Determination 26.15.08

IN THE MATTER of an Adjudication

pursuant to the Construction Contracts

(Security of Payments) Act (NT) (“**Act**”

BETWEEN:

(“**Applicant**”)

and

 (“**Respondent**”)

**REASONS FOR DECISION**

1. On 16 November 2015 I was appointed adjudicator to determine a payment dispute between the Applicant and the Respondent by the Master Builders Northern Territory (“MBNT”) as prescribed Appointer under the Act. I received a Letter of Appointment on 16 November 2015 and I collected the application documents from the MBNT offices on 17 November 2015.
2. On 18 November 2015 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I sought submissions should either party object to the appointment by 2:00pm CST on Wednesday, 24 November 2015. I also advised the parties that, having read the Application dated 16 November 2015 and served on MBNT on 16 November 2015, there were some issues on which I would be seeking further submissions and that I would write to the parties in respect of those submissions once I had received the Response. I had calculated from the date of service of the Application on 16 November 2015, that the Response, if any, was due on or before 1 December 2015.
3. On 24 November 2015 the Respondent sent me an email indicating that they would submit their response before close of business on 1 December 2015.
4. On the afternoon of 1 December 2015 I received the Response by email from the Respondent. The Respondent also advised me that a hard copy was posted to me that afternoon.
5. On that same day, 1 December 2015, the Applicant wrote to the Respondent, with a copy to me, as follows:

*“Ms Koulianos,*

*This matter has only recently been handed over to me, however, I note from the file that the application was served on your client on Monday 16 November 2015. Pursuant to section 29(1) of the Construction Contracts (Security of Payments) Act any response is due within 10 working days thereafter.*

*Unless I am missing a public holiday, the time for filing and serving the response concluded at the close of business yesterday, 30 November 2015.*

*In the circumstances, we object to the response being considered in this adjudication.*

*Regards,*

*Jeff Collins*

*Associate”*

1. Later that same day, 1 December 2015, the Respondent replied to the Applicant’s email, with a copy to me, advising that they were following the Adjudicator’s correspondence which indicated that they had until the 1 December 2015 to serve the Response, as follows:

*“Dear Jeff,*

*In the correspondence we received from the Adjudicator (Rod Perkins), it was indicated that we have until 1 December 2015 to hand in our Response.*

*I have attached a copy of the correspondence for your ease of reference. Please review the last paragraph of page two (2).*

*Thank you*

*Kind Regards*

*Anastasia Koulianos”*

1. The Applicant responded to the email shortly afterward on 1 December 2015 maintaining their objection to the Response and advised that an adjudicator has no power to extend time for compliance with section 29 of the Act, as follows:

*“I see the reference in the correspondence, however, it appears to be a miscalculation.*

*Unfortunately, the adjudicator has no power to extend the time for compliance with section 29.*

*Our objection stands”*

1. The Respondent then wrote to me by letter on 1 December 2015 indicating that they had prepared and served the Response in accordance with my direction of 18 November 2015. The Respondent also asked me to rely upon section 34 of the Act read in conjunction with section 3, the object of the Act, and accept their Response submitted earlier that day on 1 December 2015.
2. On 2 December 2015 I wrote to the parties setting out the requirements of the Act in relation to timing and the responsibility of each party to understand and adhere to those timelines. I also called for further submissions under section 34 of the Act to several questions I had in relation to the Application, as follows:

*“Dear Ms Koulianos and Mr Collins,*

*I refer to the emails to me from both parties and to the letter from Ms Koulianos all of yesterday in relation to the date by which the Response in this matter was due.*

*I have indeed made an error in calculating the date by which the Response was due.  In calculating the 10 working days allowed, I used the Department of Education 2015 Calendar for Northern Territory Schools and inadvertently missed day 30 November which is in the top left hand corner for the month of November 2015 (attached please find a copy of that calendar).*

*While the error is regrettable, and I apologise for the oversight, this was not a direction to the parties made under the provisions of the Act.  It is to each of the parties under the Act to ensure strict compliance with the times prescribed in the Act and this is particularly relevant when each is legally represented.*

*Mr Collins is correct in his assertion that as adjudicator I do not have the discretion to extend the time available to a party to prepare and serve a Response under s.29 of the Act.  I can only assume that Mr. Collins was not aware of the error until yesterday or he would have bought it to my attention.*

*As the date of service is agreed between the parties to be 16 November 2015, then the Response was due on or before 30 November 2015.   This means that I cannot consider the Response provided after that date by the Respondent in this matter and I must now proceed with the adjudication process.*

*My letter of 18 November 2015 indicated that there were questions that arose after reading the Application on which I would be seeking further submissions under s.34 of the Act.*

*I have listed those questions below to the parties:*

*In the evidence provided by the Applicant in the Application, [Mr A] in his statutory declaration made on 16 November 2015, at paragraph 11, states:*

*“[The Applicant] ceased working at the Property on 24 September 2015”.*

*I find this statement to be curious.  It is unclear whether the work required under the contract was actually completed on or before that date or if there were issues with the work under the contract.*

*I require the parties to make further submissions as to the following:*

*1.     Was the work under the contract completed on or before 24 September 2015?*

*2.     If the work was not completed, precisely what work remained to be done?*

*3.     If the work was completed, where there any issues with the work done and precisely what were those issues?*

*It also occurs to me that the work being conducted by the Applicant is prescribed residential building work under s.54 of the Building Act and requires, amongst other things, a Building Permit.*

*4. If there is a Building Permit, could either party please provide me a full copy of the permit.*

*The Applicant indicates that there is no written contract and therefore the implied provisions of the Act commence operation.  The making of a Payment Claim under Division 4 of the Schedule requires, amongst other things, that the claim be signed by the claimant.   The Applicant has not specifically signed the Tax Invoice dated 30 August 2015, and transmitted on 1 October 2015, and it is not clear how this claim was transmitted or if the Respondent has actually received the claim.*

*5. Could the parties please provide me the method of transmittal of the claim and if the claim was received and acknowledged by the Respondent.*

*In satisfying the signature requirements set by the implied provisions of the Act, the Applicant relies upon s.9 of the Electronic Transactions (NT) Act which sets out how a signature of a person required is taken to have been met in relation to an electronic communication and s.7 of that Act sets out the validity of electronic transactions under the laws of the Northern Territory.  I have not reached a landing as yet as to whether the validity of the signature of the claim has been satisfied and I seek from the parties further submissions in relation to this issue, including any case law that would support the Applicant’s signing of its claim.*

*I require the above submissions by 10.00am CST on* ***Monday 7 December 2015****.*

*Depending on the content of the above submissions, I may require further submissions from the parties in relation to any additional questions that may arise and, if this becomes necessary, I will seek an extension of time from the Registrar under s.34(3)(a) in which to make my determination.  As the parties would know, it essential that I fully inform myself in relation to this matter to ensure that there is no denial of natural justice and that I have taken account of all the evidence in this matter in line with Barr J’s decision in Hall Contracting Pty Ltd v McMahon Contractors Pty Ltd and Anor [2014] NTSC 20 at 42”*

1. On 3 December 2015 I sent a letter to the Construction Registrar, copied to the parties, seeking an extension of time within which to make my determination. The grounds sought were the complicated issues in the adjudication that required further submissions from the parties which would take some additional time to finalise. The Construction Registrar granted my request that same day 3 December 20915 and the time for making my determination was extended up to and inclusive of 18 December 2015.
2. Later that same day, 3 December 2015, the Respondent sent me its further submissions to the questions I had asked on 2 December 2015. I confirmed receipt of those submissions and requested the Respondent copy the Applicant on the submissions, which they did.
3. On 7 December 2015 the Applicant sent me its further submissions to the questions I had asked on 2 December 2015. The submissions were a little late as follows:

*“Dear Adjudicator,*

*There has been some delay in our office this morning. My apologies.*

*Applicant’s further submissions* ***attached****.*

*Regards,*

*Jeff Collins*

*Associate”*

1. Later that day, 7 December 2015, the Respondent objected to the lateness of the Applicant’s further submissions and requested that I not consider them to ensure each party has procedural fairness, as follows:

*“Dear Adjudicator,*

*We note that parties were clearly given until 10am this morning to submit our further submissions in this matter.*

*The Applicant’s submissions are out of time given they were submitted after 10am.*

*In the circumstances, and to ensure procedural fairness, we object to the further submissions of the Applicant being considered in this Adjudication.*

*Kind Regards*

*Anastasia Koulianos”*

1. On 8 December 2015 I wrote to the parties advising out that, while nothing of substance turned on the further submissions from the Applicant, I was nonetheless obliged to consider submissions put before me and I drew the parties attention to sections 34(1)(b), 34(5) and 34(6) of the Act in this respect, as follows:

*“Dear Mr Collins and Ms Koulianos,*

*I refer to the email submissions of both parties of yesterday, 7 December 2015.*

*Pursuant to the arrangements made for those submissions, which were to be provided to me by email by 10.00am CST on Monday 7 December 2015, the Applicant’s submissions were a little over two hours late.  Nothing at all of substance has turned on that de minimus lateness.*

*The Respondent in its email raised an issue of procedural fairness and that I should not take those late submissions into account.  Procedural fairness requires me to consider the substance of what the parties say, but it would be inconsistent with procedural fairness to allow one party to steal a march on the other by making late submissions to the prejudice of the other.  In this matter, the late submissions have had very little effect on my determination.*

*The Applicant has raised an objection to several of the questions I have asked and states that those questions are irrelevant to the considerations in the adjudication.  Those objections are noted, however, with respect, I draw the parties’ attention to s.34(1)(b), s.34(5) and s.34(6) of the Act.  I had understood that it is my role as adjudicator to determine the relevance of the questions I ask of the parties.*

*I require no further submissions from the parties and now consider the shutters closed in relation to any further material.*

*I thank you for your assistance.”*

1. I received no further submissions from the parties.

***Introduction***

1. The Applicant and the Respondent entered into a contract for the provision of block laying services at a residential duplex unit development project located at [redacted] in the Northern Territory on or about 9 July 2015.
2. The Applicant provided a quote to the Respondent for the work in the lump sum of $45,853.50 (including GST), which was accepted on or about 9 July 2015 and the work was then commenced on or about 11 July 2015.
3. This adjudication arises out of that contract in which the Applicant agreed with the Respondent to supply blocks, reinforcement steel, mortar, labour and other necessary requirements to construct block work for the two units to the engineered design and drawings provided by the Respondent.
4. There are no written terms of contract other than the quote and an email from the Respondent suggested by the Applicant to be an implied acceptance of the quotation.
5. On 30 September 2015 the Respondent terminated the contract for failure by the Applicant to rectify non-conforming work that had failed two consecutive inspections from the Certifier, [redacted].
6. The Applicant says it is entitled to be paid for the work it has done in the contract. The Applicant’s Payment Claim is Tax Invoice No. 00002103, dated 30 September 2015 in the sum of $46,795.10 (including GST) (“Tax Invoice 2103”).
7. The Applicant also seeks interest on the Payment Claim under the implied provisions of the Act and its costs of the Adjudication.
8. The Respondent does not dispute the Payment Claim but says that the Applicant will be paid the quoted amount for its work, that is $45,853.50 (including GST) minus the costs to rectify the uneven block work and rebuild the block work arches that did not comply with the design plans.
9. The Respondent’s counterclaims comprise the following components:

(a) Rectification work on the block work and arches in the sum of $33,302.24 (including GST); and

 (b) Additional rent incurred by the Respondent due to delay in the block work in the sum of $6,360.00 (including GST).

1. The Respondent also seeks costs on the adjudication in the sum of $3,000.00 (including GST) for its legal professional fees to respond to the dispute.
2. The Respondent has not sought costs of the adjudication, being the Adjudicator’s fees, or interest on its counterclaims.

***Procedural Background***

The Application

1. The Application is dated 16 November 2015 and comprises the following:
2. a general submission;
3. a copy of the quotation dated 9 July 2015 in the sum of $47,613.50 (including GST);
4. a copy of the payment claim Tax Invoice 2103 dated 30 September 2015 in the sum of $46,795.10 (including GST);
5. a Statutory Declaration from the Applicant [Mr A]; and
6. supporting email evidence.
7. The Payment Claim was submitted to the Respondent on 1 October 2015 in the sum of $46,795.10 (including GST).
8. The Respondent has not paid any part of the Applicant’s Payment Claim.
9. The Application was served pursuant to section 28 of the Act.

The Response

1. The Respondent served its Response on 1 December 2015 and out of time under section 29 of the Act. As the Respondent did not prepare and serve its Response within the time allowed by section 29 of the Act, I cannot consider the content of the Response in my determination. I have taken the Response document and put it to one side in a sealed envelope.

Further Submissions

1. On 2 December 2015 I sought further submissions from the parties in relation to several questions I had after reading the Application. I received the Respondent’s further submissions on 3 December 2015 and I received the Applicant’s further submissions on 7 December 2015.

***Adjudicator’s Jurisdiction and the Act***

1. The following sections of the Act apply to the contract for the purposes of the Adjudicator’s jurisdiction.
2. Section 4 of the Act – **Site in the Territory** – the site is at [redacted] in the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.
3. Section 6 of the Act – **Construction Work** – the work is block work for the construction of residential duplex units for the Applicant and section 6(1)(c) of the Act specifically provides for this type of work. I am satisfied that the work is construction work for the purposes of the Act.
4. Section 5 of the Act - **Construction Contract** - the contract is partly written and partly oral and by reference to the Applicant’s quotation, the Respondent’s email and scope of the work contained in the quote, I am satisfied that the contract is, *prima facie*, a construction contract for the purposes of the Act. The parties also agree that they entered into a construction contract.
5. The agreed contract value is disputed between the parties. The Applicant submits that the contract value quoted was a lump sum value of $47,613.50 (including GST) whereas the Respondent submits that the agreed contract value was a lump sum of $45,853.50 (including GST). Both the Applicant and the Respondent have provided quotations from the Applicant dated 9 July 2015. It appears there were two quotes and this is not uncommon when quotations are carried out for construction work.
6. The issue before me in fully considering this jurisdictional provision of the Act is: which quotation is the valid quotation that was agreed on by the parties upon which the contract was formed, that is for the contract to be a valid construction contract for the purposes of the Act?
7. In reaching a landing on this point I turned to Annexure “F” of the Respondent’s further submissions of 3 December 2015. The annexure contained an email from the Builder, NT Plasters and Builders, dated 5 August 2015 to the Applicant which said:

*“Dear Richard,*

*In relation to the dispute for the blocklaying, we have now received the building inspector’s report of which you were onsite inspection date being Monday the 27/07/15 as attached (fail)*

*At this stage I have no problem of you carrying out and completing your job (provide timeframe for completion) as per your quote dated 9/07/15 as long as all issues and fails reported by the certifier are fixed and a satisfied certifiers inspection report is provided at the end of your job that is when you will get paid the amount as per quote ($45,853.50) GST incl. I will allow you 7 working days to inform us of your intentions. If you have any further queries please do not hesitate to contact me.*

*REGARDS [signatory’s name redacted]”*

1. The Builder for the project, and who is ultimately responsible for the building work under the *Building Act*, is [redacted], who have raised this issue with the Applicant following a certifier’s building inspection. The contract for the block laying component of the work is with the Owner, [the Respondent], and the agreed value appears to clearly be $45,853.50 (including GST), which is likely to be the second quote of 9 July 2915 provided by the Applicant to the Respondent following some sort of scope change or agreed reduction in price.
2. I now turn to the terms of the contract. The Act implies provisions into a construction contract that does not have specific written provisions, such as how to make a payment claim and variations to the contract. These provisions are contained at sections 16 to 24 and the Schedule, Division 1 to Division 9 are implied into the construction contract as written provisions of the contract. The written documents of this contract are limited to a quotation from the Applicant and an email from the Respondent, which the Applicant claims to be an “implied acceptance” of the Applicant’s quotation and a tax invoice from the Applicant claiming for the work done. Nevertheless the work was carried out and the contract performed.
3. As there are no other written provisions or documents for the contract, the Implied Provisions of sections 16 to 24 and the Schedule of Implied Provisions of the Act therefore apply to this contract.
4. I am satisfied that the contract is a construction contract for the purposes of the Act, the implied provisions of the Act are implied into the contract and the agreed value of the contract is in a lump sum of $45,853.50 (including GST).
5. Section 4 of the Act - **Payment Claim** – means a claim made under a construction contract:

*“(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations; or*

*(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.”*

1. The Applicant has made a payment claim on 1 October 2015 in the sum of $46,795.10 (including GST) on Tax Invoice 2103.
2. The making of a payment claim falls under section 19 of the Act which refers to the Schedule of Implied Provisions, Division 4, which states:

*“****Division 4 Making claims for payment***

***5 Content of claim for payment***

*(1) A payment claim under this contract must:*

*(a) be in writing; and*

*(b) be addressed to the party to which the claim is made; and*

*(c) state the name of the claimant; and*

*(d) state the date of the claim; and*

*(e) state the amount claimed; and*

*(f) for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and*

*(g) for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim; and*

*(h) be signed by the claimant; and*

*(i) be given to the party to which the claim is made.*

*(2) For a claim by the contractor, the amount claimed must be calculated in accordance with this contract or, if this contract does not provide a way of calculating the amount, the amount claimed must be:*

*(a) if this contract states that the principal must pay the contractor one amount (the contract sum) for the performance by the contractor of all of its obligations under this contract (the total obligations) – the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations; or*

*(b) if this contract states that the principal must pay the contractor in accordance with rates stated in this contract – the value of the obligations performed and detailed in the claim calculated by reference to the rates; or*

*(c) otherwise – a reasonable amount for the obligations performed and detailed in the claim.*

*(3) Subclause (2) does not prevent the amount claimed in a progress claim from being an aggregate of amounts calculated under one or more of subclause (2)(a), (b) and (c).”*

1. The Tax Invoice 2103 is not signed, which is a requirement under the Schedule, Division 4, section 1(h) *“…be signed by the claimant….”.* The implied provisions for making a payment claim are mandatory as the Act uses the word “*must*” when making a payment claim. The definition of “must” was determined by Southwood J. in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 at [35] where His Honour said:

*“The use of the word “must” by the draftsman establishes a prima facie intention that compliance with the provisions is obligatory; but whether non-compliance leads to invalidity, depends upon whether there can be discerned a legislative purpose to invalidate an adjudication which is not bought within the 90 days prescribed…”*

1. The Applicant identified this weakness in the Application and seeks to rely upon section 9 of the *Electronic Transactions (Northern Territory) Act* to satisfy the signature component required by the implied provisions of the Act.
2. The Respondent in its further submissions of 3 December 2015 says that the payment claim was not validly made under the implied provisions of the Act because Tax Invoice 2103 was not signed and the electronic signature provisions of section 9 of the *Electronic Transactions (Northern Territory) Act* have not be met because there are three requirements to be satisfied before signature can be said to have taken place.
3. The *Electronic Transactions (Northern Territory) Act* at section states:

“***9 Signatures***

*(1) If, under a law of the Territory, the signature of a person is required, the requirement is taken to have been met in relation to an electronic communication if:*

 *(a) a method is used to identify the person and to indicate the person's intention in respect of the information communicated; and*

 *(b) the method used was:*

 *(i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or*

 *(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and*

 *(c) the person to whom the signature is required to be given consents to the requirement being met by the use of the method mentioned in paragraph (a).*

*(2) This section does not affect the operation of any other law of the Territory that makes provision for or in relation to requiring:*

 *(a) an electronic communication to contain an electronic signature (however described); or*

 *(b) an electronic communication to contain a unique identification in an electronic form; or*

 *(c) a particular method to be used in relation to an electronic communication to identify the originator of the communication and to indicate the originator's intention in respect of the information communicated.*

*(3) The reference in subsection (1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature.”*

1. The Respondent argues that because section 9(1)(a), 9(1)(b) and (9(1)(c) uses the word “and” this indicates that all three requirements must be met for there to be a valid signature by electronic means.
2. I do not agree with the Respondent on this point. The contract communication was carried out by email and the parties were fully aware of what was being transmitted and communicated each time an email was sent and received. It is uncontentious that throughout the contract:
3. there have been no issues or difficulties identifying each of the parties by email throughout the course of the correspondence in the contract;
4. each of the parties have received and acted on the email correspondence to perform the contract; and
5. the documents received by email were accepted to form part of the written terms of the contract and are relied upon by the parties in this adjudication.
6. I am satisfied that Tax Invoice 2103 is a valid payment claim for the purposes of the Act and complies with the provisions of section 9 of the *Electronic Transactions (Northern Territory) Act* to meet the signature requirements of the implied provisions of the Act.
7. Section 8 of the Act - **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 partially 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 Applicant made a valid payment claim on 1 October 2015 in the sum of $46,795.10 (including GST) on Tax Invoice 2103.
2. The Respondent did not pay the claim in whole or in part on or before the due time for making payment that was set out on the invoice, one of the few written terms of the contract, being 7 days.
3. The Respondent did not respond to the payment claim, reject or dispute the payment claim within 14 days or pay the whole of the amount claimed within 28 days as required by the Schedule, Division 5, section 6 of the implied provisions of the Act.
4. I am of the view that under the 7 day payment terms from issue of the invoice, clearly set out on Tax Invoice 2103 the payment claim was to be paid on or before 8 October 2015.
5. When the Respondent did not pay the Applicant its payment claim for Tax Invoice 2103 on or before 8 October 2015, a payment dispute for the claim then arose on **9 October 2015** that would trigger the making of an application for adjudication under section 28 of the Act.
6. I am satisfied that there is a payment dispute for the purposes of section 8 of the Act in which the Applicant has applied for an adjudication of the payment dispute under section 28 of the Act.
7. Section 28 of the Act – **Applying for Adjudication** – by reference to the Applicant’s documents and its further submissions, the Application is dated 16 November 2015 and was served on the Appointer MBNT on 16 November 2015. The Application was also served on the Respondent on 16 November 2015.
8. The Application contains the relevant information prescribed by section 28(2) of the Act and regulation 6 of the *Construction Contracts (Security of Payments) Regulations* (“Regulations”).
9. I am satisfied that the Application is a valid Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and the Regulations.
10. Section 29 of the Act – **Responding to Application for Adjudication** – The Respondent did not prepare and serve in time a Response to the Application as required by section 29 of the Act.
11. Section 34 of the Act – **Adjudication Procedure** – Further Submissions.

I requested further submissions from the parties on several questions I had after reading the Application. Both the Applicant and the Respondent prepared and submitted further submissions within the time I had requested. The Applicant did not answer the questions I had asked from the Application. The Applicant instead objected to the Adjudicator’s questions on the basis that they were “…*irrelevant to consideration in the adjudication*….”.

1. The Applicant has argued that the Adjudicator’s questions are irrelevant to the issues to be determined in the adjudication in that the Respondent has claimed for damages resulting from alleged defective work and that the proper course was for the Respondent to commence legal proceedings and have a court of competent jurisdiction decide these complicated issues.
2. I do not agree with the Applicant on this point. The Respondent does not seek damages but, more relevantly, counterclaims for the rectification of the Applicant’s defective work under the construction contract.
3. The Applicant was given several opportunities to rectify its defective work and it failed to undertake that rectification work and it is entirely appropriate that the Respondent counterclaims for costs it has incurred, if applicable, to rectify the Applicant’s defective work.
4. I responded to the parties on 8 December 2015 in relation to the Applicant’s objections and pointed to section 34(1)(b), section 34(5) and section 34(6) of the Act, which provide broad powers to adjudicators to fully inform themselves and obtain sufficient information to make a determination. I am of the view that the questions I had asked the parties were entirely relevant to elicit sufficient information to enable me to determine the payment dispute under the rules of natural justice.
5. Having now considered the relevant sections of the Act and the Regulations, and following attendance to the documents of the Application and the further submissions from the Applicant and the Respondent, I find that I have jurisdiction to determine the merits of the payment dispute between the Applicant and the Respondent.

***Merits of the Claims***

1. The claims made by the Applicant in the Application are as follows:
2. Tax Invoice 2103 in the sum of **$46,795.10 (including GST)**, for the block laying works; and
3. Interest under the implied provisions of the Act on the sum of $42,541.00 (excluding GST), calculated at a daily rate of $9.91 from 28 October 2015 to the date for payment in the determination.
4. The Applicant says that there is no valid reason why the Respondent has not paid the amount of $42,541.00 (excluding GST) for the work done.
5. The Respondent in its further submissions lodged a counterclaim to rectify the Applicant’s faulty and defective work, as well as seeking loss of rent and legal professional fees in responding to the dispute, as follows:
6. Cost of rectification of defective work, a counterclaim of $33,302.24 (including GST) comprising 14 supplier tax invoices;
7. Additional rent expenses incurred in the sum of $6,360.00 (including GST), being $1,060.00 (including GST) per fortnight x 6; and
8. Legal professional fees in the sum of $3,000.00 (including GST) for responding to the dispute.
9. The Respondent’s total claim over the three components of claim is the sum of **$42,662.24 (including GST)**.
10. The Respondent also submits that the equitable resolution of the dispute would be to deduct the cost of the rectification of the works and excess expenses incurred by the Respondent from the Applicant’s payment claim as follows $45,853.50 (including GST) less $42,662.24 (including GST) giving a payment of $3,191.26 (including GST) in full and final satisfaction of the Applicant’s claim.
11. I am not with the Respondent on this point as an adjudicator holds no jurisdiction in equity and I cannot determine matters in equity.

The Applicant’s Tax Invoice 2103, dated 30 September 2015

*The Payment Claim of $46,795.10 (including GST)*

1. The Applicant’s payment claim presupposes a contract value of $47,613.50 (including GST) agreed with the Respondent. However, as I have reasoned with the supporting evidence at paragraphs [36] to [43] above, the agreed lump sum contract value is $45,853.50 (including GST).
2. The Respondent has not disputed the Applicant’s claim and in its further submissions acknowledges this to be the agreed contract lump sum due and payable to the Applicant for the performance its work under the contract.
3. I award the Tax Invoice 2103 payment claim to the Applicant in the sum of **$45,853.50 (including GST)**.

The Respondent’s Counterclaim for Defective Work Rectification

*The Defective Work Counterclaim of $33,302.24 (including GST)*

1. On 27 July 2015 the Certifier, [redacted], carried out an inspection of the block work and found it to be inconsistent dimensionally and not true and plumb in its construction. The Certifier failed the block work and identified the standard of rectification it was to meet as Australian Standard 3700. The Certifier also identified the work that was to be carried out to rectify the block work to make it compliant with the Standard. The Certifier raised two reports as follows:
2. Report No. 4199F1 dated 28 July 2015 that set out the work which was to be done to rectify the failed block work inspection to comply with the Australian Standards. A copy of that report was given by notice to the Applicant on 5 August 2015 by the project Builder, [redacted]; and
3. Report No. 4199S2 dated 27 July 2015 that placed a “DO NOT PROCEED” on the failed block work as it did not comply with the approved plans and associated standards. A copy of that report was given by notice to the Applicant on 2 September 2015 project Builder, [redacted].
4. The Applicant did not rectify the defective and failed block work after the first notice given to the Applicant on 5 August 2015 or after the second notice given to the Applicant on 2 September 2015.
5. As a consequence, the Respondent terminated the contract on 30 September 2015 and had the defective and non-compliant work rectified, the cost of which is the basis of this counterclaim.
6. One of the principal issues with the Applicant’s work was the non-compliance of the arches which had to be demolished and re-built. The cost of the rectification work is divided across 14 supplier invoices for respective portions of the materials supply and work to make good the defective block work.
7. I am satisfied that the rectification work was necessary and that the Applicant had numerous and extended opportunities to make good on the defective work and did not rectify the defects identified by the Certifier.
8. I have also thoroughly reviewed the Respondent’s supplier invoices and found some of the invoices to be for work and supplies that could not be associated with the defect rectification but which would be more appropriately associated with the project building works. Accordingly, I have assessed and set out the reasonable costs associated with and allowed for the defect rectification scope identified by the Certifier in the Scott Schedule at Table 1 below:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Date** | **Subcontractor** | **Materials or Work Supplied** | **Invoice Value (including GST)** | **Value Approved (including GST)** | **Comment** |
| 19-Nov-15 | [redacted] | Inspections of block work | $350.00  | $0.00  | Inspections form part of the project inspections for the Project Builder |
| 16-Oct-15 | [redacted] | Blocks and Bagged Cement | $1,169.96  | $1,169.16  | Blocks for rectification |
| 27-Oct-15 | [redacted] | Returned Blocks not used | ($321.75) | ($321.75) | Credit for unused blocks |
| 15-Oct-15 | [redacted] | 1 cubic metre of 25MPA concrete | $247.50  | $0.00  | Main Project Supply |
| 6-Oct-15 | [redacted] | Blocks and Bagged Cement | $972.07  | $0.00  | Main Project Supply |
| 19-Nov-15 | [redacted] | Concrete Pump and Labour for block fill | $15,193.00  | $2,278.95  | 15% allowance for block fill rectification work remainder for Main Project |
| 5-Oct-15 | [redacted] | N12 and N16 deformed bar  | $852.83  | $852.83  | Reinforcement for block work rebuild |
| 4-Oct-15 | [redacted] | Dismantle block Arches | $462.00  | $462.00  | Arch block work demolish |
| 26-Oct-15 | [redacted] | Rebuild Arches and Raked wall | $6,600.00  | $6,600.00  | Rebuild of block work |
| 3-Nov-15 | [redacted] | Plastering repairs to uneven blockwalls | $4,400.00  | $4,400.00  | Rectification of block work |
| 14-Sep-15 | [redacted] | Structural Site Inspections block work | $605.00  | $605.00  | Rectification block work inspection |
| 30-Sep-15 | [redacted] | Structural Site Inspections block work | $442.75  | $442.75  | Rectification block work inspection |
| 20-Oct-15 | [redacted] | Structural Inspections for section 40 block work | $569.25  | $0.00  | Main Project Supply |
| 25-Nov-15 | [redacted] | 6m skip bin and council tip fees | $577.94  | $577.94  | Rectification of block work |
| **TOTAL** | **$32,120.55**  | **$17,066.88**  | Respondent Counterclaim |

Table 1.

1. I find that the defect rectification counterclaim made by the Respondent was incorrectly calculated and is $32,120.55 (including GST) as per the above Table 1 Scott Schedule.
2. I award the Counterclaim sum of **$17,066.88 (including GST)** to the Respondent for the rectification of defective block work which sum is to be deducted from the Applicant’s Tax Invoice 2103.

*The Additional Rent Expenses of $6,360.00 (including GST)*

1. The Respondent has claimed additional rent expenses of $6,360.00 (including GST) for the delay caused by the Applicant’s defective block work.
2. This claim simply cannot be sustained on the evidence of this contract and is ambit at best. There is no project schedule, no critical path to impact and no date of practical completion agreed between the parties to the contract. As it is, there are only limited written terms with virtually all the implied provisions of the Act implied as the contractual provisions owing to the absence of a written contract.
3. I determine that this claim fails due to the lack of any supporting evidence provided by the Respondent under the contract.

*The Legal Professional Fees of $3,000.00 (including GST)*

1. An adjudicator may award costs of the adjudication under section 36(2) if the adjudicator finds that a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party to the adjudication.
2. I have not found any frivolous or vexatious conduct or unfounded submission by either the Applicant or the Respondent in this adjudication.
3. I determine that this claim fails and each party should bear their own legal costs of the payment dispute.

***Interest on the claims***

1. In reconciling the claims, the amount the Respondent is to pay the Applicant is $28,786.62 (including GST).
2. There are no written contract terms in relation to interest in this contract and therefore the implied provisions of the Act are implied and form the contract terms applicable to the amount of interest to be paid to the Applicant. Interest on overdue payments is set out in section 7 of the Schedule and states:

*“ (1) Interest is payable on the part of an amount that is payable under this contract by a party to another party on or before a certain date but which is unpaid after that date.*

 *(2) The interest must be paid for the period beginning on the day after the date on which the amount is due and ending on and including the date on which the amount payable is paid.*

*(3) The rate of interest at any time is equal to that prescribed by the Regulations for that time.”*

1. The rate of interest prescribed by regulation 9 of the Regulations is:

 *“….the interest rate is the rate fixed from time to time for section 85 of the Supreme Court Act.”*

1. The Supreme Court Act refers to the Rules. The Supreme Court Rules follow Rule 39.06 of the Federal Court Rules and provides that the interest rate is to be the rate that is 6% above the cash rate set just before the 6 month period being considered. The Reserve Bank cash rate is currently 2.0%, therefore the interest rate applicable to this contract is 8.0% *per annum*.
2. Interest is not calculated on the GST component of the amount the Respondent is to pay the Applicant and GST is not payable on an interest amount awarded in a determination under Goods and Services Tax Determination 2003/01.
3. I award interest of $401.51 on the sum of $26,169.65 (excluding GST) from 8 October 2015, the date of due payment, to 18 December 2015, the date of determination, pursuant to section 35 of the Act.

***Costs***

1. The normal starting position for costs of an adjudication is set out in section 36(1) and section 46(4) of the Act is that each party bear their own costs in relation to an adjudication.
2. The Act at section 36(2) gives Adjudicators discretion to award costs:

*“if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs.”*

1. I have not found either the Applicant or the Respondent to have made any unfounded submissions or caused additional costs due to vexatious or frivolous conduct.
2. I determine that the parties bear their own legal costs under section 36(1) of the Act and the parties pay the cost of the adjudication of the dispute in equal shares under section 46(4) of the Act.

***Summary***

1. In summary of the material findings, I determine:
2. The contract to be a construction contract under the Act;
3. The work to be construction work under the Act;
4. The site to be a site in the Northern Territory under the Act;
5. The claim to be a valid payment claim under the Act;
6. The dispute to be a payment dispute under the Act;
7. Tax Invoice 2103 to stand in the sum of $45,853.50 (including GST);
8. Counterclaim for rectification of defects to stand in the sum of $17,066.88 (including GST) to be deducted from Tax Invoice 2103;
9. Counterclaim for rent expenses to fail;
10. Counterclaim for legal expenses to fail; and
11. Interest awarded in the sum of $401.51.
12. Accordingly, I determine that the amount to be paid by the Respondent to the Applicant is **$29,188.13 which sum includes a GST component of $2,616.97 only**.
13. This sum is to be paid to the Applicant by the Respondent on or before **15 January 2016**.

***Confidential Information***

1. The following information is confidential:
2. the identity of the parties; and
3. the location and nature of the works.

DATED: 18 December 2015



Rod Perkins

Adjudicator No. 26