

Adjudicator's Determination

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

Adjudication 18-07-02

Determination

1. I, Brian J Gallagher, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act*, determine that application for adjudication between the parties is dismissed.
2. The parties legal and preparation costs are not awarded.
3. The Adjudicators costs are to be shared equally by the Claimant and the Respondent.

Appointment of Adjudicator

4. I was appointed as Adjudicator to determine this matter by direction from the Territory Construction Association 8 May 2007.
5. I accepted the adjudication application by discussion with the Territory Construction Association 8 May 2007 and the parties were notified that 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.
 - The provisions of the *Construction Contracts (Security of Payments) Act 2004*.
 - Submission from the Claimant submitted with the Adjudication Application and received by the Territory Construction Association 3 May 2007.
 - Correspondence between Legal Counsel for the Applicant and the Respondent directed to the Adjudicator and dated 8 May 2007
 - Request from Respondent dated 9 May 2005 to vary the time required for the Response to 10 working days from the date of the Amended Application.
 - Notification of withdrawal of the Application from the Applicant dated 10 May 2007.
 - Respondent's request for the Adjudicator's decision on costs dated 17 May 2007.

Legislative Requirements

8. The Act at Section 33 requires that;
 - (1) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) –*
 - (a) *dismiss the application without making a determination of its merits if –*
 - (i) *the contract concerned is not a construction contract;*
 - (ii) *the application has not been prepared and served in accordance with section 28;*
 - (iii) *an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or*
 - (iv) *satisfied it is not possible to fairly make a determination –*

- (A) because of the complexity of the matter; or
(B) because the prescribed time or any extension of it is not sufficient for another reason; or
- (b) otherwise – determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to 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.
- (2) If the application is not dismissed or determined under subsection (1) within the prescribed time, or any extension of it under section 34(3)(a), the application is taken to be dismissed when the time ends.
- (3) In this section – "prescribed time" means –
- (a) if the appointed adjudicator is served with a response under section 29(1) – 10 working days after the date of the service of the response; or
- (b) otherwise – 10 working days after the last date on which a response is required to be served under section 29(1).

The Adjudication Application

9. The adjudication application consists of the following documents;
- Amended Application details dated 9 May 2007;
 - Adjudication Application details received 3 May 2007;
 - Respondent's letter to Claimant dated 28 March 2007;
 - Claimant's letter of Claim to Respondent dated 5 March 2007; and
 - Attachments to the application which seek to support and clarify the claims.

Jurisdiction

10. The Act defines a "Construction Contract" at Section 5(1)(a);
- (1) A construction contract is a contract (whether or not in writing) under which a person (the "contractor") has one or more of the following obligations
- (a) to carry out construction work;
11. The Act defines "Construction Work" at Section 6(1)(c) to include;
- (1) Construction work is any of the following work on a site in the Territory:
- (c) constructing the whole or a part of any civil works, or a building or structure, that forms or will form (whether permanently or not and whether or not in the Territory), part of land or the seabed (whether above or below it);
12. The Respondent's letter to the Claimant dated 28 March 2007 is clear evidence of a 'payment dispute' between the parties as defined by the Act.
13. I have had no prior association with either the Claimant or the Respondent and no conflict of interest with either party to declare.

14. The contract is for work on a site in the Northern Territory and is a contract undertaking construction work as defined in Section 6 of the Act. The contract was based on a verbal agreement between the parties in accordance with their routine methods of transacting business.
15. Works under the contract outlined in the initial Application commenced on or around February 2005. Subsequent to Registrar's advice to the parties that the Act only applies to contracts entered into after 1 July 2005, the Applicant lodged an amended Application claiming that all agreements for additional works made after 1 July 2005 were not variations to the original contract but in fact entirely new contracts.
16. The Respondent contested jurisdiction based on the timing of the initial agreement. This then was an essential matter to be determined in the Adjudication.

Validity of Application

17. The Claimant has complied with the time requirements nominated in the Act.
 - The Claimant lodged a payment claim with the Respondent dated 5 March 2007.
 - The Respondent has replied with a claim rejection dated 28 March 2007.
 - The Claimant submitted the application for adjudication to the nominated appointer 3 May 2007 within the required 28 day period of the dispute arising.
 - The application was properly served on the Respondent and the Prescribed Appointer.
 - The application sufficiently includes all of the details as required by the Act.
18. The parties have provided no advice of the dispute being "subject of any other order, judgment or other finding".
19. I determine the Adjudicator has clear jurisdiction to consider the dispute, the Application for Adjudication is valid and the determination must be made within 10 business days of the Respondent's submission or COB 1 June 2007.

The Payment Claim

20. The initial payment claim is dated 5 March 2007. The amount claimed is \$232,911.17 with GST not clarified.
21. The amended claim is dated 9 May 2007. The amount claimed is \$48,930.17

The Claimant's Withdrawal.

22. The Claimant provided the Adjudicator and the Respondent with a notice of withdrawal of its application for adjudication dated 10 May 2007.

Response to Payment Claim

23. Following the notification of withdrawal the Respondent sought a decision for the Adjudicator with respect to costs.
24. The letter requesting costs does not quantify the amount claimed. In essence it is argued that the very withdrawal of the claim supports the assertion that the claim was frivolous and hence potentially subject to an award of costs against the Applicant.
25. Since the application had been withdrawn the Respondent did not provide any Response to either the initial or amended Application.

Issues to be Determined

26. The Claimant provided submissions concerning the timing and nature of agreements entered into by the parties. It has to be determined if the agreements subsequent to the initial agreement could be construed as separate agreements or variations of the initial agreement.
27. The Respondent has lodged a request for determination on costs. Hence liability for the costs of the adjudication is also to be determined.

Dismissal of Application

28. Since the Applicant has formally withdrawn the Application there is no necessity to proceed with any detailed consideration of the merits of the points of claim or determine quantum.
29. I therefore dismiss the application and proceed only with a determination on costs.

Variations under the initial contract or new contracts

30. The classification of additional works as variations under the initial contract or new contracts is a matter of consideration pertinent to this adjudication.
31. By its very nature a verbal contract does not have a variations clause so any consideration of this question can only rely on the typical interpretations prevailing in the industry. Generally any change in quality or quantity which can be considered as integral to the initial scope of work would normally be considered a variation to that scope. Any work of a different nature or in a different location could be treated as a variation or as a separate contract depending on how the parties wished to administer the work.

32. Applying these broad principles to the list of works at page 13 of the Amended Application I would classify as follows;
- Rectification - \$3200 – new contract (no allowance to repair damage by others)
 - Scaffold Hire - \$5230 – variation (integral to performance of the works)
 - High Walls - \$20,000 – new contract (unrelated works)
 - Manhole Access panels - \$5,200 – variation (additional requirement to the initial works)
 - Perforated sheets - \$4,800 – variation (change in requirement to the initial works)
 - Rectification - \$3,000 – new contract (no allowance to repair damage by others)
 - Fire check material - \$1,000 – variation (additional requirement to initial works)
 - Repairs - \$1,500 – new contract (no allowance to repair damage by others)
 - Fire Rating - \$5,000 – new contract (unrelated works)
33. On the basis summarized above around two thirds of the additional work could arguably be classified as new contracts and hence satisfy the requirements for jurisdiction.
34. The Respondent argues in effect that all the works on the site should be considered as a single contract and that hence the Act does not apply to the claim. If this argument is supported then the Adjudicator does not have jurisdiction and cannot consider the Respondent's request for costs.
35. I determine therefore that on the balance of probabilities:
- The Claimant's basis for claim is at least partially valid and that this is sufficient to satisfy jurisdiction requirements under the Act.

Costs

36. The Respondent seeks costs from the Claimant but has failed to provide any quantification of that claim.
37. Clause 36 (1) of the Act requires the parties to bear their own costs.
38. 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.
39. I am satisfied that the Claimant has lodged an application without fully appreciating the potential limitations on the extent of coverage of the Act. The nature of communication from the Applicant to the Respondent does not indicate any frivolous or vexatious action.

40. I therefore determine that;
- The conduct of the parties has not been frivolous or vexatious.
 - The parties legal and preparation costs are not awarded and are to be borne by the Parties.
 - The Adjudicator's costs are to be shared equally by the parties.

Conclusion

41. I have concluded as follows:
- The application is dismissed at the request of the Applicant.
 - The parties legal and preparation costs are not awarded.
 - The Adjudicators costs are to be shared equally by the Claimant and the Respondent.

Brian J Gallagher
NT Registered Adjudicator No 18.
28 May 2007