

**Adjudicator's Determination
pursuant to the Construction Contracts (Security of Payments) Act (NT)**

Applicant

and

Respondent

DETERMINATION

I, David Alderman, Registered Adjudicator No 23, determine on 27 October 2010 in accordance with section 38(1) of the Construction Contracts (Security of Payments) Act 2004 (NT) that the amount to be paid by the Respondent to the Applicant is \$23,390.90 inclusive of GST and interest, and that, the date the sum of \$23,390.90 is payable is 28 October 2010 and that, the Respondent is to pay interest to the Applicant and interest accrues at the rate of 10% per annum after 28 October 2010 on any part of the sum of \$20,819.55 exclusive of GST, unpaid.

Finally, I determine there is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the Act.

Dated:

David Alderman
Registered Adjudicator No. 23

Appointment

The Applicant applied on about 5 October 2010 for an adjudication under the *Construction Contracts (Security of Payments) Act* (NT) (the Act), consequent upon which I was appointed adjudicator on 6 October 2010 by the Master Builders NT to determine this application. The Master Builders NT is a prescribed appointor under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act.

Details

Applicant

Respondent

Documents Reviewed

I have received and considered the application dated 5 October 2010 together with the attachments A to L.

I also received and considered the response dated 19 October 2010 which was received on that day by e-mail. The response contained the Response and annexures A to F.

I received and considered an email from PN for the Applicant which email seems to have been sent to Mr Garraway for the respondent.

I received and considered an email from Mr Garraway solicitor for the Respondent dated 19 October 2010 which seems to have been sent to the Applicant.

The Applicant's Submissions

The Applicant makes the following submissions.

The Applicant delivered a quote to the Respondent on 24 August 2009 and revised that quote on 24 November 2009. On 24 November 2009 the Respondent accepted the quote number 29254-01. The contract sum was \$92,984.20 plus GST.

The work to done was plumbing works at [site location].

On 2 February 2010 the contract Works were amended as per quotation 29254-02 dated 15 December 2009 as per the Respondent's purchase order number 1954.

The Applicant carried out the work and submitted progress claims.

During the course of the works and there were variations which were approved by the Respondent in the sum of \$21,598.

The last and 5th progress claim was made on 13 July 2010 and claimed \$54,414.51. The Respondent paid \$31,513.01 of that claim on 26 August 2010.

The Respondent alleges the sum of \$22,901.50 inclusive of GST is unpaid and payable.

The plumbing works were completed in July 2010 and the appropriate certificates were delivered on 10 July 2010.

On about 24 September 2010 the list of defects was issued by the Respondent to the Applicant. The Applicant says it remedied those defects.

The Applicant alleges the Respondent has been delaying payment on the basis that the Applicant would be paid when the Respondent was paid.

The Respondent's Submissions

The Respondent alleges it has incurred costs due to the fault of the Applicant and those costs should be deducted from the claim made by the Applicant.

The Respondent alleges that there were significant shortcomings with the quality of work done and materials supplied by the Applicant.

The Respondent contends that, taking into account the Respondent's costs, the Applicant is entitled to \$10,097.50 inclusive of GST.

The costs claimed by the Respondent are claimed as follows.

Item 1
Failure to Follow Building Plans

The water mains for fire fighting equipment were installed under the arts building when they were supposed to be installed around the building. This defect was brought to the Applicant's foreman's attention but he refused to rectify the mistake. The Respondent had to rectify this problem and was required to use 4 men for eight hours plus a tip truck and backhoe for eight hours, to do so.

The cost of the backhoe is \$126.50 inclusive of GST per hour. The cost of the excavator is \$126.50 inclusive of GST per hour. Labour is billed at \$80 plus GST per hour

The Respondent also required a water pump, a vertical RAM, some concrete floor thrust blocks and fill sand. The Respondent does not have invoices to support these claims.

Item 2

The Applicant failed to install the dectites for the downpipes. The Respondent engaged a third party to rectify these problems. The Respondent alleges the cost to it to supply and install dictates is \$350 inclusive of GST.

The Respondent has not been billed by the plumber for these works.

Item 3

The Applicant refused to remove iron shavings that it left on the roof and the Respondent alleges it had 2 of its staff remove the iron shavings so as to avoid rust.

The Respondent claims 2 man hours at \$80 per hour inclusive of GST. The Respondent claims \$160 inclusive of GST.

Item 4

The Applicant failed to install disabled toilet handrails. The Respondent remedied this problem by having its staff install the handrails.

The Respondent claims 1.9 man hours and \$80 per hour inclusive of GST. The Respondent claims \$150 inclusive of GST.

Item 5

The Applicant failed to remove old stormwater pipes from the site and the Respondent removed them.

The Respondent claims 2 men at eight hours per day at \$80 per hour inclusive of GST. The Respondent also claims the use of the Respondent's tip truck and backhoe for the same period. It also claims the cost of paying for commercial waste at \$500.

The Respondent claims \$2, 792 for this item. The Respondent has no invoices or records to support the claim.

Item 6

The Applicant used the Respondent's supplier to provide cement stabilisation sand. The Respondent has been charged \$1, 540 for the sand inclusive of GST.

Item 7

The Respondent claims rectification works by the Applicant of the toilet pipe work caused damage to the vinyl and waterproofing on the floor which damage the Respondent had to repair.

The Respondent claims \$750 inclusive of GST. The Respondent does not provide any invoices to support this claim.

Item 8

The Respondent claims that the Applicant, despite being given notice, placed pipes where the footings needed to be put. To remedy this, the Respondent excavated the pipes by hand with two men and relocated them. This took 4 man hours.

The Respondent claims \$320 inclusive of GST.

Item 9

The Respondent claims for an excavator supplied to the Applicant which used it to install the stormwater pipes for the art room.

The Respondent claims the Hire of the excavator at \$660 inclusive of GST and delivery of the excavator to site at \$88 inclusive of GST. An invoice for the excavator is supplied.

The Respondent claim it is due the sum of \$12,804.00 inclusive of GST as a result of the matters referred to in Items 1 to 9 above.

The Respondent submits that the sum of \$12,804 should be deducted from the sum the Applicant claims from the Respondent to reflect the costs incurred by the Respondent due to the matters referred to in Items 1 to 9 above.

Issues as to Jurisdiction

The Jurisdiction Questions

Section 33 of the *Construction Contracts (Security for Payments) Act* ("the Act") requires the adjudicator to, within the prescribed time, dismiss the application without consideration of its merits if one of the following are true:

- The contract concerned is not a construction contract.
- The application has not been prepared and served in accordance with section 28.
- Another body has dealt with the subject matter of the dispute that is the subject of the application.
- The adjudicator is satisfied it is not possible to fairly make a determination because of the complexity of the matter or it cannot be completed in time.

Construction Contract

I am of the view that the contract in this matter is a construction contract. The parties do not disagree.

s 28 Requirements

Section 28 requires the following:

- The Applicant must be a party to the contract and serve the written application within 90 days of the dispute arising.
- The Applicant must provide any deposit of security for the cost of the adjudication that the adjudicator requires.

- The application must:
 - be prepared in accordance with the regulations and
 - state the details of or have attached to it the construction contract or relevant extracts and any payment claim that has given rise to the payment disputes and
 - all the information documents and submissions on which the party making it relies in the adjudication.

Section 28 requires there to be a conforming application and service of the application within 90 days of a payment dispute arising, which in turn requires the determination of the existence of a payment dispute, which in turn requires the determination of the existence of a payment claim together with a challenge to the payment claim or a failure to pay the amount claimed which all require a determination of what is the construction contract and what are its terms, express or implied.

The Terms of the Contract

In this matter the quote from the Applicant to the Respondent dated 24 August 2009 refers to the drawings and sets out the work that is to be done to comply with those drawings. It also notes that certificates of compliance will be provided. The quote also sets out some exclusions from the price. The quotation provides a sum exclusive of GST to be paid for the works and materials.

The quotation states that payment terms of seven days net apply unless negotiated and agreed otherwise. This term is overborne by the provisions of the Act. (See below)

The quotation states the interest of 10% per annum calculated daily will be charged on late payments.

The Respondent accepted the quotation by delivery of a purchase order dated 24 November 2009.

There was a variation to the contract and a further purchase order was issued on 2 February 2010 stating that the Applicant was to carry out works as per the quote as amended on 24 November 2009.

The Act provides that if the contract does not have a written provision about how party must make a claim to another party for payment then the terms set out in division 4 of the schedule to the Act are implied into the contract. (Section 19)

The quotation states the payment terms are “*seven days net apply unless negotiated and agreed otherwise*”.

This does not amount to a written provision about how party must make a claim to another party for payment. In addition the time for payment is replaced by the time provided for in the Act.

Accordingly the terms set out in Division 4 of the Schedule to the Act are implied into the contract.

The terms in Division 4 are as follows:

- (1) A payment claim under this contract must -
 - (a) be in writing;
 - (b) be addressed to the party to which the claim is made;
 - (c) state the name of the claimant;
 - (d) state the date of the claim;
 - (e) state the amount claimed;
 - (f) for a claim by the contractor - itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim;
 - (g) for a claim by the principal - describe the basis for the claim in sufficient detail for the contractor to assess the claim;
 - (h) be signed by the claimant; and
 - (i) be given to the party to which the claim is made.

In addition, there are no provisions in the contract as described by the parties with respect to how the Respondent was to respond to a claim and therefore the Act caused terms to be implied into the contract so as to govern how the Respondent should respond to a claim. (Section 20)

The terms implied into the contract are those set out in Division 5 of the Schedule and are as follows:

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;
 - (b) be addressed to the claimant;
 - (c) state the name of the party giving the notice;
 - (d) state the date of the notice;
 - (e) identify the claim to which the notice relates;
 - (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;
 - (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
 - (h) be signed by the party giving the notice.

The Payment Claim

I am firstly required to determine whether or not the payment claim complies with the requirements of the Act.

The Applicant alleges the payment claim is the invoice dated 13 July 2010 which is progress claim No 5 and in it, the Applicant claims the sum of \$54,414.51 inclusive of GST.

Progress claim number 5 is a claim for all of the works not previously claimed for by 13 July 2010 and the Applicant claims that the works are at that time 100% completed. Progress claim 5 alleges the contract sum was \$177,767.34 and that \$128,299.60 had been paid up to the time of the claim, both sums exclusive of GST. The balance owing is therefore \$54,414.51, inclusive of GST.

The previous claim No 4 was a claim for \$128,099.60 worth of work less the sum paid \$118,811.63 which sum was paid in full on 3 June 2010.

Progress claim number 5 does not appear to be a repeat claim. No allegation is made by the Respondent that progress claim number 5 is a repeat claim. I determine that claim No 5 is not a repeat claim.

The tax invoices in this matter have each set out the percentage of the works completed as at the date of the claim less the sum paid to date plus agreed variations to arrive in the sum claimed.

The invoices would not set out the basis of a claim in sufficient detail for the contractor to assess the claim.

However, it is clear that during the course of the contract the Respondent has received the invoices and by some process assessed them and made payments according to its assessment which until the 5th claim were assessed at the percentage and amount claimed and paid in full.

I find that the parties are bound by an estoppel by convention based on the conduct of relations between the parties during the course of the contract which has resulted in an agreed assumed state of facts which both parties are estopped from denying. *Con-Stan Industries of Australia v Norwich Winterthur Insurance* (1986) 160 CLR 226;

I determine that the invoices including Invoice No 5 contain sufficient detail for the Respondent to assess the claim.

I note the payment claims are not signed as required by the implied terms.

I find that the parties are estopped from denying the claims are payment claims for this reason because of an estoppel by the convention as described above.

I find each of the tax invoices, and in particular the tax invoice No 5 of 13 July, 2010 to be payment claims.

I now have to consider the response pursuant to the implied terms of the Act.

Response to the Payment Claim

On 13 July 2010 the Applicant delivered to the Respondent the 5th payment claim the subject of this adjudication.

Upon receiving the payment claim the Respondent had to pay the sum when it became due or else the Respondent had to reject or wholly or partly dispute the claim by giving a notice of dispute within 14 days of receiving the claim.

In this matter no notice of dispute was delivered within 14 days of 13 July 2010.

There being no notice of dispute as required by the implied terms the Respondent had to pay the amount claimed in the payment claim within 28 days of receiving the claim.

28 days from 13 July 2010 is 10 August 2010. On that day the sums claimed by the Applicant became due and payable by the Respondent.

Payment Dispute

On about 13 July 2010 the Applicant delivered to the Respondent the 5th payment claim.

Upon receiving the payment claim the Respondent had to reject or wholly or partly dispute the claim by giving a notice of dispute within 14 days of receiving the claim or else pay the sum within 28 days of delivery of the payment claim.

In this matter no notice of dispute is delivered within 14 days of 13 July 2010.

The Respondent did not pay the whole of the amount of the claim within 28 days of receipt of the claim.

The 28 days expired on 10 August 2010. On this day the amount claimed was due to be paid under the contract.

Section 8 of the Act provides that a payment dispute arises if the amount claimed in a payment claim is due to be paid under the contract and the amount has not been paid in full or the claim has been rejected or wholly or partly disputed.

On 10 August 2010 the amount claimed was due to be paid and had not been paid at all and there was no dispute or rejection of the claim as required by the contract and so I determine that the payment dispute with respect to the 5th invoice dated 13 July 2010 arose on 10 August 2010.

Compliance with s28

In this matter a payment dispute has arisen in accordance with section 8 of the Act and the Applicant has within 90 days of 10 August 2010, which is 90 days expires on 8 November 2010, made an application for adjudication pursuant to section 27 of the Act.

The Applicant, who is a party to the contract, has within 90 days of the dispute arising prepared an application for adjudication and served it on the other party to the contract and upon a prescribed appointor.

The application contains the information prescribed by the regulations and states and has attached to it the construction contract involved save for the terms implied into the contract pursuant to the Act, together with the payment claim that has given rise to the payment dispute and the application also has attached the relevant information documents and submissions.

The Applicant has, I determine, complied with the provisions of section 28 of the Act.

That being so, the adjudicator now has to consider the other elements of section 33 of the Act.

Section 33 Determination

I determine that the contract to which this adjudication application relates is a construction contract and the application has been prepared and served in accordance with section 28 and that the matters set out in section 33 (1)(a)(3) and (4) do not apply to this application.

Those matters being so I am not required to dismiss the application without making a determination of its merits and am in fact required by section 33.2 of the Act, to determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment and if so determined the amount to be paid and any interest payable on it under section 35 and the date on which the amount must be paid.

Section 35 provides that if an adjudicator determines that a party to a payment dispute is liable to make a payment the adjudicator must also determined that interest must be paid on the payment in accordance with the contract or otherwise the payment from the date the payment dispute arose at a rate not greater than the rate prescribed by the regulations until including the date of the determination.

The Act provides that if the payment is overdue under the construction contract then interest must be paid on the payment in accordance with the contract.

The contract in this matter provides that interest is payable at the rate of 10% per annum calculated daily.

There being no reason to dismiss the application based on consideration of the matters set out in section 33.1 of the Act the adjudicator is now required to assess the claim on its merits.

Assessment of the Claim

The Act requires that where the adjudicator has not dismissed the application on a jurisdictional basis, the adjudicator is to determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment to any other party and if so determine the amount to be paid.

In making a determination the adjudicator must act informally and if possible make the determination on the basis of the application and its attachments and if a response has been prepared and served in accordance with section 29, the response and its attachments.

In this matter, on 13 July 2010 the Applicant submitted to the Respondent progress payment number 5 claiming \$54,414.51. The Respondent paid \$31,513.01 on 26 August 2010. The balance due therefore is \$22,901.50 including GST.

I have already determined that the terms of contract set out in division 5 of the Schedule apply to this matter. The Respondent was required pursuant to the implied terms of the contract to pay the whole of the amount of the claim within 28 days if it had not within 14 days otherwise given the claimant notice of dispute and paid an amount not in dispute.

The Respondent in this matter did not pay the sum claimed within 28 days of the date of the claim: that is by 10 August 2010. Accordingly pursuant to the implied terms of the contract the whole of the sum claimed became due and payable to the Applicant on 10 August 2010. The Respondent has made a part payment on 26 August 2010.

The balance due to the Applicant pursuant to the provisions of the act is \$22,901.50 including GST.

I do not understand the Respondent to be saying that the Applicant is not entitled to the monies claimed for the work done which is covered by invoice number 5, but rather the Respondent is saying that it has expended amounts for and behalf of the Applicant in rectifying works or by providing the Applicant with equipment or materials to complete works during the course of the contract and the Respondent wants to be paid for that expenditure.

There being no dispute to the amount claimed for the work done by the Applicant which is covered by progress claim number 5, I determine that the Applicant is entitled to a payment of the sum of \$22,901.50 including GST.

The Respondent claims that although it does not have an argument about any of the work to which claim No 5 relates, it nevertheless has a claim against the Applicant for the amounts it expended for and behalf of the Applicant in rectifying works or by providing the Applicant with equipment or materials enabling the Applicant to complete the works during the course of the contract as follows:

- Moving water pipes from where the Applicant put them to where the plans required them to be.
- Installing dectites on failure of the Applicant to do so.
- Removing iron shavings on failure of the Applicant to do so.
- Installing disabled toilet handrails on failure of the Applicant to do so.
- Removing rubbish from site on failure of the Applicant to do so.
- Fixing vinyl and waterproofing on the floor of the toilets being damage caused by the Applicants work.

- Applicant buying sand on Respondent's account.
- Moving pipes to avoid footing holes.
- Loan of an excavator.

The Respondent claims the costs of these works and monies paid on the Applicant's behalf should be set off against the sum claimed by the Applicant in the payment claim.

I do not think that is the case.

If the Respondent wished to claim money from the Applicant, the Respondent had to follow the terms of the contract in relation to making a claim. In this matter, pursuant to section 19 of the Act, the provisions in division 4 of the schedule are implied into the contract as terms of the making of a claim.

As previously set out, those provisions require a claim to be in writing. They also require the claim to be signed by the principal and to be given to the Applicant. The implied terms with respect to a principal require the claimant to describe the basis for the claim in sufficient detail for the contractor to assess the claim.

The Respondent has not made a claim to the Applicant in the manner required by the terms of the contract with respect to any of the matters referred to in the response.

The claims set out in the response are not claims made in accordance with the statutorily implied terms of the contract and are therefore, not claims that are due to be paid, by the Applicant to the Respondent.

There being no claims due to be paid by the Applicant to the Respondent, none of the matters referred to by the Respondent in its response, which are listed above, are matters that can be taken into account in the adjudication.

The Respondent's claims could well be made in the context of a final accounting in a Court (Section 47) in a claim for damages for breach of contract but they cannot be made in answer to an Application when the sums claimed are not due because the Respondent has not followed the terms of the contract.

I determine that the Respondent is not entitled to be paid anything by the Applicant.

Interest

The Applicant is entitled to be paid by the Respondent the sum of \$22,901.50 including GST and is entitled to interest on that sum at the rate of 10% as provided for in the contract (Section 35.1).

The payment claim provided that payments had to be made within seven days of invoice. This clause is overridden by section 20 of the Act which implies into the contract the terms in Division 6 of the schedule. The contract therefore requires payment within 28 days after the Respondent receives the payment claim.

The money claimed in the payment claim was therefore not due and payable until 10 August 2010. Interest from then until 28 October 2010 is 79 days at 10% of \$22,901.50 namely \$495.68.

Reconciliation

Sum due by the Respondent to the Applicant	\$22,901.50
Interest on \$22,901.50 @ 10% pa for 78 days	\$495.68
Sum to be paid by the Respondent to the Applicant	\$23,397.18

Costs

1. Section 36(1) of the Act requires the parties to bear their own costs.
2. Section 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.
3. I find that the obligations as to costs as set out in Clause 36(1) should not be altered.

Conclusions

1. In accordance with s 38(1) of the Act I determine that the amount to be paid by the Respondent to the Applicant is \$23,397.18 inclusive of GST and interest, and that, the Respondent is to pay interest to the Applicant and interest accrues at the rate of 10% per annum after 28 October 2010 on any part of the sum of \$20,819.55 exclusive of GST, unpaid.
2. The sum of \$23,397.18 inclusive of GST is payable on 28 October 2010.

3. There is nothing in the conduct or submissions of either party to attract the operation of s 36(2).
5. I draw the parties' attention to the slip rule in s 43(2) if I have made a miscalculation or some other correctable error.
6. I determine there is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the Act.

Dated:

David Alderman
Registered Adjudicator No. 23