

**ADJUDICATION**

**PURSUANT TO**

**NORTHERN TERRITORY OF AUSTRALIA  
CONSTRUCTION CONTRACTS (SECURITY OF PAYMENT) ACT 2004**

**IN THE MATTER OF A PAYMENT DISPUTE**

**BETWEEN**

**AND**

**MATTER NO. : 20.13.02**  
**COMPLETION DATE : 15 August 2013**  
**RELEASED DATE : 16 August 2013**  
**ADJUDICATOR : MR DAVID V COURT**

**WHEREAS:**

1. The purported construction contract from which the Adjudication Application arose is for construction works (fabrication and supply of sliding doors) carried out in New South Wales by the Applicant for the Respondent, where the goods were delivered by the Applicant to the Respondents warehouse in NSW, following which the Respondent subsequently transported the goods to a site in the Northern Territory.

## Appointment of Adjudicator

2. The Applicant applied on 18 July 2013 to the Royal Institution of Chartered Surveyors Dispute Resolution Services (“RICS DRS”) being a prescribed appointor, to appoint an Adjudicator to adjudicate the payment disputes which have arisen in relation to the following payment claims:

<b>Invoice No.</b>	<b>Date</b>	<b>Amount Claimed (incl GST)</b>	<b>Amount Paid (incl GST)</b>	<b>Amount in Dispute</b>
10011	11 Nov 2012	\$81,840.00	\$40,920.00	\$40,920.00
10026	12 Apr 2013	\$6,820.00	\$nil	\$6,820.00

**Total = \$47,740.00**

3. RICS DRS appointed me on 23<sup>rd</sup> July 2013 as the Registered Adjudicator to adjudicate the said payment disputes.
4. Having regard to the provisions of the *Construction Contracts (Security of Payments) Act 2004* (“Act”), and after satisfying myself that I had no material interest in the Parties, the payment dispute concerned or in the contract under which the dispute has arisen, I confirmed my acceptance of the Adjudication Application, by way of letter ref. 20-13-02/002 dated 23 July 2013, which was sent to the Parties on that same day.

## Evidence Regarded in this Adjudication

5. In arriving at my decision under this Adjudication I have taken into consideration the following:
- 5.1. The provisions of the Act, associated Regulations and Guidelines.
- 5.2. The Applicant’s Application for Adjudication (“Application”) dated 18 July 2013 (served 18 July 2013) and all attached documents;

- 5.3. The Respondent made no Response.
- 5.4. All correspondence received and matters agreed and/or clarified with the Parties since my appointment as Adjudicator for this dispute.

### **Clarification of Formal and Procedural Matters**

6. In coming to my decision on this matter I note the following formal and procedural matters:

- 6.1. Neither Party contended that the adjudication should not be dealt with in accordance with the Act, associated Regulations and Guidelines;
- 6.2. Neither Party contended that the payment dispute had been dismissed or determined with an order, judgement or other finding by an arbitrator or a court or other body dealing with a matter which is the subject of the application.
- 6.3. Neither Party had any objection to the Adjudicator;
- 6.4. Neither Party rejected my request for the Parties to reimburse my fees, on the basis that the fee is \$275 per hour (not GST registered) for all time spent by me in relation to the adjudication, commencing upon receipt of the Application from RICS DRS;
- 6.5. Neither Party rejected my request for the Parties to reimburse me for all out of pocket expenses incurred in connection with the adjudication; and,
- 6.6. The Applicant paid \$1,000.00 as security for my fees on 31 July 2013.

### **BACKGROUND**

7. 18 July 2013 the Applicant applied to RICS DRS to adjudicate the above referenced payment disputes.

8. 25 July 2013 I received an email from Nathan Landrey advising that he and John Shanahan had been appointed as Liquidators for the Respondent on 11 June 2013.
9. 26 July 2013 I advised the Applicant of the status of the Respondent and sought their advice as to whether they still wanted to proceed with the adjudication or withdraw given the circumstances.
10. 31 July 2013 the Applicant responded stating:

*'...I would like to confirm to go ahead with the adjudication.  
Please find attached remittance...'*

11. 7 August 2013 I wrote to the Parties invoking my right to request further information pursuant to Division 3, Section 34(2)(a) of the Act, seeking clarification regarding the location where the goods supplied by the Applicant were shipped to after fabrication in NSW?

12. 7 August 2013 the Applicant responded stating:

*'...I am here to confirm we've delivered all the goods to [the Respondent], [Respondent's NSW address]...'*

13. 8 August 2013 I wrote to the Parties invoking my right to request further information pursuant to Division 3, Section 34(2)(a) of the Act, seeking clarification regarding whether, *'...the Applicant had any responsibility and took any action to deliver the Goods to site in Darwin. Additionally if they performed any work to install the Goods on site in the Northern Territory and if so what that work entailed...'*

14. 8 August 2013 the Applicant responded stating:

*'...We don't have responsibility to deliver on site to Darwin and we don't involve any installation work on site. We only supply and deliver the goods to [the Respondent's] warehouse in ... NSW...'*

## THE PAYMENT DISPUTE

15. The Applicant has raised this Adjudication Application under the Northern Territory of Australia Act.

16. Section 6(1) of the Act defines construction work for the purpose of the Act, relevant excerpts of which are as follows:

*'(1) **Construction work is any of the following work on a site in the Territory:***

*(a) ...*

*(b) ...*

*(c) **Constructing the whole or a part of any civil works, or a building or structure...***

*(d) **Fixing or installing on or in anything mentioned in paragraph (c)...*** [Emphasis added]

17. Section 4 of the Act defines 'site in the Territory' as follows:

*'means a site **in the Territory**, whether on land or off-shore...'*

[Emphasis added]

18. Section 5(1) of the Act defines a construction contract for the purpose of the Act, relevant excerpts of which are as follows:

*'(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;***

*(b) **To supply to the site** where construction work is being carried out any goods that are related to construction work...' [Emphasis added]*

19. Section 33(1) of the Act defines the Adjudicator's functions for the purpose of the Act, relevant excerpts of which are as follows:

*'(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; or*

*(ii) The application has not been prepared and served in accordance with section 28; or*

*(iii) An arbitrator or other person or court or other body dealing with the matter arising under a construction contract makes an order, judgement 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...'*

[Emphasis added]

20. Section 28(1) of the Act outlines the requirements for applying for adjudication for the purpose of the Act, relevant excerpts of which are as follows:

*'(1) To apply to have a payment dispute adjudicated, a party to the contract must, within 90 days after the dispute arises...*

*(a) Prepare a written application for adjudication; and*

*(b) Serve it on each other party to the contract;...' [Emphasis added]*

## CONCLUSION

21. By reference to the above extracts from the Act coupled with the clarifications provided by the Applicant, I am satisfied that:

21.1. Whilst the works executed by the Applicant maybe considered construction work in the practical sense, it is not considered to be construction work for the purpose of the Act because it is not carried out on a site in the Territory (Section 6(1) of the Act refers);

21.2. The requirements of Section 5(1) of the Act in relation to the definition of a construction contract for the purpose of the Act are that it must relate to 'construction work' as defined by the Act. In this case it is neither construction work as defined by the Act, nor is the works carried out, supplied to a site in the Northern Territory by the Applicant, as confirmed in their email replies of 7 and 8 August 2013. Accordingly it follows that the contract in place is not a construction contract for the purpose of the Act.

21.3. Notwithstanding the above, I note that Invoice No. 10011 was served upon the Respondent on 11 November 2012 and Invoice No. 10026 was served upon the Respondent on 12 April 2013.

21.4. The Application was served upon the Respondent on 18 July 2013, which means that Invoice No. 10011 was served 249 days prior to service of the Application and Invoice No. 10026 was served 97 days prior to service of the Application.

22. Section 33(1) of the Act dictates that I must dismiss the application without making a determination of its merits if I consider it falls foul of one or more of the four subcategories outlined under Sections 33(1)(a) (i) – (iv).

23. Dealing with the subcategories chronologically:

23.1. For reasons outlined above I find that the contract concerned is not a construction contract;

- 23.2. Notwithstanding the above, (which is fatal to the Application), I note that Invoice No. 10011 was served 249 days prior to service of the Application, which, even if the payment terms agreed were the maximum allowed by legislation (50 days after service of payment claim), I find would make this element of the application not prepared in accordance with Section 28 of the Act because the dispute in relation to Invoice No. 10011 occurred greater than 90 days prior to when the application was served (Section 28(1) of the Act refers).
- 23.3. The dispute in relation to Invoice No. 10026 'may' still be within the 90 day threshold, however I find that I must not consider the merits of such because of the fatal flaw expressed under paragraph 23.1 above;
- 23.4. I find no evidence provided to suggest that the Application would be dismissed for reasons outlined under Section 33(1)(a)(iii);
- 23.5. I find no evidence provided to suggest that the Application would be dismissed for reasons outlined under Section 33(1)(a)(iv);
24. Accordingly and as a result of the above I find that I must dismiss this application without making a determination of its merits (Section 33(1)(a)(i) of the Act refers).
25. Section 39(1) of the Act requires an appointed adjudicator to give reasons for dismissing an Application and to communicate the decision and the reasons in writing to the Parties and to the Registrar.
26. Above are the reasons for my dismissal of this part of the Application for adjudication.

#### **DETERMINATION IN RELATION TO PROCEDURAL MATTERS**

27. The default provisions of the Act state that the parties involved in a dispute are liable to pay the costs of an adjudication in equal shares.



28. I find no reason to break from the default position of the Act. Accordingly having regard to Section 46(5) of the Act, I find that the Parties are liable to pay the costs of this adjudication in equal shares.
29. The total cost of this adjudication is \$1,815.00 (GST Incl). However, given the circumstances I am willing to discount this fee to \$1,000.00 (GST Incl). Apportionment of the costs equally between the Parties pursuant to Section 46(5) of the Act means that each Party bears an equal share of \$500.00 (GST Incl).
30. The Applicant has already paid \$1,000.00 (GST Incl) as security for costs of this adjudication, therefore pursuant to Section 46(5) of the Act I determine that the Respondent must pay the Applicant the sum of \$500.00 (GST Incl) to result in all Parties paying an equal amount of the costs.
31. I determine that all payments ordered under this adjudication should be made within 7 calendar days from the date of release of this adjudication.
32. Should payment not be made within 7 calendar days from the date of release of this adjudication then I determine that interest at 6% as prescribed under section 8 of the *Civil Judgements Enforcements Act 2004* is to be levied on such of the amount as is unpaid after this date, until the date of payment or entry of this adjudication and determination as a judgement of the Supreme Court.
33. This determination is full and final settlement of all matters in consideration under the adjudication.



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**ADJUDICATOR: MR DAVID V COURT**

**16 August 2013**

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**RELEASE DATE**