**ADJUDICATOR’S DETERMINATION**

**PURSUANT TO**

***CONSTRUCTION CONTRACTS* (*SECURITY OF PAYMENTS) ACT***

**NORTHERN TERRITORY OF AUSTRALIA**

**[*redacted/edited version*]**

**APPLICANT (“the Applicant”)**

**RESPONDENT (“the Respondent”)**

**19.16.01**

**Date: 17/2/2016**

I, John Brears, as the appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act* (the Act)determine that:

1. The Adjudication application is dismissed under Section 33(1)(a)(ii) of the Act, because the application was not made within the time prescribed in Section 28(1) of the Act.
2. The Adjudicator’s fees and costs for the work carried out total $9,800.00 and are to be paid in equal parts by the Applicant and the Respondent.
3. **Appointment as Adjudicator**

I was appointed as Adjudicator by The Law Society NT to determine this dispute on 21 December 2015.

1. **Pre Adjudication Meeting**
2. I notified both parties that I would hold a pre adjudication meeting on Thursday 24 December 2015 at 9.00 am in the MBA offices, Winnellie Road, Darwin.
3. Present at the meeting were

For the Applicant Mr Ryan Gould, Clayton Utz

For the Respondent Ms Lucy Hancock (by telephone), Gaydens

The Adjudicator Mr John Brears

1. I advised that from the “Application for Adjudication”, I had concluded that the Applicant and the Respondent had entered into a “construction contract” as defined under section 5(1) the Act. Neither party disagreed.
2. I also concluded that the “construction work” was carried out in the Northern Territory as defined in section 6(1) if the Act. Neither party disagreed.
3. I further concluded that a payment dispute has arisen as defined in section 8(a) of the Act. Neither party disagreed.
4. I advised that I had no previous or current involvement with either party. Neither party indicated that I had a “conflict of interest”.

I requested that both parties nominate one person to be the point of contact for each party.

The Applicant nominated Mr Ryan Gould, Clayton Utz

The Respondent nominated Mr [EC]

8. I noted that

1. The application was served on 18 December 2015
2. The application was received by the Adjudicator on 22 December 2015.

9. I advised the Applicant that from my preliminary look at the application documents, I noted that

1. A large number (1000+) of the pages were not numbered and some were blank.
2. No index or contents list had been provided to explain what was what.
3. The cross referencing of documents in the application contained a number of errors.

10. I subsequently confirmed this in a letter to the Applicant dated 6 January 2016 and advised both parties of the extensions granted by the Registrar to my time for making my determination (Appendix 1).

11. I asked both parties to deposit $5000.00 in the MBA Trust Fund, by 6 January 2016, to cover my preliminary estimate of the costs.

1. **Documents Regarded in making The Determination**

In making the Determination, I have had regard to the following

3.1 The provisions of the *Construction Contracts (Security of Payments) Act 2004*

3.2 The Adjudication application by the Applicant, dated 15 December 2015 (Appendix 2)

3.3 The Response to the Adjudication application by the Respondent dated 6 January 2016 (Appendix 3)

3.4 The Adjudication application by the Applicant with a number of errors etc corrected, dated 12 January 2016, (Appendix 4).

1. **Determination**,

Section 33(1)(a) of the Act requires:

***33 Adjudicator’s functions***

1. *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)the Applicant;*

*(a) Dismiss the application without making a determination of its merits if:*

1. *the contract concerned is not a construction contract;*
2. *the application has not been prepared and served in accordance with section 28;….*

In addition section 28 of the Act specifies that:

***28 Applying for adjudication***

1. *To apply to have a payment dispute adjudicated, a party to the contract must, within 90 days after the dispute arises or, if applicable, within the period provided for by section 39(2)(b):*
2. *prepare a written application for adjudication; and*
3. *serve it on each other party to the contract; and*
4. *serve it on:*
5. *if the parties to the contract have appointed a registered adjudicator and that adjudicator consents – the adjudicator; or*
6. *if the parties to the contract have appointed a prescribed appointer – the appointer; or*
7. *otherwise – a prescribed appointer chosen by the party; and*
8. *provide any deposit or security for the costs of the adjudication that the adjudicator or prescribed appointer requires under section 46(7) or (8).*
9. *The application must:*
10. *be prepared in accordance with, and contain the information prescribed by the Regulations; and*
11. *state the details of or have attached to it:*
12. *the construction contract involved or relevant extracts of it; and*
13. *any payment claim that has given rise to the payment dispute; and*
14. *state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.*
15. *Subsection (1) applies to a dispute even if it arises within the 90 day period immediately preceding the commencement of this subsection.*

The Applicant submitted its sixth progress claim, No. 201412, for the period ending 31 December 2014 “In or about early January 2015” to the Respondent’s representative. The claim was for $220,213.01 (excluding GST).

On 15 January 2015, the Respondent’s representative issued to the Applicant a payment certificate No.6, dated 15 January 2015 certifying the amount of $220,213.01 (excluding GST) was due from the Respondent to the Applicant. This was the whole amount claimed under progress claim number 201412.

In addition, on 15 January 2015, the Applicant issued to the Respondent a tax invoice number 010 in the amount of $220,213.01, in respect of progress claim 201412 and payment certificate No.6. Clearly the Applicant was expecting to be paid this amount within the prescribed time period.

Under the contract between the Applicant and the Respondent the payment of Progress Payment No.6 is due within 10 Business Days, after 15 January 2015, which is 30 January 2015.

Payment by the Respondent to the Applicant was not made on or before 30 January 2015.

Under section 8 of the Act, a payment dispute arises when the amount claimed is due to be paid and the amount has not been paid in full:

***8 Payment dispute***

*A payment dispute arises if:*

1. *a payment claim has been made under a contract and either:*
2. *the claim has been rejected or wholly or partly disputed or*
3. *when the mount claim is due to be paid, the amount has not been paid in full; ….*

I consider that the payment dispute arose on 30 January 2015, because the Respondent did not made any payment to the Applicant.

The Applicant, under section 28(1) of the Act:

*“must, within 90 days after the dispute arises, prepare a written application for adjudication and serve it on each other party to the contract.”*

The Applicant did not serve the application until 18 December 2015, upon the Respondent, which is considerably outside the 90 day period. The Applicant has therefore not complied with *section 28(1*) of the *Act*.

The Applicant has also suggested that the non-provision of a statutory declaration (reference clause 38.1 of the contract between the Applicant and the Respondent), with the sixth progress claim No. 201412 in January 2015, allows it to then withdraw this claim and resubmit it in September 2015, with a copy of the statutory declaration, in an attempt to restart the 90 day time period.

I note that the submission and payment of the first five progress claims was carried out without the provision by the Applicant of any statutory declarations, nor was there a request by the Respondent for them to be subsequently provided. Similarly, with the sixth progress claim number 201412, the Respondent has not advised the Applicant that the non-provision of the statutory declaration is the reason for not paying the progress claim.

I therefore do not accept this argument put by the Applicant to allow an application for adjudication to be submitted in December 2015, when the payment dispute clearly arose at the end of January 2015.

John Brears

Adjudicator

**Appendix 1 – omitted**

**Appendix 2 - omitted**

**Appendix 3 - omitted**

**Appendix 4 - omitted**