

DETERMINATION NO: 24.13.02

ADJUDICATOR'S DETERMINATION

UNDER THE

NORTHERN TERRITORY OF AUSTRALIA

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT

IN THE MATTER BETWEEN:

(Applicant)

AND

(Respondent)

BY

**Paul W Baxter
(Adjudicator)**

DETERMINED

17 April 2013

DETAILS OF PARTIES

The Applicant:

The Respondent:

The Adjudicator

Mr Paul Baxter
PO Box 39408
Winnellie
NT 0821

T: 0418 894 300
F: (08) 8947 0297
E: pbaxter@pwbaxter.com.au

ADJUDICATOR'S DETERMINATION

I, Paul William Baxter, the appointed adjudicator, determine that:

- (i) The respondent shall pay the applicant the sum of \$76,876.22 inclusive of GST within 7 days of the date of this determination. This includes interest to 24 April 2013.
- (ii) Each party shall bear its own costs and the costs of the adjudication of \$7,260.00 inclusive of GST shall be shared equally between the parties. In order to effect this sharing , costs of the adjudication shall be paid as follows:

- a. The applicant has paid an initial deposit of \$12,760.00 inclusive of GST to the adjudicator.
 - b. The respondent shall pay the applicant half the cost of the adjudication. That is \$3,630.00 inclusive of GST.
 - c. The adjudicator will refund the applicant \$5,500.00 inclusive of GST to reflect the actual cost of the adjudication.
- (iii) If payment of the adjudicated amount and / or share of the costs is no made by 24 April 2013 then interest will become payable in addition at the rate prescribed by the regulations S 85 of the Supreme Court Act (10.5%). However interest shall not become due unless and until the applicant has invoiced the respondent correctly for the amounts determined.

Signed.....

Date: 17 April 2013

1. BACKGROUND

The applicant seeks \$83,890.64 inclusive of GST plus interest, being the amount said to be outstanding in respect of Progress Claim No 2 made 21 November 2012.

Background to the application was that the applicant was the subcontractor for the installation of subdivision water and sewerage works on behalf of the respondent at [project location]. On 26 July 2012 the applicant prepared a Lump Sum Quotation including a Schedule of Rates for the works and on 20 August 2012 the respondent accepted their quotation and confirmed the applicant as the preferred [project] subcontractor.

2. APPOINTMENT OF THE ADJUDICATOR

The Applicant made an application to the Master Builders Association Northern Territory Inc. ("MBNT") for the appointment of an adjudicator to adjudicate the dispute regarding the Payment claim under the Construction Contracts (Security of Payments) Act ("Act"). On 20 March 2013, Paul Baxter, an adjudicator registered in Northern Territory, was appointed by MBNT as the adjudicator. The MBNT letter of appointment describes receipt of service from the applicant as dated 19 March 2013.

The appointment was within the 5 working days required by the Act.

On the basis of my lack of knowledge of either the parties or the project I considered, that I had not material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen or in any party to the contract. Having subsequently reviewed the response, it remains my view that I have no conflict of interest.

On 30 March 2013 I wrote to the parties on a number of administrative matters. Included within these was:

- a) A request for an extension of time of one week within which to make my determination, to which I required an answer in order to establish

how I would need to plan the undertaking of the determination. The Applicant agreed to grant that extension of time.

- b) I have confirmation that the Respondent read this email 6.30 am 3 April 2013 but have not received any correspondence from them.
- c) An explanation that the Registrar will receive a copy of any determination and will make it public unless either party objects due to the confidential nature of the subject. Neither party informed me of any information that, because of its confidential nature, is not suitable for publication by the Registrar.

3. SUBMISSIONS FROM THE PARTIES

Following appointment, I received from MBNT two lever arch files prepared by the applicant's solicitor containing the application and various evidentiary documents, the whole separated into Tabs 1 to 50.

I have not received any correspondence from the respondent.

4. CONTRACT

The contract was formed 20th August 2012 upon the acceptance by the respondent of the applicant's quote 26 July 2012 for \$981,197.67 (including GST). The acceptance letter states that a formal subcontract will be worked through with you to establish payment and retention structures. The works were for the [project site].

Various correspondence was presented by the applicant in relation to the details of the contract conditions that the respondent proposed be incorporated in a formal agreement. The conditions proposed by the respondent's legal representative were generally unacceptable to the applicant, hence there was no formal subcontract.

There are no written provisions in this subcontract other than the contract price and the drawings and specification that relates to the contract price.

5. DISMISSAL CONSIDERATIONS

Jurisdiction is determined by the following factors:

- (a) That the adjudicator be appointed by either the Registrar or by a prescribed appointer (refer s28 (1) of the Act).
- (b) That the contract for the works was formed after the date of proclamation of the Act being 1 January 2005 (refer Part 1 s 2 (1)).
- (c) That the works be a site in the Territory (refer Part 1 s 6 (1)).
- (d) That there is a payment dispute, as given in Part 1 s 8 of the Act.
- (e) That the applicant applying for adjudication be a party to the contract as defined in Part 3 s 27 of the Act, noting the exception under subclauses (a) and (b).
- (f) That the application for adjudication be made within 90 days after the dispute arises, as defined under Part 3 s 28(1) of the Act.
- (g) That the matter relates to construction work, as given in the definition of this term, Part 1 s.6 of the Act.

With respect to the specific facts of the case, I deal below with each of the issues in points a)-g) above:

- (a) The manner of the appointment has been dealt with above. The Application has been satisfactorily served in accordance with the requirements of s.28.
- (b) The contract for the works was dated 20 August 2012, which is after the commencement of the Act.
- (c) The site is within the Territory.
- (d) There is a payment dispute within the meaning of the Act. The dispute arose 19 December 2012 when the Respondent failed to pay Progress Claim No 2 from the Applicant.
- (e) Applicant is a party to the contract.

- (f) The Application for adjudication was made 19 March 2013, which was within 90 days after the time for the payment of the claim arose.

As there is no contract, no written provision has been made about these matters in relation to a claim by the applicant to the respondent. The provisions of Division 5 of the Schedule therefore apply.

Division 5 Responding to Progress 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 of receiving the payment claim-
 - (i) give the claimant a notice of dispute; and
 - (ii) if the claimant disputes part of the claim- pay the amount of the claim that is not disputed; or
 - (b) within 28 days of receiving the payment claim, pay the whole of the amount of the claim.
- (3) the notice of the 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
- (f) be signed by the party giving the notice.

By subclause (2), the respondent has 14 days from receipt of the notices to dispute them, failing which it had 28 days from receipt to pay them. Remembering that Division 5 is implied as a contractual term, the amounts claimed were due to be paid under the contract (s8) 28 days after receipt by the respondent.

That brings the notice 19 March 2013 to within the 90 period for an application.

I find the application is in time in respect of Payment Claim 21 November 2012

The Payment Claim complied with the implied terms of the Act, in that it:

- (i) was in writing;
- (ii) was addressed to the respondent as the party to which the claim was made;
- (iii) stated the applicant as the claimant;
- (iv) stated the date of the claim;
- (v) stated the amount to be claimed;
- (vi) described the basis for the claim in sufficient details for the respondent to accept the claim;
- (vii) was signed by the applicant; and
- (viii) was given to the respondent, being the party to which the claim is made.

(g) The matter related to the supply of plant, labour and supervision for the site and the work clearly falls under the definition of construction work.

Finally neither party has raised any suggestion that there exists any judgement or other finding about the dispute that is the subject of the application.

I am therefore satisfied that I have jurisdiction in this matter.

Section 33(1) of the Act compels the adjudicator to dismiss an application without making a determination on the merits, in the following circumstances:

- (a) Pursuant to 33(1) (a) (i), if the contract concerned is not a “construction contract” as defined in the Act.
- (b) Pursuant to 33(1) (a) (ii), if the application has not been prepared and served in accordance with section 28 of the Act.
- (c) Pursuant to 33(1) (a) (iii), if an arbitrator or other person or court or other body has made an order, judgement or other finding concerning the payment dispute in issue.
- (d) Pursuant to 33(1) (a) (IV), if the adjudicator is satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time and any extension thereof is insufficient.

If none of these circumstances apply then the adjudicator is required to determine, on the balance of probabilities, whether any party to the payment dispute is liable to make a payment

There being no objections raised by the respondent and having considered the matters for dismissal I find I have no reason to dismiss the application without making a determination on the merits in accordance with s33(1)(a) of the Act. In accordance with s33 (1)(b), I must determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment.

3 MERITS

Variation No 1- Supply of Select Fill

Applicant contends that oversize boulders were found in the excavated material after they began excavating. The problem being that these large boulders may be unsuitable for backfill material and advice was sought from the Supervising Engineer and the respondent. At the site meeting 27 September 2012 the respondent through the supervising engineer advised that oversize boulders were indeed not suitable for backfill material and the applicant was to provide select material for backfill. The applicant had previously advised that to provide select fill at the cheapest cost he would have to screen excavated material using an excavator and operator. The applicant advises the supervising engineer that screening excavated material to be used as backfill would be a variation the contract and these works will be an extra cost to the project. The applicant continues with the works including the backfilling with the new select fill. 25 September 2012 the supervising engineer directs that the previously unsuitable backfill material can now be used to backfill benching. The applicant indicates to the respondent that the select fill is almost completed and advises again as to the extra costs involved because of the respondent's instruction to use select fill. 9 November 2012 the respondent confirms the variation is likely to be accepted. By various correspondences from 13-21 November 2012 the applicant outlines the justification, history of discussions and calculation of the variation claim.

The evidence shows that screened select fill and not excavated material was instructed to be used for backfilling for the majority of the project. Excavated material was allowed in the quoted price. Excavated material was considered to be suitable in the contract but this was only confirmed after the applicant had been instructed to provide select fill. Screened select fill was provided to most of the contract in lieu of the excavated fill allowed for in the quotation. The applicant has claimed that select fill is a variation to the contract. The respondent confirms that the variation for select fill is likely to be accepted and it is the quantum of the claim that is unacceptable.

On the balance of probabilities I find that that the variation for select fill is a legitimate variation to the contract and as the respondent has not

disputed the claim, the respondent must pay the full amount claimed by the applicant.

Variation No 2- ITP Preparation

The applicant contends that quality assurance was not included in the original Schedule of Rates dated 26 July 2012. In fact certification costs were specifically excluded in the estimate. He also argued that the supervising engineer was to provide Quality Assurance and certification.

I have a number of problems with these contentions.

- (a) The quotation which was accepted included B11-3848. Clause G9 calls for the contractor to provide ITP'S.
- (b) The supervising engineer provided much of the detail necessary for the provision of acceptable ITP'S to PAWA.
- (c) The ITP'S were a summary of the required hold points and witness points contained in the specification. Industry practice is to have job specific ITP'S in order to have documentation in place to ensure that the contract has been carried out in accordance with the specific requirements of the plans and specification. I believe it would be a minimum requirement for a contractor carrying out contracts of this complexity to have ITP'S.
- (d) The respondent Tab (39) instructs her legal representative that there is no requirement put in the original specifications from the engineer and so QA was not allowed for.
- (e) I find I have to rely on the statement from the respondent as evidence that QA was not allowed for rather than rely on the documents included in the contract letter. The instructions contained Tab (39) are clear and concise.
- (f) I find on the balance of probabilities that the applicant did not allow in his contract price for ITP'S in the course of the contract the requirement to produce them was an extra cost to his contract sum.

- (g) The respondent has not disputed the costings supplied by the applicant, hence the respondent is directed to pay the full amount claimed by the applicant. For the preparation of the ITP's.

Variation No 3-Additional costs to work around Electrical Installations

- (a) The applicant is seeking additional payment for additional costs for working around electrical installations. He argues that it is normal industry practice to schedule overhead electrical installations after excavation for underground sewer and water mains have been completed.
- (b) The applicant states there is no variation as such for this work but he is still entitled to additional costs.
- (c) I am at a loss as to why the applicant is seeking additional costs when he clearly states there is no variation as such for these works.
- (d) Each contract drawing except 21 of 33 has a clause warning the contractor to be aware of underground services.
- (e) Page 8 of the specification Cl 1.6.8 clearly describes how work is to be conducted around Power Lines. The description of works identified in the additional payment claim is similar to the works outlined in the specification.
- (f) Variation 3 is different from Var 1@2 in that 1@2 were claims that were accepted by the respondent as being variations to the contract. The problem with var 1@2 was that there was no amount approved. With var 3 there is no approval and no amount accepted by the respondent.
- (g) The implied provision of the Act in respect for variations Section 1 provides only for variations. Without a variation to the contract there can be no variation claim. The applicant's claim is for additional costs not for a variation.
- (h) The letter of Engagement 20 August 2012 accepts the applicant's quote 26 July 2012 for the Lump Sum \$981,198.67 (including GST) for

all [project works]. There is no provision in this contract letter or in the Act for additional costs

- (i) I find that there being no provision in the contract letter or in the Act for additional costs I cannot award a claim for additional costs. Any other conclusion would produce a commercially inconvenient result that might have wide ranging and unintended consequences for the duration of this contract.
- (j) On the balance of probabilities I reject the claim for additional costs.

8 . CONCLUSION

Summarising my findings, the applicant is entitled to payment for the amount outstanding for Progress Claim No 2 less the amount claimed for additional costs for working close to electrical installations.

Amount Outstanding for Progress Claim No 2	\$83,890.64
Less Additional Costs (incl GST)	\$9,559.00
Total (incl GST)	\$74,331.64

9. DETERMINATION

In accordance with s 38 (1) of the Act I determine that the amount to be paid by the respondent to the applicant is \$77,035.88 (incl GST) being the amount owing of \$74,331.64 plus interest of \$ 2,694.24 to 24 April 2013 under s 35 (1) (a) of the Act.

Interest accrues on the sum of \$74,331.64 at the rate of \$21.28 per day.

The sum of \$77,035.88 inclusive of GST is payable 17 April 2013.

10. COSTS OF ADJUDICATION

I determine that each of the parties shall bear its own costs and that the costs of the adjudication shall be shared equally between the parties.

The costs of the adjudication are:

Adjudicators fees: 33 hours @ \$200.00 per hour	6,600.00
GST	660.00
Total inclusive of GST	7,260.00

The applicant has already paid \$12,760.00 incl GST on account. Since the cost of the adjudication has been reduced because there was no submission by the respondent, I shall repay the applicant \$5,500.00 being the difference between the anticipated costs of the adjudication and the actual costs.

The respondent shall pay to the applicant half the costs of the adjudication, \$3,630.00 including GST within 7 days of the date of this determination.