

Adjudicator's Determination

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

Adjudication 18.15.01

(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 of the Application dated 9 February 2015 is \$177,463.22 including GST.
2. The date payable is 5 December 2014 and total interest due and payable to 9 March 2015 is \$3,826.95 and interest continues to accrue at the rate of \$40.71 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 Law Society Northern Territory 9 February 2015.
5. I was appointed as Adjudicator by the Law Society Northern Territory 11 February 2015. The Society notified the parties of the appointment that 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 13 November 2014)*
 - 7.2. Application from the Applicant dated 9 February 2015.
 - 7.3. Response from the Respondent dated 23 February 2015.
 - 7.4. Submission from the Applicant dated 2 March 2015.

The Adjudication Application

8. The Adjudication Application was served on the Respondent 9 February 2015. The Application consists of the following documents;
 - 8.1. Adjudication Application, and
 - 8.2. 8 Attachments of supporting documentation.

The Response

9. The Adjudication Response was served on the Applicant and the Adjudicator 23 February 2015 and consists of the following documents;
 - 9.1. Respondent's reply to the Application, and
 - 9.2. 13 Attachments of supporting documentation.

Jurisdiction

10. The dispute arises out of a contract between the parties for the Applicant to manufacture and supply ready mixed concrete to the Respondent for works on various building projects in the Northern Territory.
11. The Adjudicator declares no conflict of interest within the meaning of the Act.
12. The parties have made no advice that the dispute is the "subject of any other order, judgment or other finding".
13. The Applicant submitted a payment claim to the Respondent 7 November 2014. The parties agree that the contract between them was oral save for documents created to account for business transactions. Therefore the implied provisions in the Act apply to the contract between the parties. The 7 November 2014 payment claim complies in each respect with the requirements listed in the Act at Division 4 of the Implied Provisions Schedule.

14. On 14 November 2014 by written notice the Respondent disputed the Applicant's payment claim in its entirety. I consider that a valid payment dispute exists and that the Application for adjudication is in accordance with Section 28 of the Act.
15. There are therefore no impediments to the Adjudicator's jurisdiction in relation to the adjudication.

Applicant's Payment Claim under the Act

16. The disputed payment claim submitted 7 November 2014 refers to invoiced deliveries of concrete throughout the course of the contract for the period 2 June 2014 to 15 August 2014 as per the following schedule.

Date	Invoice No	Amount Due incl. GST
02/06/2014	BC44383	\$7,777.00
03/06/2014	BC44411	\$2,533.08
06/06/2014	BC44567	\$9,110.20
07/06/2014	BC44577	\$5,301.34
07/06/2014	BC44582	\$9,332.40
11/06/2014	BC44658	\$418.22
12/06/2014	BC44712	\$8,443.60
14/06/2014	BC44798	\$225.72
17/06/2014	BC44893	\$34,902.55
18/06/2014	BC44951	\$7,777.00
19/06/2014	BC44990	\$2,444.20
20/06/2014	BC45049	\$8,259.90
24/06/2014	BC45143	\$6,221.60
25/06/2014	BC45186	\$31,241.32
26/06/2014	BC45265	\$6,631.02
26/06/2014	BC45270	\$299.20
27/06/2014	BC45296	\$1,333.20
30/06/2014	BC45341	\$728.64
01/07/2014	BC45405	\$7,777.00
02/07/2014	BC45436	\$9,865.68
04/07/2014	BC45521	\$8,259.90
07/07/2014	BC45635	\$8,665.80
10/07/2014	BC45770	\$5,466.12
10/07/2014	BC45774	\$2,977.48
11/07/2014	BC45811	\$888.80
11/07/2014	BC45812	\$7,777.00
12/07/2014	BC45823	\$1,314.50
14/07/2014	BC45880	\$425.04
15/07/2014	BC45921	\$8,076.20
16/07/2014	BC45946	\$482.90

17/07/2014	BC46017	\$2,888.60
21/07/2014	BC46125	\$225.72
22/07/2014	BC46190	\$7,777.00
31/07/2014	BC46416	\$11,370.70
06/08/2014	BC46629	\$2,185.26
06/08/2014	BC46631	\$8,221.40
07/08/2014	BC46677	\$1,333.20
08/08/2014	BC46711	\$299.20
12/08/2014	BC46808	\$2,222.00
15/08/2014	BC46925	-\$12.60
Sub Totals		\$241,467.09

Respondent's Notice of Dispute

17. The notice of dispute makes particular reference to supply of defective concrete in relation to invoice numbers BC44893, BC45186, BC45774, BC45880 and BC46017. The total value of these disputed Invoices is \$72,434.99.
18. The Respondent advises his customer relevant to invoices BC44893 and BC45186 has not paid \$120,000 for work and materials supplied and alleges he is facing a defective work damages claim which exceeds the total value of the 7 November 2014 claim.
19. It is also noted that the invoices are not addressed to the Respondent. The Applicant and the Respondent agree all concrete supplied and invoiced under the contract had previously been paid for by the Respondent and that this point is no longer in consideration.

Deed of Assignment

20. In the Response the Respondent provides a copy of a deed of assignment which assigns all of his rights in relation to invoices BC44893 and BC45186 totaling \$66,143.88. The Assignee is the Respondent's end customer who is apparently pursuing a claim for defective work damages associated with that concrete supply and installation. This deed is dated 19 February 2015 which is 10 days after the Application was served.

Additional submissions

21. I invited the parties to provide submissions on the ramifications of the Respondent assigning all of his rights in relation to invoices BC44893 and BC45186. In particular I raised the question that if the Respondent has assigned its rights to these two invoices is it no longer entitled to rely on possible counter claims associated with those two invoices to offset other invoiced debt.

22. In the Response the Respondent argued that the adjudication should be delayed until the dispute between the Respondent and its customer is resolved by court process. I advised the parties that the adjudicator is required to make a determination on the balance of probabilities, provided no order or judgement has been made in the matter and that he is satisfied the complexity of the matter does not hinder a fair determination. So to simplify things I asked the parties to consider removing invoice numbers BC44893 and BC45186 from the adjudication and confining the determination to the balance of the disputed claim.
23. The Applicant advised it would agree to removal of the two invoices on the basis that the Respondent is not entitled to rely on any counterclaims associated with the two invoices and subject to the Respondent and the adjudicator agreeing to the removal on those terms. The Respondent failed to make a submission as requested. Hence there is no agreement to adjust the matters for determination in the adjudication.
24. In the Response the Respondent had included a 38 page engineer's report on two reinforced concrete slabs fabricated from the concrete supplied and billed on Invoices BC44893 and BC45186. The report is dated 14 January 2015. Previously the Respondent had made reference to third party testing and technical reports in his notice of dispute. However this was the first time the Applicant was offered the opportunity to evaluate the veracity of the Respondent's claim of defective supply. In the interests of natural justice I offered the Applicant the opportunity to comment on the report. The Applicant declined to comment on the report on the presumption that the parties would agree to the removal of the two invoices from the adjudication. I must therefore proceed with a determination taking into account the information provided in the technical report.
25. I also sought clarification of technical data provided with the Application. The Applicant clarified that material in question.

Invoices BC44893 and BC45186

26. The concrete on invoices BC44893 and BC45186 was supplied to construct two slabs for a light industrial complex consisting of 6 storage units and associated offices. Each slab is 48 metres by 14.8 metres with a full perimeter edge beam and 2 equally spaced internal beams. Invoice BC44893 is for the supply of 156.8 cubic metres of concrete for slab 1 on 17 June 2014. Invoice BC45186 is for the supply of 140.6 cubic metres of concrete for slab 2 on 25 June 2014.
27. Towards the end of July extensive cracking started to appear in the slabs. These cracks now range from hairline to 2mm. Australian Standards allow cracks with maximum width of 0.3 mm. As a result of this cracking the Respondent's customer arranged for coring and strength testing of both slabs on 26 July 2014. Slab 1 test results were 18.4MPa and 16.1MPa. Slab 2 test results were 14.7 Mpa and 14.8MPa. The parties agree the specified compressive strength of the concrete at 28 days should have been 25MPa.

28. The engineer's report flags 4 defects with the two slabs – substandard compressive strength, excessive cracking, ineffective contraction joints and incorrectly placed reinforcement.
29. Based on the concrete batching information provided by the Applicant the 25MPa mix design allows for 270 kg of cement with a water cement ratio of 0.482. This means that for each 7.4 cubic metre batch the total amount of water included should be 963 litres. The Respondent's routine process control testing indicates this mix would yield a 28 day compressive strength in excess of 25 Mpa. In the normal course of events this is what you would expect with that cement content and water cement ratio.
30. The Respondent discounts the Applicant's claim of water added on site at the Respondent's request is a contributory cause of the inadequate strength results. Given that the volumes of water added range from 0 to 140 litres the average addition per load on each slab is 40 litres. That would mean an average increase in the water cement ratio of 0.02. I am inclined to support the Respondent's claim that moisture added on site has not significantly reduced the ultimate compressive strength.
31. The Respondent makes reference to a Particle Size Distribution test conducted on the Coarse Sand at the Applicant's batching yard. The test report advises an excessive clay and fine silt proportion. There are two major difficulties with this test result. Firstly, it was sampled by the Respondent who is presumably not NATA certified to obtain representative samples and secondly, it was taken 3 September 2014 over two months after the concrete in question was batched. On those two factors I am struggling to place any significant relevance on this test result.
32. The engineer's report also notes other contributing factors as to why the two slabs developed excessive cracking. The contraction joints failed because they may have been applied too late (possible construction error), they were too far apart (design error) and the reinforcement was not cut (construction error). The reinforcement was not placed correctly (construction error). The slabs may not have been cured properly (possible construction error). There is no record of actual curing applied. I can only rely on the Respondent's claims.
33. Ultimately the engineer recommends two options of corrective action to resolve the problem. The first option involves removing the existing slab, redesigning and then reconstructing to the revised design. His second option is to cover the existing with a new slab of concrete batched with a water cement ratio of 0.45 and super plasticisers to aid placement. In both cases redesign to specifically suit the project is required.
34. The recommendations for redesign imply that the original design was not fit for purpose. The incorrect placement of the reinforcement indicates that the Respondent's claim of industry standard work practice is open to question. The failure of the concrete test cores indicates the Applicant has a case to answer for inadequate concrete supply.

35. As this report has only just been released I can only presume that no corrective active action has been taken and in these circumstances quantifying any damages claim is premature. Moreover in the event that the Applicant can be found liable he should be provided the opportunity to mitigate the costs. Bear in mind the Applicant also conducts a civil construction business that could execute any corrective action with its own resources.
36. On the balance of probabilities I consider that the costs of any corrective action should be shared between the Applicant, the Respondent, and the Respondent's customer (responsible for design). Since no corrective action has been taken and no associated costs have been itemised and detailed the counterclaim is not quantified. There is also insufficient information to determine proportionate liability between the various parties. However at face value the concrete supplied on invoices BC44893 and BC45186 does not appear to have met strength requirements and it is therefore reasonable for the Respondent to withhold payment for these two invoices.

Invoice BC45774

37. According to the Respondent's notice of dispute Invoice BC45774 is for 13.4 cubic metres of defective concrete supplied 10 July 2014 to the same site as for invoices BC44893 and BC45186. All of the Respondent's evidence of defective supply relates to concrete supplied on 17 June 2014 and 25 June 2014. There is no evidence to support claims of defective supply on 10 July 2014. On the balance of probabilities I determine Invoice BC45774 is due and payable.

Invoice BC45880

38. Invoice BC45880 relates to 1.4 cubic metres of concrete supplied 14 July 2014 to a different project site. The parties agree that the concrete supplied was incorrect in terms of aggregate colour. The Applicant replaced the concrete at no charge to the Respondent. The parties disagree on the labour costs to remove and replace the defective concrete. The Applicant has offered \$500 to cover the Respondent's costs. The Respondent claims costs of \$3000 citing 3 men for two days. Given the small volume of 1.4 cubic metres I consider the Applicant's estimate to be more credible. On the balance of probabilities I determine Invoice BC45880 in the amount of \$425.04 is due and payable and that the Respondent is entitled to a credit of \$500 for costs incurred.

Invoice BC46017

39. Invoice BC46017 relates to 13.0 cubic metres of concrete supplied 17 July 2014 to a different project site. The Respondent claims that the concrete supplied to this site would not dry or finish in a proper manner and that the Respondent was not paid for labour on that site in the sum of \$3,200 by its customer. There is no assertion of concrete being of inadequate strength. There is no mention of the Respondent's customer refusing to pay for the concrete supply. I am therefore inclined to support the Applicant's assertions that the problems were with the Respondent's workmanship. On the balance of probabilities I dismiss the Respondent's counterclaim of \$3,200.00 associated with invoice BC46017.

Invoice BC44951

40. There was no reference, in the Respondent's notice of dispute, to invoice BC44951 for the supply of 35 cubic metres to yet another different project site on 18 June 2014. The Applicant raises the matter in the Application citing the wrong invoice number. The Respondent states his position on the matter in the Response. The Respondent asserts that he did not order that particular supply because he was only contracted to supply and place concrete to footings on that site. The Applicant claims that as per standard ordering arrangements between the parties the Applicant's son phoned the order to the batch plant. The Applicant has provided several signed declarations of the employees involved to support his version of events. On the balance of probabilities and the evidence presented I determine that invoice BC44951 in the amount of \$7,777.00 is due and payable.

Valuation of Applicant's Claim of 7 November 2015.

41. For the reasons as set out above I find on the balance of probabilities the GST inclusive value of the Applicant's Claim to be:

Claim as presented	\$241,467.09
Less invoices BC44893 & BC45186 not due	<u>\$66,143.87</u>
Sub Total	\$175,323.22
Less credit for costs associated with invoice BC45880	<u>\$500.00</u>
Amount Outstanding.	\$174,823.22

Interest on Outstanding Amounts

42. Section 21 of the Act provides for interest on late payments at the rate of 8.5%. Interest is calculated as follows:

Payment on the claim presented 7 November 2014 was due 5 December 2014. Interest at 8.5% per annum accrued up to 9 March 2015 is \$3,826.95 and continues to accrue at \$40.71 per day until paid.

Adjudicator's Costs

43. Clause 36 (1) of the Act requires the parties to bear their own costs.
44. 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.
45. I am satisfied that the submissions from both parties contain merit and are neither frivolous nor vexatious.
46. I therefore determine that adjudicator's costs are to be shared equally by the parties.
47. The parties were requested to provide a deposit to cover the costs of the adjudication. The Respondent failed to make the requested deposit. By arrangement with the Applicant I will invoice the Applicant with the full costs of the adjudication and have included the Respondent's cost share of \$2,640.00 in the adjudicated amount

Conclusions

48. For the reasons set out in the Adjudication, I determine as follows:
 - 48.1. The Adjudicated Amount for the Applicant is \$177,463.22 including GST.
 - 48.2. The date payable is 5 December 2014 and total interest due and payable to 9 March 2015 is \$3,826.95 and interest continues to accrue at the rate of \$40.71 per day until payment is made.
 - 48.3. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

Brian J Gallagher
NT Registered Adjudicator No 22.
9 March 2015