**ADJUDICATOR 6 No2 of 2 2024**

**CONSTRUCTION CONTRACTS (SECURITY OF PAYMENT) ACT 2004**

**(NORTHERN TERRITORY)**

**\*This determination has been redacted as per the requirements of section 54 of the Construction Contracts (Security of Payments) Act 2004\***

**IN THE MATTER OF AN ADJUDICATION BETWEEN:**

**APPLICANT [redacted]**

**And**

**RESPONDENT [redacted]**

**BY**

**GRAHAM ANSTEE-BROOK (ADJUDICATOR)**

**ISSUED: 18 November 2024**

# ADJUDICATOR’S DETERMINATION

I Graham Ivan Anstee-Brook the appointed adjudicator in the matter determine that:

* 1. The Respondent must pay the Applicant the sum of $175,824.00 (GST inclusive) by 5:00pm on 25 November 2024.
  2. The Respondent must pay the Applicant interest on the sum of $175,824.00 (GST inclusive) at the rate of 10.35% per annum, calculated from 28 September 2024 to the date the Respondent pays the Applicant the sum of

$175,824.00 (GST inclusive).

* 1. The Respondent must pay the Applicant the sum of $4,800.00 + GST in relation to the costs of the Application incurred by the Applicant by 5:00pm on 25 November 2024.
  2. In respect of the Adjudicator’s costs the Respondent must pay the Applicant the sum of $854.00 + GST by 5:00pm on 25 November 2024.



Graham Anstee-Brook Adjudicator

# ENGAGEMENT

* 1. The Applicant and Respondent entered into a contract in November 2023 which was comprised of a purchase order dated 11 February 2024 and Terms of Sale (Goods and Services) (**the Contract**) pursuant to which the Applicant was to provide works (**the Works**) at a site in the Northern Territory (**the Site**).

# APPOINTMENT OF ADJUDICATOR

* 1. I was appointed adjudicator on the 29 October 2024 by the Construction Contract Registrar pursuant to section 30(2) of the Construction Contracts (Security of Payments) Act 2004 (**CCA**).
  2. I confirmed my appointment as adjudicator to the parties on 30 October 2024.

# CONFLICT OF INTEREST

* 1. I have no material personal interest in the payment dispute or in the Contract under which the dispute has arisen.
  2. I see no reason to disqualify myself pursuant to Section 31 of the CCA.

# DISMISSAL UNDER SECTION 33(1)(a) OF THE CCA

* 1. I am obliged to dismiss the Application without making a determination on the merits depending on my findings of fact relating to section 33(1)(a)(i) to (iv) of the CCA. I am obliged to consider each of the subsections to determine whether I am obliged to dismiss the Application without making a determination on the merits. *Moroney Anor and Murray River North Pty Ltd* [2008] WASAT 111 at [82].

Section 33(1) provides as follows:

*An appointed adjudicator must within the prescribed time or any extension of it made under section 34(3)(a) –*

1. *dismiss the application without making a determination of its merits if –*
   1. *the contract concerned is not a construction contract; or*
   2. *the application has not been prepared and served in accordance with section 28; or*

*(iia) the dispute that is the subject of the application is also the subject of another application that has not been dismissed or determined; or*

* 1. *an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order,*

*judgement or other finding about the dispute the subject of the application; or*

* 1. *satisfied that it is not possible to fairly make a determination;*
     1. *because of the complexity of the matter; or*
     2. *because the prescribed time or any extension of it is not sufficient for any other reasons; or*

# CONSTRUCTION CONTRACT

* 1. If the contract between the parties is not a construction contract I must dismiss the Application.
  2. Section 6 of the CCA provides that construction work includes any of the following on a site in the Northern 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)*

*(e) altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing anything mentioned in (c) (or any fittings described in paragraph (d) that form part of the thing)*

* 1. I am satisfied that the works fall within the parameters referred to above.
  2. The Contract is a construction contract.

# APPLICATION PREPARED IN ACCORDANCE WITH SECTION 28 OF THE CCA

* 1. To satisfy the requirements of section 28 of the CCA:
     1. within 65 working days after a payment dispute arises the Applicant must prepare a written application for adjudication, serve the application on the other party to the contract and on a Prescribed Appointer
     2. the Applicant must if the parties to the contract have appointed a Prescribed Appointer serve the application for adjudication on that Prescribed Appointer.
  2. On 13 September 2024, the Applicant issued a tax invoice dated 13 September 2024 to the Respondent claiming the sum of $175,824.00 (GST inclusive) (**Payment Claim 2**).
  3. Payment Claim 2 sets out the due date for payment claim 2 as 27 September 2024.
  4. The Applicant contends that the Respondent did not pay the sum claimed of

$175,824.00 or any other amount and that remains the position on the date the Application was served.

* 1. Pursuant to section 28 of the CCA, a payment dispute arises if, by the due date for payment, the party liable to pay has not paid the amount due in full. As no payment was made by the Respondent on 27 September 2024, a payment dispute under the CCA has crystalised.
  2. The payment dispute, having arisen on 28 September 2024, and the Application has been served on 16 October 2024 and 18 October 2024 (refer to [10]), the Applicant has satisfied the requirements of section 28 of the CCA.

# SERVICE OF APPLICATION

* 1. The Application was served on the Respondent by email on 16 October 2024 and was also served by Registered Post on 18 October 2024.

# SERVICE OF RESPONSE

* 1. Pursuant to section 29 of the CCA, a respondent wishing to serve a response must do so within 15 working days after the date on which the application for adjudication was served on the respondent.
  2. If service is to be taken as effective on 16 October 2024, the Respondent was required to serve a response by 6 November 2024 and if service is taken to by effective on 18 October 2024, the Respondent was required to serve a response by 8 November 2024.

The Respondent did not serve any response by either 6 November 2024 or 8 November 2024.

* 1. I did receive correspondence from the Respondent on 12 November 2024 advising that *the Respondent does not intend to contest either of these two Applications for Adjudication claims*.

# APPLICANT’S CLAIM

* 1. Given that the Respondent did not serve a response, I am obliged to make a determination on the information provided by the Applicant in the Application.
  2. On 18 July 2024, the Applicant by its solicitors, wrote to the Respondent claiming payment of $693,440.00 for works carried out at the Site. This claim was for all works which had been completed under the Contract.
  3. On 18 July 2024, the Respondent wrote to the Applicant confirming that all works under the Contract had been completed and that it intended to make payment of the full amount claimed.
  4. I am satisfied that the Applicant has completed and satisfied all obligations under the Contract and that the Works had been performed as required by the Contract.
  5. On the basis of the above facts, I am satisfied that the Applicant’s claim must succeed and determine that the Respondent must pay the Applicant the sum of $175,824.00 (GST inclusive).

# INTEREST

* 1. The Contract provides for payment of interest at *…the rate prescribed by the Supreme Court of the Northern Territory on the sum outstanding for the period from the due date until the date payment is received…*
  2. The Applicant contends in the Application that the rate prescribed by the Supreme Court of the Northern Territory is the Reserve Bank of Australia rate of 4.35% plus 6%, which results in an interest component of 10.35%.
  3. I have determined that the due date for payment of Payment Claim 2 is 27 September 2024 and accordingly, I determine that the Respondent must pay the Applicant interest calculated from 28 September 2024 on the sum of

$175,824.00 at the rate of 10.35% per annum to the date of payment of the sum of $175,824.00.

# APPLICANT’S LEGAL COSTS

* 1. The Applicant contends that the Respondent should pay the Applicant the sum of $4,800.00 (GST exclusive), pursuant to section 36(2) of the Act.
  2. Section 36(2) of the Act provides that an adjudicator who is satisfied a party to a payment dispute has incurred costs of an adjudication because of frivolous or vexatious conduct, on the part of or unfounded submissions by another party, may decide how to allocate costs.
  3. Frivolous conduct can be described as conduct that has no basis in law. The Respondent, at an early stage, undertook to pay the full amount due to the Applicant but no such payment was ever made.

In my view, the Respondent, by reason of the correspondence that has been referred to in this determination, has no basis in law not to make payment to the Applicant and that conduct can be described as *frivolous.*

* 1. I am satisfied that the Applicant has incurred costs in this adjudication by reason of the frivolous conduct of the Respondent and that I am entitled to make a determination pursuant to section 36(2) of the CCA.
  2. I determine that the Respondent must pay the Applicant the sum of $4,800.00 plus GST in relation to the costs of the Application incurred by the Applicant.

# ADJUDICATOR’S COSTS

* 1. The Applicant contends that a determination should be made pursuant to section 46(1A) of the CCA determining that the Respondent should pay the Adjudicator’s costs.
  2. In my view, there is no ability under section 46 of the CCA to make a determination as requested by the Applicant in relation to the Adjudicator’s costs of the Adjudication.
  3. An adjudicator is entitled to payment pursuant to section 46(1A) and that the parties to the dispute pursuant to section 46(4) are jointly and severally liable for pay such costs.
  4. I determine that the parties each pay half the Adjudicator’s costs.
  5. The Applicant provided a deposit of $5,000.00 for the Adjudicator’s fees and disbursements and the Respondent is required to pay the Applicant half of the Adjudicator’s fees and disbursements.
  6. The Adjudicator’s fees and disbursements are $1708.00 + GST and accordingly, I determine that the Respondent must pay the Applicant $854.00

+ GST.