Role of Superintendent
- (3) Prolongation Costs.
- (4) Variations.
- (5) Liquidated Damages.
- (6) Progress Claims and Certificates.

9.1 Contract Period and Extensions of Time

Contract (005)

- (1) In the tender documents (Annexure Part A) the date for Practical Completion (PC) was specified as 17/7/2006 based on an award of contract date of 24/4/06.
- (2) In (A) Tender (27/3/2006) the Award of Contract date was specified as 10/4/2006 and the completion date was specified as 18/7/2006.
- (3) In an email (21/4/2006) from (RS) to (AD) the date for (PC) was “*relaxed*” to 31/7/2006.
- (4) In a letter (22/5/2006) from (RS) to (AOM) the date for (PC) was “*relaxed by 6 weeks*” which I take to be to the 11 September 2006.
- (5) In a letter (21/8/2006) from (A) to (R) a claim for an extension of time and a claim for additional costs for disruption and delay was submitted.
- (6) An email (11/10/2006) from (RPM) to (AOM) confirmed that the date of (PC) was now extended until 21/12/2006.

Contract (006)

- (7) In the tender documents the dates for start and completion are not specified.
- (8) In a letter from (RS) to all tenderers (I assume) dated 28/3/2006, fabrication is to start not later than 24 April 2006.
- (9) In (A) tender (18/5/2006) the Award of Contract date is specified as 22/5/2006 and the completion date is specified as 29/9/2006.

(10) In Annexure Part A of the General Conditions of Contract for AS4000, the date for practical completion was to be 17/7/2006 based on the date of award being 21/4/2006.

(11) An email (11/10/2006) from (PRM) to (AOM) confirmed that the date of (PC) was now extended until 21/12/2006.

This email (11/10/2006) confirms that *“there is however sufficient evidence to show that there have been significant delays in the issuing of drawings to (A) to provide an extension of time on both contracts until 21 December 2006.”*

Also suggested was that further extensions of time beyond this date would be assessed, subject to future progress and assessments of delays, if this became necessary.

From the aforementioned list of correspondence, and my conclusions below regarding the Role of the Superintendent, I have concluded that the original contract completion dates for contracts (005) and (006) have been extended from 17/7/2006 until 21/12/2006.

From this correspondence I have also concluded that on the balance of probabilities these extensions of time are due to *“compensable causes”* because of the email (11/10/2006) and that there is no correspondence suggesting or evidencing that any of the delays up to 11/10/2006 have been caused by the (A).

Subsequent correspondence in November, December and January, by both parties alleges that the other party is causing further delays. These claims are not substantiated in detail, however this Adjudication is only concerned with the extended contract period up to 21/12/2006, and will not be considering the remainder of the contract period after this date.

9.2 The Role of Superintendent

The correspondence, previously listed, from the (R) has been signed by both, (RS), (noted in the contract annexure A as “The Superintendent” but who has also signed under the title “Project Manager”) and (RPM) (who has signed under the title “Project Manager”).

I note that in a letter dated 5/1/2007, (RS) appoints (RPM) as “the Superintendent’s Representative” (SR) with the authority to issue directions under certain clauses in the contract.

Prior to this date (5/1/2007) I have no correspondence from (R) or (RS) specifying or limiting (RPM) position or authorities.

In an email dated 9/11/2006 from (AOM) to (RPM), a request was made to *“confirm his status in the contract”*.

If (RPM) authorities were to be limited under the contract, as decided by the (R), then I would have expected this to be communicated to the (A). No correspondence to this effect is evident.

(RPM) did by email (11/10/2006) advise (AOM) that the contract period had been extended to 21/12/2006. No similar directions by (RS) are evident.

Therefore because (RPM) and (RS) both work for the same company, and on the same project, and (RPM) has been issuing directions regarding extensions of time, I consider that, on the balance of probabilities, all directions issued by (RPM) are with the full knowledge and approval of the “*Superintendent*” and as such can be considered as directions under the contract by the “*Superintendent*”

Similarly, all correspondence sent by the (A) to (RPM) has likewise been served on the “*Superintendent*” as required under the contract.

9.3 Prolongation Costs

Under the terms of the contract, clause 34.9 “*Delay Damages*” the (A) can claim for delay damages based on “*an extension of time for a compensable cause*”, pursuant to sub clause 41.1.

I have previously determined that the extension of time, extending the contract period to 21/12/2006 are due to “*compensable causes*”

In a letter to (R) dated 21/8/2006 (ref AOM-2460) (A) submits an “*Extension of Time Claim and Additional Costs for Disruption and Delays*” with references to the relevant clauses in the contract, and which I consider constituted a “*prescribed notice*” issued in accordance with clause 41.1.

In this letter (A) submits a claim for

- (a) Extension of Time of 16 weeks, extending the contract completion date until 11 November 2006, and
- (b) Additional costs due to Disruption and Delay totalling some \$484,669.856.

Under clause 41.3 of the contract, within 56 days of receiving this “*prescribed notice*” (before Monday 16 October 2006) the (RS) should have assessed the claim and notified both parties of the decision.

However, on 28/9/2006 (A) submitted two further claims for prolongation costs for,

- (a) Contract (005) – \$619,206.77 + GST
- (b) Contract (006) – \$651,947.60 + GST.

The claims included detailed sheets of calculations showing how the total amounts claimed were reached.

I have no further correspondence from (A) or (R) relating to the first (21/8/2006) claim for additional costs, so I conclude that the two further claims (28/9/2006) supersede the first one.

Further in an email (dated 11/10/2006) from (RPM) to (AOM) under “Claims for Prolongation” it is stated that *“It was further agreed that these claims would be taken off the table at this time pending the resolution of the claims for additional costs (I assume for additional construction works), and the determination of a more accurate contract completion date”*.

Notes of that meeting on 29/9/2006 included in the (R) response record that

- (a) *Prolongation Claim submitted is estimate only, not to be realised at present as length of job is not known. and*
- (b) *Prolongation claim to be taken off the table pending resolution of and claims.*

This same email (11/10/2006) referred to the meeting on 29/9/2006 between both parties.

In a later email (15/12/2006) from (AOM) to (RS) it was stated that the *“claim is now back on the table”*

From this correspondence I concluded that consideration of the second two claims (28/9/2006) had been suspended by the agreement of both parties, but that from the 15/12/2006, consideration by the (RS) should commence.

This has been confirmed by a letter from (RS) to (AOM) on the 21/12/2006.

I therefore consider that the prescribed notices under clause 41 of the contract have been issued by (A) but are now dated from 15/12/2006. The (A) has 28 days from this date to provide any further information that he may wish to provide to the (RS) and the (RS) has to assess the claim and notify the parties within 56 days from 15/12/2006, which is before 9/2/2007.

This date of 9/2/2007 is beyond the end of the contract period that I am considering under this adjudication.

Therefore I cannot consider any of this prolongation claim in this adjudication.

9.4 Variations

The (A) has carried out, under instructions from, and with the agreement of the (R), an amount of additional work as variations to the contract under clause 36.

The (A) and the (R) appear to have agreed to submit for consideration and approval these variations on a progressive basis and when approved, interim payments made to (A), separate to the normal monthly progress claims. However, the (RS) has not complied with clause 36.4, where, in particular after approving the amount of a variation, *“that price shall be added to or deducted from the contract sum”*.

The (RS) apparently, did not issue written notices of proposed variations (ref. clause 36.2) (see admin manual form S119), which would have required the (A) to advise what effect these variations would have on the construction program.

When the variations were approved they should have been included into the monthly progress claims, (refer to clause 37.1 “*progress claim shall.....include details of other moneys then due to the contractor pursuant to provisions of the contract*”), with any interim payments that had been made and incorporated into the calculations of what outstanding monies were due to the (A) when the (RS) issues the progress certificate.

I will consider these additional works as variations to the contract, when adjudicating this dispute, and determining if any additional payments are due.

One of the variations submitted was the (A) variation number 8 “*Extend Paint Facility*”. This variation was submitted on 30/9/2006, approved on 10/10/2006 and then the invoice 8231 issued on 12/10/2006 and payment received on 19/10/2006 by (A).

The extension works were used to carry out blasting and painting of the large steelwork items. In an email from (RPM) to (AOM) 10/10/2006 it is confirmed that “*we will contribute the sum of \$30,000.00 towards the cost of the works. It is agreed that this extension to the paint facility is a critical factor in consolidating and accelerating the fabrication program for both the and Contracts..... to achieve our completion date of 21 December 2006 for dry commissioning*”.

On 14/12/2006 (RPM) wrote to (AOM) to advise that “*our payment of \$30,000.00 will be withdrawn*”.

I have considered the correspondence relating to the extension of the painting facility and during my site inspection on the 19/3/2007 confirmed that the extension works had been carried out. I can find no details in the agreement between (R) and (A) that there were any conditions in the agreements by (R) to pay the \$30,000.00, that would allow them to recover the money as a debit from (A) at some time in the future, if they so choose.

Therefore, I consider that the (RS) should not deduct \$30,000.00 from payments of other monies due under contract.

9.5 Liquidated Damages

1. The (A) has submitted two progress claims for work carried out on the two contracts up to 21/12/2006 for the following amounts (including GST)

1.1 Contract (005)	\$627,771.48
1.2 Contract (006)	\$1,265,321.15

2. The (RS) has assessed the claims and issued (9/1/2007) progress certificates for the following amounts (including GST)

2.1 Contract (005)	[\$127,951.31]
2.2 Contract (006)	\$458,039.34

Note: [negative amount]

3. The progress certificates include amounts deducted for liquidated damages as follows (excluding GST)

3.1 Contract (005)	\$77,500.00
3.2 Contract (006)	\$77,500.00

4. The (A) submits that

- (a) The (RS) has failed to assess and issue notices for extensions of time claimed by (A)
- (b) In addition the (RS) has not acted reasonably under the contract, by not *“having full regard to all of the consequences and impacts of delays”*.

5. The (R) replies that

- (a) The (A) has not substantiated their assertion that they are *“clearly entitled to an extension of time for matters within the control of the (R)”* that have caused delays.
- (b) An extension of time has been granted to 21/12/2006.
- (c) There is no proof that the (RS) has not acted reasonably under the contract.

6. I conclude that from a full review of the *“Notice of Dispute”* documentation and the *“Response”* documentation. Plus other documents, referred to in the above documentation, but only provided subsequently at the Adjudication’s request,

that

- 1. The (A) did (21/8/2006) apply for an extension of time, in accordance with the contract.
- 2. The (RS) did not comply with clause 34.5 and provide within 28 days, an assessment of the (A) claim (21/8/2006) for an extension of time.
- 3. The (A) did (14/9/2006) provide to (R) a critical path program that indicated a completion date for contract (006) of 27/3/2007.
- 4. The (A) did (6/10/2006) advise (R) that their claims for extensions of time to their contracts were for contract completion on

- (a) Contract (005) 11/11/2006
- (b) Contract (006) 2/2/2007

- 5. The (R) did (11/10/2006) advise (A) that the date of (PC) was now extended until 21/12/2006.
- 6. (RPM) did by letter (22/12/2006) advise (AOM) that *“their restrictive work practices have caused delays to the completion of the works”* and that *“we will be directing the Superintendent to deduct liquidated damages”*
- 7. The (A) did by letter (7/1/2007) allege that the (RS) had failed to properly assess their claims for Extensions of Time to their contract periods.

8. I also note the (R) has not complied with clause 34.2 and notified the (RS) and (A) “*of anything that will probably cause delay*”.
9. With due consideration to all of the above and with regard that clause 20 of the contract AS4000 requires that “*The Principal shall ensure that at all times the Superintendent fulfils all aspects of the role and functions reasonably and in good faith*”.

I consider that the statement from (RPM) acting (I assume) as (R) project manager that “*we will be directing the Superintendent*” does not allow the Superintendent to “*function reasonably and in good faith*”.

10. Following the statement by (RPM) (22/12/2006) “*we will be directing the Superintendent*” a progress certificate was issued by (RS) (9/1/2007), deducting liquidated damages.
11. The (RS) has not provided any evidence of how he has assessed (A) claims for further extensions of time, or how he has assessed that (A) should pay (R) liquidated damages. Instead (RS) appears to have complied with the “*directions*” from (RPM).

I consider that (RS) has not been allowed to “*function reasonably or act in good faith*”, as he is required to do under the contract.

I therefore do not consider that any liquidated damages should be deducted from progress payments at this time.

9.6 Progress Claims and Certificates

I consider that the (RS) has not properly complied with clause 37.2 (a) of the contract and clearly “*evidenced the (RS) opinion of the monies due from the (R) to the (A) pursuant to the progress claim and given reasons for any difference*”. The progress certificates issued on 9/1/2007 referring to the (A) progress claims (invoices 8342 and 8343), just detail the amounts and percentages deducted without any detailed reasons given. I draw a comparison with the letter from (RPM) to (AOM) dated 7/12/2006 titled “*Determination of Variation Claims*” relating to the fabrication and erection of additional steelwork. The (RS) here has given a detailed explanation of how he has calculated the amount that has been assessed as the value of (A) claims. I have been given no detailed correspondence that refers to these progress certificates and explains the deductions.

Therefore, when determining the amount of any monies due to (A), I will exclude these deductions.

The (A) total claims up to 21/12/2006 are as follows (all amounts include GST)

Contract (005)	\$2,831,441.49
Contract (006)	\$2,917,514.08

Previously in 9.3 I have determined that Prolongation Claims cannot be considered in this adjudication because the (RS) on 21/12/2006 is still within the 56 day assessment and determination period.

I therefore determine that (A) progress claims should be reduced as follows

Contract 005)	
Initial Amount Claimed	\$2,831,441.49
Less Prolongation Claim	<u>\$681,127.47</u>
Maximum Allowable Claim	\$2,150,314.02

Contract (006)	
Initial Amount Claimed	\$2,917,514.08
Less Prolongation Claim	<u>\$717,142.36</u>
Maximum Allowable Claim	\$2,200,371.72

I have previously determined that (RS) has not properly complied with the contract and therefore when calculating the amounts due to the (A), I will be excluding any of the deductions made by (RS).

The (R) total payments up to and including the 21/12/2006 are as follows (all amounts include GST)

Contract (005)	
Contract Works	\$2,093,721.22
Plus Additional Works	<u>\$109,948.90</u>
Total (including GST)	\$2,203,670.12

Contract (006)	
Contract Works	\$1,603,415.16
Plus Additional Works	<u>\$81,778.39</u>
Total (including GST)	\$1,685,193.55

I determine that the progress payments due for work up to and including 21/12/2006, less previous payments, are

Contract (005)	
Maximum Allowable Claim	\$2,150,314.02
Less Total Previous Payments	<u>\$2,203,670.12</u>
Amount due	[\$53,356.10]

Contract (006)	
Maximum Allowable Claim	\$2,200,371.72
Less Total Previous Payments	<u>\$1,685,193.55</u>
Amount due	\$515,178.17

Considering both contracts together

(005) – Amount Due	[\$53,356.10]	
(006) – Amount Due	\$515,178.17	
Net Amount Due		<u>\$461,822.07</u>

Further payments received by (A)

(1) 2/2/2007	\$330,088.03	
(2) 4/4/2007	\$10,180.91	
		<u>\$340,268.94</u>

Amount of progress payments still outstanding		<u>\$121,553.13</u>
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Calculation of Interest

The contract clause 37.2 requires that “*The Principal shall within 7 dayspay to the Contractor the balance of the Progress Certificate*”.

The (RS) issued the Progress Certificate on 9/1/2007, which I have assumed was received by the (R) on the same day

The (R) should have paid the (A) by the 16/1/2007. However, the first payment of \$330,088.03 was not received by (A) until 2/2/2007. I am advised that a second payment of \$10,180.91 was received by (A) on 4/4/2007.

I determine that the balance due of \$121,553.13 should be paid on or before 12/4/2007.

I calculate that the interest due on these three late payments totals \$5,542.75 (*which has been calculated in accordance with the clause 37.5 of the contract*).

For the reasons set out before in this determination,

I determine that the Adjudicated Amount is	\$121,553.13
Plus	<u>\$5,542.75</u>
Total	\$127,095.88

The Adjudicated amount is payable on or before 12/4/2007.