

ADJUDICATORS'S DETERMINATION
PURSUANT TO
CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT
NORTHERN TERRITORY OF AUSTRALIA

Between:

APPLICANT

And

RESPONDENT

ADJUDICATION Number 19.14.01
Date: 21/4/2014

The appointed Adjudicator, pursuant to the *Construction Contracts (Security of Payments) Act* (the Act), determined that:

The Applicant shall pay to the Respondent, \$516,571.00 plus interest charges of \$9,496.15, which totals \$526,067.15 on or before the 21 May 2014.

History

1. Appointment of Adjudicator

I was appointed as Adjudicator by Master Builders, Northern Territory (MBNT) to determine this dispute on 5 March 2014.

2. Pre Adjudication Conference

I held a pre adjudication conference at 11.00 am on 14 March 2014.

Present were the Applicant & the Respondent

I explained that before starting work on the adjudication, I needed to raise a number of issues and seek responses from both parties.

2.1 Issue 1 – Existence of Contract

I advised that from “Notice of Dispute” and attached documentation, it appeared that the Applicant and the Respondent had entered into a “Construction Contract” for work, as defined in Section 6(1) of the Act.

Both parties agreed.

2.2 Issue 2 – Location of Work

I advised that it appeared that the “Construction Work” was carried out in the Northern Territory, as defined in Section 6(1) of the Act.

Both parties agreed.

2.3 Issue 3 – Payment Dispute

I advised that it appeared that a payment dispute had arisen as defined in Section 8(a) of the Act.

Both parties agreed.

2.4 Issue 4 – “Conflict of Interest”

I advised both parties of my current employment and knowledge of both companies and stated that I did not consider that I had a “Conflict of Interest”.

Both parties agreed.

2.5 Issue 5 – “Point of Contact”

I requested that each party nominated a point of contact.

The Applicant nominated *[intentionally omitted]*

The Respondent nominated *[intentionally omitted]*

2.6 Adjudication

I advised that all the requirements of the Act appear to have been complied with, and the adjudication could proceed.

The Respondent was to provide its response by “close of business” on 28 of March 2014.

I would then hand down my decision by 11 of April 2014.

I subsequently applied for and was granted an extension of time until 21 of April 2014.

2.7 Deposit of Funds

I requested that both parties deposit \$*[amount omitted]* each into the MBA(NT) trust fund. This money was to cover the adjudication’s costs and fees, until the determination was completed and issued. The adjudicator would then direct how the funds were to be distributed.

3. DOCUMENTS REGARDED IN MAKING THE DETERMINATION

In making the determination, I have regard to the following:

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

3.2 The Adjudication Application, dated 5 March 2014, which consists of:

- (1) Covering letter, dated 5 March 2014 (1 page)
- (2) Index (1 page)
- (3) Adjudication Application (5 pages)
- (4) Invoices from the Respondent (3 pages)
- (5) Letter from the Respondent dated 8 April 2013 (4 pages)
- (6) Email letter from the Applicant dated 11 February 2014 (4 pages)
- (7) Letter from the Quantity Surveyor dated 8 February 2014 (1 page)
- (8) Letter from the Quantity Surveyor dated 7 February 2014, with attachments (15 pages)
- (9) Purchase Order 17642 (1 page)
- (10) Visitor Register (4 pages)
- (11) Scope of Works for the Project (13 of 16 pages)
- (12) A DVD labelled – Tender Documents

On the DVD are

12.1 Tender documents issued by the Head Contractor

- (a) – Scope of Works for Tender (pages 1 to 16)
- (b) – Annexure – Special Conditions (1 to 16 pages)
- (c) – Medium Works Subcontract for ----- (pages 1 – 101)
- (d) – Medium Works Subcontract – Tender Documents (pages 1 to 70)

12.2

- (a) – Tender documents (Part I) submitted by the Applicant to the Head Contractor (pages 1 to 68) – nominating the Respondent as a subcontractor
 - (b) – Tender documents (Part II) submitted by the Applicant to the Head Contractor (pages 1 to 98)
- (13) Costings for Variations to Project (3 pages)
 - (14) Respondent – Rates Book (4 pages)
 - (15) Applicant – Time lines for project
 - (16) Respondent – Schedule of key dates with activities started, finished or carried out (2 pages)
 - (17) Email (dated 17 January 2014) from the Respondent to the Applicant (1 page)
 - (18) Email (dated 14 February 2014) from the Applicant to the Respondent in reply to email (dated 13 February 2014)

3.3 The Response to the Adjudication Application dated 26 March 2014, which consists of:

- (1) letter from the Respondent to the Adjudicator dated 26 March 2014 (1 page)
- (2) Index (1 page)
- (3) Response by the Respondent dated 26 March 2014 (7 pages)
- (4) Respondent's Invoices (4 pages)
- (5) Respondent's Sales Register dated 27 March 2014 (1 page)
- (6) Tender letter from the Respondent to the Applicant, dated 8 April 2013 (4 pages)
- (7) Letter from the Quantity Surveyor to the Applicant dated 7 February 2014 with attachments (18 pages)
- (8) Letter from the Quantity Surveyor to the Applicant dated 8 February 2014 (1 page)
- (9) Respondent's Tax Invoice for work (4 pages)
- (10) Purchase order to the Respondent dated 20 January 2014 for hire of equipment (1 page)
- (11) Respondent's Quotation dated 21 August 2013 for hire of equipment (3 pages)
- (12) Email from the Respondent to the Applicant dated 14 February 2014 with attachment of a purchase order (3 pages)
- (13) Applicant's purchase order No. 17642 dated 11 September 2013 to the Respondent
- (14) Letter from the Applicant to the Respondent dated 4 September 2013 (4 pages)
- (15) Applicant's purchase order No. 17648 dated 11 October 2013
- (16) Respondent's Hazard Reports dated 11 and 12 September 2013 (2 pages)
- (17) Respondent's Incident/Accident Reports dated 16 October 2013 and 2 November 2013
- (18) Respondent's Hazard Report dated 25 November 2013 with photographs (5 pages)
- (19) Email dated 26 March 2014 with attached report (3 pages)
- (20) Documents relating to application for Visitor Passes, qualification documents for workers engaged on the project (81 pages)
- (21) Respondent's Rates Book Pages and workers' time sheets and Visitor Register Sheets (46 pages)
- (22) Email 27 May 2013 from the Applicant to the Respondent (1 page) re start date on site
- (23) Email 17 July 2013 from the Respondent to the Applicant (1 page) re delays to start on site
- (24) Email 27 June 2013 from the Respondent to the Applicant (2 pages) re environmental clearance certificate
- (25) Email 2 August 2013 from the Respondent to the Applicant (1 page) re base access approval
- (26) Email 12 August 2013 from the Respondent to the Applicant (3 pages) re radiation safety hazard
- (27) Email 12 September 2013 from the Applicant to the Respondent regarding radiation safety hazard (2 pages)
- (28) Email 19 September 2013 from the Respondent to the Applicant re delays to progress (3 pages)
- (29) Letter from the Applicant to the Respondent dated 18 November 2013 regarding delays to progress payments (1 page)

- (30) Email 22 November 2013, from the Head Contractor to the Respondent regarding preparations to scaffolding for possible cyclone (1 page)
- (31) Email 10 December 2013, Respondent's internal email re waiting on information (1 page)
- (32) Schedule of dates and activities relating to scaffolding, blasting and delays (2 pages)
- (33) Email from the Applicant to the Respondent re hire charges for scaffolding 11 December 2013 (1 page)
- (34) Email 19 December 2013 from the Applicant to the Respondent regarding removal of planks from scaffolding (2 pages)
- (35) Email 7 January, from the Head Contractor to the Applicant regarding demobilisation and request for detailed variation costs for this work (1 page)
- (36) Email letter 17 January 2014 from the Respondent to the Applicant detailing costs for labour, plant and equipment on the site (1 page)
- (37) Letter 11 February 2014 from the Applicant to the Respondent requesting revised rates for labour, plant and equipment (2 pages)
- (38) Email 14 February 2014 from the Respondent to the Applicant regarding labour, plant and equipment costs (1 page)
- (39) Letter 18 February 2014 from the Applicant to the Respondent re stand down rates for labour, plant and equipment and proceeding to adjudication (1 page)
- (40) Email 19 February 2014 from the Respondent to the Applicant regarding contractual arrangements and stand down costs (1 page)
- (41) Email dated 3 March 2014 from the Applicant's Lawyers to the Respondent (1 page)
- (42) Letter dated 3 March 2014 from the Applicant's Lawyers to the Respondent regarding invoices and requesting more detailed information (3 pages).

In addition to the previous listed documents, I was sent an email by the Respondent dated 31 March 2014, which I note was also copied to the Applicant.

This was after the time period allowed in the Act for the Respondent to reply and I am therefore unable to consider the information that the email contained.

4. DETERMINATION

From the responses given at the pre adjudication conference (see above 2.1 Issue 1), both parties agreed that a “Construction Contract” had been entered into for work as defined under the section 6(1) of the Act.

From the documents included in the application by the Applicant and the response by the Respondent and listed above in 3, the Respondent was invited by the Applicant to submit a tender to provide access scaffolding and carry out blasting and repainting works to the *[project details omitted]*, as part of tender package of work that the Applicant submitted to the Head Contractor.

The Respondent submitted a tender to the Applicant on 8 April 2013 (ref 3.2 (5) and 3.3 (6) and quote number TM130408-1). The tender was for a total sum of \$339,240.00 plus GST, which equals \$373,164.00, and also includes

Item 6.3 Commercial Qualifications details:

“Payment claims shall be submitted monthly and payment shall be strictly 30 days from the date that the monthly claim is submitted”

The Applicant, some 5 months later, on the 11 September 2013 after work had commenced, issued a purchase order, number 17642, to the Respondent to carry out the works;

“ as per your quote TM130408-1 for \$339,240.00 plus GST which equals \$373,164.00”

I consider that the tender quotation by the Respondent and the purchase order by the Applicant form the basis of the contractual agreement between the two parties.

From the schedule dates provided by the Respondent (3.2(16)), work started on the 24 July 2013 and continued through July, August, September, October and into November 2013. A number of stoppages occurred due to health concerns for the construction workers, access to site restrictions etc.

The responsibility for these delays is not a matter for this “Adjudication”, which is only concerned with the non payment of invoices 9258, 9305 and 9454.

In addition, the Respondent gave another quotation (Quote No. TM130904-1) on the 4 September 2013 for “Extra Works”, which totalled \$119,800.00 plus GST, which equals \$131,780.00. The terms and conditions on this quote were identical to the original quote. The Applicant then issued a purchase order 17648 on the 11 October 2013 for additional works;

1. *as per variation request for \$119,800.00 plus GST.*
2. *Hourly rate for the Respondent’s Personnel to remove and reinstate walkway panels.*

I note it would appear that a purchase order was issued to carry out work with no prior agreement over hourly rates to be charged.

On the 19 September 2013 the sent an email to the Applicant proposing a course of action (the works apparently were on hold) to restart the works and pointing out the costs that the Respondent was incurring while the work force and plant was on “stand by”.

This proposal was rejected by the Head Contractor (see 3.3 (28)).

On 18 of November 2013 the Applicant sent an email (3.3 (29)) to the Respondent advising that delays to progress payments were due to “*delays in their Head Contractor processes*”.

In addition the email asked the Respondent to submit claims for “stand by” rates for ongoing scaffold hire and the UHP Unit.

With regard to the above email (3.3 (29)), it is relevant to note that

1. The Act has certain “*Prohibited Provisions*”, namely ;

Part 2 Prohibited and implied provisions of construction contracts

Division 1 Prohibited provisions

12 Pay if paid and pay when paid provisions

A provision in a construction contract has no effect if it purports to make the liability of a party (party A) to pay an amount under the contract to another party contingent (whether directly or indirectly) on party A being paid an amount by another person (whether or not a party).

This provision means that the Applicant cannot delay paying the Respondent because the Applicant has not been paid by the Head Contractor

2. The request by the Applicant to the Respondent to submit claims for “stand by rates etc” clearly indicates that the Applicant expected to be charged by the Respondent for labour and plant on “stand by”.

The Respondent then submitted invoices

- (1) 9258 on 28/11/13
- (2) 9305 on 31/12/2013
- (3) 9454 on 14/2/204.

The Respondent expected to be paid by the Applicant within 30 days of the date of the invoice.

The Act has certain “Implied Provisions” within which the following provision is relevant to this matter.

Division 2 Implied provisions

20 Responding to payment claims and time for payment

The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:

- (a) when and how a party must respond to a payment claim made by another party;*
- (b) by when a payment must be made*

From the documentation provided to me, the Applicant has not responded to the Respondent in the way detailed in the Act namely

Division 5 Responding to payment claims

6 Responding to payment claim by notice of dispute or payment

- (1) This clause applies if:*
 - (a) a party receives a payment claim under this contract; and*
 - (b) the party:*
 - (i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or*
 - (ii) disputes the whole or part of the claim.*
- (2) The party must:*
 - (a) within 14 days after receiving the payment claim:*
 - (i) give the claimant a notice of dispute; and*
 - (ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or*
 - (b) within 28 days after receiving the payment claim, pay the whole of the amount of the claim.*
- (3) The notice of dispute must:*
 - (a) be in writing; and*
 - (b) be addressed to the claimant; and*
 - (c) state the name of the party giving the notice; and*
 - (d) state the date of the notice; and*
 - (e) identify the claim to which the notice relates; and*
 - (f) if the claim is being rejected under subclause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract; and*
 - (g) if the claim is being disputed under subclause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reasons for disputing it; and*

I have considered all of the correspondence provided by the Applicant and the Respondent and I am unable to accept that any of it fully complies with “*The Notice of Dispute*” as defined in the Schedule to the Act, Divisions 5, 6 (2) and (3).

I therefore consider that the Applicant should pay the Respondent the total of the three invoices which is;

Invoice 9258	\$195,360.00
Invoice 9305	\$193,996.00
Invoice 9454	<u>\$127,215.00</u>
Total	<u>\$516,571.00</u>

on or before the 21 May 2014.

Because these payments are now overdue, I determine that the Applicant should pay the Respondent interest on these amounts which I calculate as follows.

1. Invoice 9258 – 28 November 2013 for \$195,360.00 was due for payment on 28 December 2013.

Interest due is

2013 – 3 days @ 8.75% =	\$140.50
2014 – 108 days @ 8.50% =	\$4,913.44

2. Invoice 9305 – 31 December 2013 for \$193,996.00 was due for payment on 30 January 2014.

Interest due is

2014 – 78 days @ 8.50% =	\$3,523.82
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3. Invoice 1954 – 14 February 2014 for \$127,215.00 was due for payment on 17 March 2014.

Interest due is

2014 – 31 days @ 8.50% =	<u>\$918.39</u>
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Total Interest due \$9,496.15