

Adjudicator's Determination

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

Adjudication 18.07.04

1. I, Brian J Gallagher, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act*, determine that the application for adjudication between the parties is dismissed.
2. The parties legal and preparation costs are not awarded.
3. The Applicant shall bear 100% of the Adjudicator's costs.

Appointment of Adjudicator

4. I was appointed as Adjudicator to determine this matter following discussion with the Territory Construction Association 18 October 2007 and the parties were notified by facsimile that day.
5. The Adjudicator has been properly appointed in accordance with the *Construction Contracts (Security of Payments) Act 2004*.

Documents Regarded in Making the Determination

6. In making the determination I have had regard to the following.
 - The provisions of the *Construction Contracts (Security of Payments) Act 2004*.
 - The Application for Adjudication received by the Territory Construction Association (TCA) 16 October 2007.
 - The Response to Application for Adjudication received by the Adjudicator 30 October 2007.

Legislative Requirements

7. 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*

The Adjudication Application

8. The adjudication application consists of the following documents;
 - Application document dated 16 October 2007;
 - 5 Exhibits attached to the application which seek to support and clarify the claim.

The Adjudication Response

9. The adjudication response consists of the following documents;
 - Response document dated 30 October 2007;
 - 7 Exhibits attached to the response which seek to support and clarify the response.

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).
 - (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 Building Practitioner’s Board dated 13 September 2007 (Exhibit 2 in the Application) 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.
15. The Parties agree that the contract was entered into on or about 2 August 2006. Despite the fact that the submitted copies of the contract document are executed only by the Claimant, the terms and nature of the contract are not disputed.

Validity of Application

16. The Act defines the time a payment dispute arises at Section 8(a).
 - (a) *when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed;*
17. The Act defines the time period for raising a dispute at Section 28(1).
 - (1) *To apply to have a payment dispute adjudicated, a party to the contract must, within 28 days after the dispute arises or, if applicable, within the period provided for by section 39(2)(b)-*
 - (a) *prepare a written application for adjudication;*
 - (b) *serve it on each other party to the contract*
18. Clause 18(b) of the Contract provides the relevant requirements for payment under the contract.

If the Contract Sum is to be paid progressively during the execution of the Works, the Builder shall submit to the Owner a claim for progress payments once each two weeks or such other time as stated in Item H.1 of the Appendix. (The Appendix provides for progress claims at defined stages of completion). The amount of each progress claim, less any amount which the owner may be entitled to retain or withhold pursuant to the provisions of clauses 15 (Premature Inspections) and 33 (Retention Fund) hereof, shall be paid by the Owner to the Builder within a period of ten (10) days from the date of submission to the Owner of the said claim.

19. Clause 18(c) of the Contract provides the relevant requirements for a progress claim under the contract.

A progress claim submitted to the Owner by the Builder shall show:

- (i) The Builder's valuation of work executed, including variations included in such claim.*
 - (ii) The Builder's valuation of any unfixed materials and/or goods intended for and delivered to or adjacent to the Works included in such claim.*
 - (iii) Any amount which, pursuant to these Conditions, the Owner is entitled to retain or withhold.*
 - (iv) The total amount previously claimed by the Builder pursuant to this clause.*
 - (v) The amount claimed by the Builder.*
20. The Applicant submitted its progress claim in the form of Tax Invoice No. 7 to the Respondent dated 6 July 2007 in the amount of \$54,205.96. (Application Exhibit 3) Tax Invoice No. 7 includes all the information required by Contract Clause 18 (c) and as such can be considered a valid progress claim submitted in accordance with the terms of the contract.
21. The Respondent advises he made a payment of \$17,000 against Tax Invoice No.7 on 20 July 2007. The Applicant's bank statements confirm both the date and amount of this payment (Application Exhibit 4).
22. Under the terms of the contract the due date for payment was 10 days after the submission of the claim or 16 July 2007. Whilst the Respondent formally acknowledges the existence of a payment dispute in its correspondence to the Building Practitioner's Board dated 13 September 2007, the actual commencement of the dispute is defined by the Act as the due time for payment when no payment is made or the payment is not made in full. Hence I determine the date for commencement of the payment dispute to be 16 July 2007 and not 13 September 2007 as submitted by the Applicant.
23. Under Section 28 of the Act the Applicant was required to serve the Application within 28 days of commencement of the dispute; i.e. on or before 13 August 2007. The Application was not formally submitted until 16 October 2007, over two months later than the due date.
24. I therefore determine the Application has not been properly served as required by the Section 28 of the Act.

Dismissal of Application

25. Under Section 33(1)(a) of the Act the Adjudicator, having determined that the Application has not been prepared and served in accordance with Section 28 of the Act, must dismiss the application without making a determination of its merits.
26. I therefore dismiss the application and proceed only with a determination on costs.

Costs

27. Clause 36 (1) of the Act requires the parties to bear their own costs.
28. 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.
29. I am satisfied that by lodging an Application 64 days beyond the admissible date the Applicant has lodged an application which is unfounded under the Act.
30. I therefore determine that;
 - The parties legal and preparation costs are not awarded and are to be borne by the Parties.
 - The applicant shall bear all of the Adjudicators costs.

Conclusion

31. I have concluded as follows:
 - The application is dismissed.
 - The parties legal and preparation costs are not awarded.
 - The Applicant shall bear 100% of the Adjudicator's costs.

Brian J Gallagher
NT Registered Adjudicator No 18.
5 November 2007