

Matter No: 71.23.01

IN THE MATTER OF

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT 2004

and

**IN THE MATTER OF AN ADJUDICATION
BETWEEN**

Applicant: [Redacted]

Respondent: [Redacted]

Adjudicator: Robert Beck – Adjudicator No 71

Prescribed Appointer:

RICS Dispute Resolution Service
ABN 69 008 651 232
Suite G1, Centrepont Business Centre
Level 1, 48-50 Smith Street,
Darwin, NT 0800

Adjudication Determination Summary

Construction Contracts (Security of Payments) Act 2004

Adjudicator: Robert Beck

Adjudication Application No: 71.23.01

Applicant: [Redacted]

[*applicant*]

Respondent: [Redacted]

[*respondent*]

Project: [Redacted]

Payment Claim:

Date: 5 September 2023

Amount: \$252,880.81 exclusive of GST

Payment Schedule:

Date: 25 September 2023

Amount: \$152,851.37 exclusive of GST

Application Details:

Prescribed Appointer: RICS Dispute Resolution Service

Application Date: 27 November 2023

Acceptance Date: 1 December 2023

Response Date: 15 December 2023

Adjudicators Determination:

Jurisdiction: No

Adjudicated Amount: Not applicable

Due Date for Payment: Not applicable

Rate of Interest: Not applicable

Applicant's Fee Proportion: 50%

Respondent's Fee Proportion: 50%

Decision Date: 9 January 2024

Determination

This determination is made pursuant to the provisions of the *Construction Contracts (Security of Payments) Act 2004* [**the Act**]. It arises from an adjudication application made by the applicant on 27 November 2023 in respect of a payment claim served on the respondent by the applicant on 5 September 2023. The amount of the payment claim was \$252,880.81 exclusive of GST. The respondent issued a payment schedule in reply to the payment claim, on 25 September 2023 for a payment of 152,851.37 exclusive of GST.

My determination is that:

- (a) I do not have jurisdiction;
- (b) there is no due date for payment;
- (c) interest is not applicable; and,
- (d) the applicant and respondent are responsible for my fees in equal proportions.

Robert Beck, Adjudicator, 9 January 2024

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BACKGROUND AND INTRODUCTION

1. The applicant, is a subcontractor to the respondent for installation of sewer and water pipework at [site details redacted] in Northern Territory (the **works**).
2. The applicant submits the parties entered into a contract around 27 April 2021.¹ The applicant provided a copy of the contract.
3. The respondent submits the parties entered into a contract around 15 June 2021.² The respondent refers to the copy of the contract provided by the applicant that was signed on 9 June 2021 by the applicant and 15 June 2021 by the respondent.
4. The construction contract is a bespoke contract issued by the respondent. The contract consists of a “Master Services Agreement” between the parties and a copy of a document titled “Head Contract Subcontract”, jointly referred to as the construction contract’.
5. The contract sum is for an amount of \$899,019.67 excluding GST.³
6. On 5 September 2023 the applicant served payment claim No 11 on the respondent [the **payment claim**], the payment claimed was for payment of \$252,880.81 excluding GST [the **claimed amount**].
7. The respondent didn’t issue a payment schedule in reply to the payment claim and on 25 September 2023 the applicant wrote to the respondent pointing out that it had exceeded the 10 business days required by the Act to respond to the payment claim.
8. The respondent issued a payment schedule in reply on 25 September 2023, the payment schedule advised payment of \$152,851.37 excluding GST and pointed out that certain variations were not approved as well as it (the respondent) had applied liquidated damages to the payment⁴ [the **payment schedule**].
9. On 27 November 2023 the applicant lodged an adjudication application [the **adjudication application**] with RICS Dispute Resolution Service [**RICS**] and served a copy of the adjudication application on the respondent at the same time.
10. On 28 November 2023 RICS referred the application to me and notified the parties of same on 29 November 2023.
11. I being an eligible person to adjudicate the matter accepted the referral and notified the parties of my acceptance on 1 December 2023.

¹Adjudication application [8].

² Adjudication response [6].

³ Schedule 1: Contract Particulars.

⁴ Applicant’s submission [12].

Documents

12. I was provided with and base my determination on the following documents:
- (a) Adjudication application with accompanying submissions, including evidence of a copy being served on the respondent (247 pages).
 - (b) Respondent's adjudication response dated 15 December 2023 with accompanying submissions (296 pages).
 - (c) My request for a submission to the parties of 18 December 2023 (1 page).
 - (d) Applicant's 20 December 2023 email in response to my 18 December 2023 request (1 page).
 - (e) Respondent's 20 December 2023 email from Squire Patton Boggs (1 page).

JURISDICTION

13. Prior to proceeding with an adjudication determination, I need to determine that the contract, the payment claim, the payment schedule and the adjudication application to which the payment claim relates, accord with the Act so that I have jurisdiction to determine the application.

Construction Contract, Work and Related Goods and Services

14. The applicant contends it entered into a contract with the respondent on 27 April 2021.⁵
15. The construction contract between the parties that I have been provided with by the applicant is a 'Master Services Agreement' that was signed by the applicant on 9 June 2021 and the respondent on 15 June 2021.
16. The respondent does not take issue with the copy provided by the applicant and refers to it in its adjudication response, accordingly I accept it is a true copy of the construction contract between the parties.
17. The work to be carried out is for the applicant to supply materials and carry out installation of sewer and water pipework for the Borrooloola Subdivision Development at Borrooloola in the Northern Territory for the respondent.

⁵ Adjudication application [8].

18. This type of work is consistent with the definition of construction work at s 6(1) of the Act and is not precluded as construction work by s 6(2) of the Act.
19. The supply of related goods is consistent with the definition at s 7(1) of the Act.
20. The construction contract was entered into after commencement of the Act, it suits the requirements of s 9(2) of the Act and does not suit the restrictions of s 9(3) and (4) of the Act.
21. I therefore determine the construction contract and the works are in accordance with the Act.

Payment Claim

22. The Act defines a payment claim as being a payment claim made under the construction contract.⁶
23. The construction contract at clause 28.1 sets out the procedure for the applicant to make a payment claim. Item 14 of Schedule 1 to the construction contract advises payment claims are to be submitted on the 15th of each month.
24. Clause 28.2 of the construction contract provides for the respondent issuing a payment certificate within 10 business days of receipt of the payment claim.
25. On 5 September 2023, by email attachment the applicant served a payment claim (No. 11) on the respondent.
26. On 25 September 2023 the applicant sent the respondent an email advising that it had not received a payment certificate in response to the payment claim and that it was more than 10 business days since the payment claim was submitted.
27. Also on 25 September 2023, in reply to the applicant's email of the same day, the respondent sent the applicant a payment certificate in the form of an email setting out, inter alia, variations that had not been approved and the value of liquidated damages the respondent deducted from the payment claim.
28. The applicant notified the respondent by email on 25 September 2023 that it disputed the amount the respondent intended to pay and that the payment certificate was not valid, as it had been submitted out of time, being after the 10 business days after receipt of a payment claim, as required by the construction contract.

⁶ Section 7A(1).

29. The respondent contends that if I must dismiss the adjudication application without making a determination of its merits if, inter alia, *“The Adjudication Application has not been prepared and served in accordance with section 28 of the Act;”*⁷
30. The respondent then gives details of where the adjudication application has not been prepared and served in accordance with s 28 of the Act, because the payment claim;⁸
- (a) *is not a ‘claim made under a construction contract’;*
- (b) *is consequently not a payment claim as that term is defined in section 7A of the Act;*
and
- (c) *cannot give rise to a payment dispute as defined by the Act referable to the Adjudicator.”*
31. Following receipt of the adjudication response on 15 December 2023, under s 34(2)(a) of the Act and for procedural fairness, on 18 December 2023 I requested the applicant provide a submission on the respondent’s contentions referred to above. I set a deadline for the submission.
32. On 20 December 2023 the applicant advised by email that it would not be providing a submission as requested by me on 18 December 2023.
33. Considering the date of the payment claim advised by the applicant (5 September 2023); the requirements of the construction contract when a payment claim may be served (the 15th day of the month); the respondents contentions and the applicant’s reluctance to provide a submission, I dismiss the application without making a determination of its merits.

Due Date for Payment

34. A due date for payment is not applicable.

Interest

35. Interest is not applicable.

⁷ Adjudication response [23].

⁸ Ibid [26].

Adjudicators fees

36. Section 36(1) of the Act provides for each party bearing their own costs in relation to an adjudication.
37. The applicant is silent on any apportionment of my fees, the respondent submits that my fees should be apportioned equally between each party.
38. I do not consider either party has been frivolous or vexatious, accordingly my fees amounting to \$5,830.00 inclusive of GST are to be paid equally by each party.
39. As the applicant has provided a deposit of \$10,000.00, I require the;
 - (a) Applicant to forward me its banking details for me to transfer \$4,170.00 to its account; and
 - (b) the respondent to pay the applicant the sum of \$2,915.00 for its portion of my fees.

Summary

40. I have determined that;
 - (a) I do not have jurisdiction;
 - (b) a due date for payment is not applicable;
 - (d) interest is not applicable; and,
 - (e) The parties are responsible to pay my fees equally.

Robert Beck, Adjudicator
9 January 2024