Northern Territory of Australia

Adjudicator’s Decision pursuant to the

**Construction Contracts (Security of Payments) Act**

Adjudication Decision: 48.16.01

*Construction Contracts (Security of Payments) Act*

**Adjudicator**

|  |  |  |
| --- | --- | --- |
| Adjudicator s38(1)(b) | : | Jonathan Nicholas Smith  Registered Adjudicator No. 48 |

**Application Details**

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| --- | --- | --- |
| Adjudication Number s38(1)(b) | : | NT48-15-01 |
| Applicant s38(1)(b) | : | Surveyor |
| Name | : | [*redacted*]  (“*Applicant*”) |
| ACN/ABN | : | [*redacted*] |
| Address | : | [*redacted*] |
| Respondent s38(1)(b) | : | General / Main / Head Contractor |
| Name | : | [*redacted*]  (“*Respondent*”) |
| ACN/ABN | : | [*redacted*] |
| Address | : | [*redacted*] |
| Project | : | [*redacted*] |
| Type | : | [*redacted*] Construction |
| Location | : | [*redacted*] |
| Payment Claim | : | s.19 |
| Date | : | Dated 14 October 2015 but served via email 17 October 2016 at 4:05pm |
| Amount | : | $9,826.30 (Inclusive of GST) |
| Response to Payment Claim |  | s.20 |
| Notice of Dispute | : | Email 19 October 2016 at 9:40am |
| Amount Paid | : | None |
| Adjudication Application | : | s28 |
| Application Date s28(1) | : | 24 November 2016 |
| Date copy of Application given to Respondent s28(1)(b) | : | 28 November 2016 |
| Nomination of Adjudicator s30(1) | : | 28 November 2016 |
| Response Date s29(1)(b) | : | 9 December 2016 |
| Date copy of Response given to Applicant s29(1)(a) | : | 9 December 2016 |

**Adjudicator’s Decision**

|  |  |  |
| --- | --- | --- |
| Construction Contract s33(1)(a)(i) | : | Is compliant with s5 |
| Payment Claim | : | Is compliant with S19 & Schedule Division 4 |
| Response to Payment Claim | : | By Email 9:40am on 19 October 2016 |
| Adjudication Application s33(1)(a)(ii) | : | Complies with s28 and Regulation 6 |
| Response to Adjudication Application s29(2) | : | Complies with s29 and Regulation 7 |
| Has a decision been made elsewhere s33(1)(a)(iii) | : | Not of which I am aware |
| Is it possible to make a determination s33(1)(a)(iv) | : | Yes |
| Adjudicated Amount s33(1)(b)(i) & s38(1)(c)(i) | : | Nil to be paid to the Applicant |
| Security to be returned s33(1)(b)(i) & s38(1)(c)(ii) |  | Not Applicable |
| Due Date for Payment of Adjudicated Amount s33(1)(b)(ii) | : | Not Applicable |
| Date on or before Security must be returned s33(1)(b)(ii) | : | Not Applicable |
| Rate of Interest s33(1)(b)(i) | : | Not Applicable |
| Decision on Fees s36(2) | : | None |
| End of Prescribed Time s33(3) | : | 23December 2016 |
| Decision Date s38(1)(b) | : | 13th December 2016 |

**Information not suitable for publication**

|  |  |  |
| --- | --- | --- |
| **Paragraph Number** | **:** | **Reason** |
| None |  |  |

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# Decision

I, Jonathan Nicholas Smith, as Registered Adjudicator Number 48 pursuant to *Construction Contracts (Security of Payments) Act NT* (the Act), for the reasons set out in this decision in respect of the Application made on the 24th November 2016, decide that:

1. No amount is payable to the Applicant,
2. Neither party engaged in behaviour which enlivens s36(2).

# Background

1. The Respondent is an engineering consultant on a project to construct the [*redacted*] project in the Northern Territory.
2. On the 14th September 2014, the parties entered a sub-consultancy agreement whereby the Applicant would undertake a scope of surveying work for a lump sum price, defined in its proposal dated 25 June 2014.
3. This adjudication arises from a Payment Claim[[1]](#footnote-1), for an amount of $9,826.30 (Inclusive of GST) dated the 14th October 2016 and served by the Applicant on the Respondent via email at 4:05pm on the 17th October 2016 for work undertaken at the end of 2015 and CAD information provided in dwg format at the beginning of 2016.
4. At 9:40am on the 19th October 2016, the Respondent sent the Applicant an email in response to the payment claim.
5. On the 24th November 2016, the Applicant made application for adjudication of the matter to the RICS Dispute Resolution Service a Prescribed Appointer (the “***PA***”); named at 5 in the Regulations under s4 the Act.
6. On the 28th November 2016, the PA referred the matter to me.
7. I am registered under the Act as an Adjudicator; my registration number is 48.
8. I am not a party to the contract.
9. I have made enquiries of my business partners and am satisfied no conflict of interest exists which would preclude me from deciding the application.
10. On the 30th November 2016, I wrote to the parties indicating my understanding of timing.

# The Construction Contract

1. The Application contains a copy of an executed sub-consultancy agreement between the parties wherein the Applicant was to perform surveying work for the Respondent.
2. Surveying work is identified as a professional service under s7(2) of the Act and therefore, the contract complies with the definition of construction contract under s5(1)(c) of the Act.
3. The contract was entered on the 14th September 2015 which is after the date of commencement of section 9 of the Act on the 1st July 2005 and is therefore compliant with s9(1) of the Act.
4. The contract is in writing which is compliant with s9(2) of the Act.
5. I am not aware of any circumstance where the contract might be excluded by anything in ss9(3)-9(5) of the Act.
6. The parties have made no submissions and I cannot see where any provisions of the contract offend Part 2 Division 1 of the Act.
7. I am satisfied that the contract is a construction contract within the meaning in the Act.
8. The contract does contain written provisions at [10]-[11] which deal with variations and hence the provisions in the contract apply and not those in the Schedule, Division 1.
9. The contract does contain written provisions at [4]-[7] which deal with the amount, or a way of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs and hence the provisions in the contract apply and not those in the Schedule, Division 2.
10. The contract does contain written provisions at [5] and in the Details at item 5, which deal with whether; or not; the contractor can make a claim to the principal for a progress payment for the obligations under the contract the contractor has performed and hence the provisions in the contract apply and not those in the Schedule, Division 3.
11. The contract does contain a written provision which deals with how the Applicant must make a claim to the Respondent for payment and hence the provisions in the contract apply and not those in the Schedule, Division 4.
12. Notably, all that the contract says at [5] is “*Each invoice must be in the format we request and provide the information and documentation we ask you to provide in, or with, your invoices*.”
13. I have no submission, nor does the Respondent complain that the claim made by the Applicant on the 14th October 2016 is not in the format it requires, nor that it does not contain information and documentation it has requested. I have no information that the Respondent has ever provided “*the format we request*”
14. In these circumstances whilst the contract at [5] does provide for how the Applicant must make a claim, there is no format provided and therefore it may be in any format.
15. Equally, those contract provisions are specific to a claim made by the Applicant, there are no provisions on how the Respondent might make a claim on the Applicant, as the Respondent says it proposes to do in its email at 9:40am on the 19th October 2016. There is an indemnity provision at [26] in the contract which might allow for recouping the cost of rectifying defective work or services, but not how.
16. Clause 1(c) says that damage may be caused to the Respondent should the Applicant fail to perform the services in accordance with the sub-consultancy agreement, however it does not then provide a process whereby those costs might be set-off against a payment claim by the Applicant or a method by which they might be quantified under the contract.
17. My jurisdiction extends only to adjudicating the payment claim made by the Applicant on the 17th October 2016 in terms of the contract and the Act. Where the contract is silent on damages or more precisely how they might be set-off, then absent a right provided by the Act, I have no jurisdiction to decide damages.
18. Any claim for damages subsequently made by the Respondent is not something I have any jurisdiction to decide. It may be a new payment claim.
19. If the Respondent wanted to make a deduction to the amount claimed by the Applicant, then it needed to do so by way of showing that it had a right under the contract to set-off the amount it sought to with-hold. Merely indicating in the contract at 1(c) that it might suffer damage does not provide me with a contractual mechanism whereby I might be able to set the amount off against this payment claim made by the Applicant.
20. The contract does not contain a written provision which deals with when and how a party must respond to a payment claim made by another party hence the provisions in the Schedule, Division 5 apply.
21. The contract does contain a written provision which deals with by when a payment must be made and hence the provisions in the contract apply. Under [6] payment shall be made 42 calendar days after receiving an invoice submitted in accordance with the consultancy.
22. The contract does not contain a written provision which deals with interest to be paid on any payment that is not made at the time required by the contract. and hence the provisions in the Schedule, Division 6 apply.
23. The contract does not contain a written provision which deals with when the ownership of goods passes from the contractor for goods that are:
    1. related to construction work; and
    2. supplied to the site of the construction work by the contractor under its obligations under the contract.

Hence the provisions in the Schedule, Division 7 apply. Ownership of goods is not an issue in this adjudication.

1. The contract does not contain a written provision which deals with what must happen to unfixed goods of a kind mentioned in section 22 if either of the following persons becomes insolvent:
   1. the principal;
   2. a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods or services that are related to construction work.

Hence the provisions in the Schedule, Division 8 apply. This is not an issue in this adjudication.

1. The contract does not contain a written provision which deals with the status of an amount retained by the principal for the performance by the contractor of its obligations under the contract. hence the provisions in the Schedule, Division 9 apply. In any event, I am not aware of any such amount being withheld.

# The Payment Claim

1. The Respondent says that as the Applicant served it with a claim for this work on the 30th March 2016 and it rejected that invoice on that date[[2]](#footnote-2), that the dispute arose on that date and therefore this application is not compliant with s28 of the Act as it is made more than 90 days after that date.
2. If this were an application for adjudication of the claim made in March which had then been adjudicated, I would agree, because s43 would render that adjudication decision final and no further payment claim / adjudication application might be made. However, this is a different payment claim, albeit for the same amount and for the same work, where no previous amount has been adjudicated.
3. The definition of Payment Dispute is found at s8 of the Act:

“***8 Payment dispute***

*A payment dispute arises if:*

*(a) a payment claim has been made under a contract and either:*

*(i) the claim has been rejected or wholly or partly disputed; or*

*(ii) when the amount claimed is due to be paid, the amount has not been paid in full; or*

*(b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or*

*(c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned*.”

1. The claim the subject of this application was made on the 17th October 2016, therefore a dispute has definitively arisen; which is different to the dispute arising from the 30th March 2016 payment claim.
2. The question then arises: can the Applicant make a claim for the same work again?
3. Certainly, if the Schedule Division 3 applied, then under 4(2) of that part, the Act’s default is that *“The making of a claim for a progress payment does not prevent the contractor from making another claim for an amount payable to the contractor under or in connection with this contract*.”, but in this case Division 3 does not apply and the contract provisions prevail.
4. The contract at [5] says:

“*At the agreed time for invoicing, you may invoice us for the subconsultancy fees relating to the subconsultancy services undertaken during the period covered by the invoice.*”

1. Whilst the contract, in the details at item 5, allows for the agreed time for invoicing to be monthly, it does not provide any form of time bar to amounts previously invoiced or for subconsultancy work undertaken prior to the end of the last month. There is no definition of what is the “*period covered by the invoice*”. That period seems to me to be entirely up to the Applicant. Where it is entirely up to the Applicant, then claims for earlier periods are allowed under the contract.
2. Equally there is nothing in the contract which specifically prevents such a claim or which says what is essentially the reverse of Schedule Division 3 at point 4(2), that no amount previously claimed could be claimed again.
3. In these circumstances, I am satisfied that the Applicant has not breached that element of s28 as this application was made within 90 days after this payment dispute arose from the 17th October 2016 payment claim by way of the Respondent’s email at 9:40am on the 19th October 2016.
4. I have already decided that under clause [5] of the contract, the claim may take any form.
5. I am satisfied that the Respondent was aware of what it was receiving when it received the payment claim on the 17th October 2016. I note that the payment claim complies with the requirements of Schedule, Division 4 even though it is the contract provisions which apply.

# The Payment Claim Response

1. On its adjudication application form, the Applicant says it did not get a Notice of Dispute.
2. On the 19th October 2016 at 9:40am, the Respondent emailed the Applicant saying it would not pay the invoice and why.
3. I am satisfied that email does what is necessary to trigger s8 of the Act and a payment dispute arose at that time.

# The Adjudication Application

1. I am satisfied the application in relation to the 17th October 2016 payment claim has been made in time under s28(1).
2. I am satisfied, and I have no submissions to the contrary, that the application otherwise complies with the requirements of s28 of the Act and Regulation 6.

# The Response to the Adjudication Application

1. I received a response to the adjudication application on the 9th December 2016 which is within the time provided in s29(1) of the Act.
2. I am satisfied, and I have no submissions to the contrary, that the response otherwise complies with the requirements of s29 of the Act and Regulation 7

# Matters for Determination

1. The Applicant seeks an amount of $9,826.30 for what it says is additional survey work outside the scope of its original contract with the Respondent.
2. The Respondent says the work is within the original scope and was undertaken because the original work was defective and inadequate.
3. It is important to note here that an adjudicators function is to apply the contract and the Act only.
4. What then did the Applicant contract with the Respondent to do?
5. When I received the application, whilst it contained a copy of the contract it did not contain a copy of the Applicant’s proposal dated 25 June 2014 identified in the contract as defining the scope of the services to be provided.
6. I requested a copy, was given one by the Applicant and the Respondent confirmed that the copy I had been given was the document upon which the contract was founded.
7. Importantly the contract; authored by the Respondent; at [23] contains an ‘entire agreement clause’, therefore anything that came before the date of execution of the contract is a nothing, unless it was referred to in the contract document. The proposal dated 25 June 2014 is named in the contract document.
8. That proposal is crucial, it says:

Wednesday, June 25, 2014

Project ref No: 70722

**Attention:** [*redacted*]

[Respondent’s name and address redacted]

**DETAIL SURVEY QUOTATION**

**[*LOCATION REDACTED*]**

**FOR T14-1499**

Dear Sir,

In response to your emailed request for a quotation, [*the Applicant*] is pleased to provide you with the following quotation for survey:

**Scope of Survey**

* Conduct detailed survey along the [*location redacted*];
* Survey 12 [*redacted*] cross sections including hydrographic pick-up of [*details redacted*];
* Place control for future construction;
* Provide client plan of detail survey on client’s perferred CAD format.

**COMMERCIAL IN CONFIDENCE**

Total fees for survey and Detail Plan:

**Total Survey: $ 15,950.00**

GST: $ 1,590.00

Total inc GST: $ 17,545.00

Should you require any clarification of this quotation, please do not hesitate to contact me.

**Regards**

|  |  |  |
| --- | --- | --- |
| **[*name redacted*]** | **Project Manager** | **Surveyor** |
| **[*Applicant’s name and address details redacted*]** | | |

1. I am satisfied that the ‘Scope of Survey’ noted above equates to the ‘Subconsultancy Services’ identified in the contract “*as defined in your proposal dated 25 June 2014 (project reference mo. 70722)*” which is the document above.
2. The quotation does not exclude any work, for example, areas difficult to reach or where the work might be affected by workplace health and safety concerns.
3. The Respondent says in performing this work the Applicant has not done so:
   1. To its satisfaction; and
   2. In accordance with the requirements of the Consultancy Agreement. (Contract).
4. Under clause 2(a) the Applicant is required to perform the services to the Respondent’s satisfaction. I am satisfied I can step into the shoes of the Respondent to determine if it should have been satisfied.
5. There is nothing in the information before me that says the Applicant did not perform:

Item 1, the detail survey [*location redacted*]; or

Item 2, [*redacted*] cross sections including hydrographic pick up of [r*edacted*]; or

Item 3, to place control for future construction; or

Item 4, to provide the client a plan of detail survey in clients preferred CAD format.

1. There is no specification for the services other than that they be to the Respondent’s satisfaction.
2. The Respondent says the works do not meet its satisfaction because:
   1. There is a gap in the information around [*geological feature details redacted*]; and
   2. There is s difference between levels taken by Sitzler and those taken by the Applicant.
3. Regarding the gap in information about the [*geological feature*], in Item 1 the Applicant contracted to undertake a detail survey, of the [*redacted*], that is not the case in item 2 where it contracted to undertake 12 cross-sections, not to undertake a detail survey.
4. The words in the quotation are clear to me the hydrographic survey was to complete the survey along the 12 cross-sections in those parts of the cross-section which were under water.
5. It was not a commitment to undertake a complete hydrographic survey of [*redacted*].
6. However, where it did not contract to undertake those cross-sections at particular intervals; for example, [*redacted*]; then I think it is reasonable to assume that they would be taken at intervals which produced a reasonable model of the terrain about the proposed [*works*] location.
7. In that regard, I accept the Respondent’s submission that the [*geological feature*], as a significant feature, should have been picked up. Clearly it was not, there is a gap in the survey. I accept the Respondent’s position that this element of the pick-up was part of its originally contracted scope under item 2.
8. It is irrelevant that there is a safety or access issue to the [*geological feature*], the Applicant’s quotation does not make any conditions about inaccessible locations. It has therefore contracted the risk of undertaking the survey by whatever means are necessary to provide the survey in full. It can’t not provide some of it because it is difficult to pick up.
9. As the claim made by the Applicant is for picking up this feature, then I am satisfied to do so was part of its original scope. I don’t think a request to take a photograph so that the designers could make sense of an area where it had not been supplied any detail survey is one which leads to a variation.
10. I don’t think the Applicant was directed to undertake a variation, it was directed to undertake its scope after the Respondent, in several emails, had said it did not understand why the [*geological feature*] was not picked up and identified an issue with the survey datum.
11. With regard to the datum issue, there is simply not enough information for me to decide one way or another whether Sitzler’s survey or that of the Applicant is correct or if indeed there is no difference and it is merely a matter of interpolation of contours. It is somewhat surprising however that there seems to be a difference of approximately 2m in an area which is relatively flat.
12. Because the Respondent has not asserted a right to set-off, nor claimed any costs associated with that issue it’s not necessary for me to decide.
13. The basis of the Applicants payment claim is that it was directed to undertake a variation to pick up additional levels in the area of the [*geological feature*]. I am satisfied that it was not so directed and that the work was part of its original scope. Therefore, I cannot allow the claim.

**TO COLLECTION $0.00**

# Due Date for Payment

1. As there is no amount due for payment then I need not determine a due date for payment.

# Interest

1. As there is no amount due for payment then I need not determine a rate of interest.

# The Adjudicated Amount

1. In assessing the provisions of the contract and the submissions of the parties, I decide that no amount is payable to the Applicant under s33(1)(b).

# Adjudicators Fees

1. I am satisfied that neither party engaged in behaviour which enlivens s36(2).

# Determination

1. For the reasons set out above, I decide that no amount is payable to the Applicant in respect of the Adjudication Application dated the 24th November 2016, is Nil.



Jonathan Smith

Registered Adjudicator - No. 48

13th December 2016

1. Referenced F.71558-3 [↑](#footnote-ref-1)
2. Adjudication Reply Attachment One [↑](#footnote-ref-2)