

Claimant: ROHD Four Pty Ltd (t/a CM Testing Service)

Respondents: Bundaberg Earthworx Pty Ltd

Adjudicator's Decision under the Building and Construction Industry Payments Act 2004

I, Chris Lenz, as the Adjudicator pursuant to the *Building and Construction Industry Payments Act 2004* (the "Act"), decide (with the reasons set out below) as follows:

1. The adjudicated amount of the adjudication application dated to 8 December 2010 is **\$8,165.00**
2. The date on which the amount became payable is **18 November 2010**
3. The applicable rate of interest payable on the adjudicated amount is **10%** simple interest.
4. The Respondent is liable to pay the ANA's fees and the adjudicator's fees

Signed: 

Date:..... **6 January 2011**

Chris Lenz Adjudicator

Background

1. The ROHD Four Pty Ltd t/a CM Testing Service (referred to in this adjudication as the "claimant") contracted to perform soil and concrete testing various residential sites in Bundaberg in Queensland as well as petrographic analysis for Agnes Quarry for Bundaberg Earthworx Pty Ltd (referred to in this adjudication as the "respondent").
2. The claimant served 9 payment claims totalling \$8,165.00 (the "outstanding amount") on 4 November 2010 for work carried out on various dates (the earliest being on 29 January 2010) and at various locations, which were properly endorsed, as each stated that "*This is a payment claim made under the Building and Construction Industry Payments Act 2004 (Qld)*" (the "Act").
3. On 22nd November 2010 the claimant posted a notice to the respondent stating that the respondent had 5 business days to submit a payment schedule as it intended applying for adjudication (the "notice").
4. On 2 December 2010 the respondent's office administrator emailed the claimant advising that the outstanding amount was to be paid on Tuesday, 8 December 2010.
5. On 8 December 2010, the claimant applied to the Queensland Law Society ("QLS") for adjudication and copied the application documents to the respondent in which the claimant asserted that the outstanding amount had not been paid.
6. On 13 December 2010 the QLS nominated me to adjudicate the dispute and on 15 December 2010 I emailed the claimant and respondent and faxed and emailed my acceptance notice to both parties.
7. I did not receive an adjudication response from the respondent.

Construction contract

8. Having regard to the adjudication application and the submissions made by the claimant that the respondent (which I find had been a client of the claimant since 2003) would simply ring in their job request for testing or sampling, and the claimant would carry out the work and issue a certificate together with an invoice.
9. I find that this was an *arrangement* between the claimant and the respondent which falls within the definition of construction contract identified in Schedule 2 of the Act which provides as follows:

"construction contract" means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party."
10. I find that the all the invoices related to work involving soil testing (invoices 8502, 8447, 8620, 8588, 8583, 8567, 8545, 8530, 8679, 8712, 8940, 8956, 8896, 8895, 8864, 8771, 8531, 8490, 8444, 8438, 9035, 8974, 8874, 8847, 8838, 8814, 8813, 8809, 8537) fall within the definition of related goods and services as defined by section 11(1)(b)(iv) of the Act relating to *soil testing for construction work* as they were preparatory to the construction of homes.
11. The concrete testing identified in invoice 8410 I find are related goods and services are related to the placing of concrete in culvert walls, which I find falls within the construction work definition of section 10(1)(b) of the Act as *forming part of the land for roadworks*.
12. The invoice number 8597 related to petrographic analysis of the Agnes Quarry I find that this falls within the definition of construction work identified in section 10(1)(g) of "*carrying out the testing of soils and road making materials during the construction and maintenance of roads*" as the lab request form referred to gravel.
13. I have therefore found that all the work encapsulated by the invoices involved the provision of related goods and services for construction work under a construction contract for work carried out in Queensland thereby satisfying s3 of the Act and therefore it is a matter which may be adjudicated.

14. I accept that the original invoice for the petrographic analysis (8597 dated 10 May 2010) was made out to the respondent and find that the respondent ordered this work be carried out, such that the change in name requested subsequently by the respondent resulting in the reissue of that invoice in the name of Discovery Coast Quarries, did not affect the respondent's obligation to pay them that payment claim.

Service of the payment claim and the adjudication application

15. In reliance upon the copy of the mail out book provided and without any controverting evidence, I find that the payment claims were served on the Respondents by post on 4 November 2010.
16. I find that the **payment claims** were suitably endorsed and identified the work carried out, and in each case the invoice identified the **amount being claimed**, thereby satisfying s17(2) of the Act.

Due date for payment

17. The payment claims which referred to specific invoices did not identify a time for payment. Each individual invoice specified that the terms were 14 days from the invoice date, however, in most cases of the invoices cannot be construed as payment claims. Accordingly, I find that the contract made no specific provision for the date for payment for the payment claims, and therefore I rely upon section 15 (1)(b) to find that the due date for payment was 10 business days from the date of the payment claim.
18. Accordingly, I find the **due date for payment is 18 November 2010**.
19. There is no evidence in the material of a payment schedule from the Respondents, and there has been no adjudication response. The only material which I find that emanates from the respondent was an email on 2 December 2010 indicating it would pay the outstanding monies by the following Tuesday, 8 December 2010.
20. I find that payment did not occur, and I've not been advised by the claimant that it has been paid so I assume that the monies are still outstanding.

Provision of the notice and the adjudication application

21. I find that the notice dated 22nd November 2010 satisfies s21(2) of the Act because it was given 2 business days after the due date for payment, which is within 20 business days provided by s21(2)(a) of the Act, and it stated that the Respondents had 5 business days within which to provide a payment schedule.
22. I find that the Claimant made an adjudication application on 8 December 2010 to the QLS, which is within 10 business days after the payment schedule should have been delivered.

Amount of the payment claim

23. The respondent did not provide a payment schedule, or an adjudication response. This means I have nothing from the respondent to provide alternative values for the work.
24. I am satisfied that the amounts identified in the invoices for the work carried out are reasonable. I find that the respondent's agent did e-mail and say that it was going to pay the outstanding amount on 2 December 2010, and therefore infer that it had no dispute as to the amount. Therefore, I find that the outstanding amount is still payable.
25. Accordingly, I **find that the amount of \$8,165.00** is the amount for the work carried out by the claimant for the respondent.

Interest

26. The claimant makes no claim for interest and there is no evidence of any agreement regarding interest for outstanding amounts. I am obliged to determine interest under the Act and need to establish whether the penalty rate of interest is payable if I find that it is a *building contract* to which s67P of the *Queensland Building Services Authority Act*

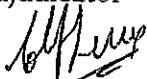
("QBSA Act") applies. This provision is in Part 4A of the QBSA Act which deals with building contracts other than *domestic building contracts*. A *domestic building contract* is defined in Schedule 2 of the QBSA Act as having the meaning in the *Domestic Building Contracts Act 2000*.

27. s7(1)(a) of the *Domestic Building Contracts Act 2000* ("DBCA") provides that a *domestic building contract* is a contract to carry out *domestic building work*. *Domestic building work* is defined in s8 of the DBCA as *the erection or construction of a detached dwelling*. A *detached dwelling* is defined in Schedule 2 of the DBCA as a single detached dwelling or a duplex, and I find by inference that the work was carried out for residential properties which relates to work for *detached dwellings*.
28. This means that the construction contract is a *domestic building contract*, and therefore s67P of the QBSA Act does not apply.
29. It is not clear whether the petrographic analysis work also fell within the definition of domestic building contract, however, the amount of that invoice is \$520 and it is not in my view significant to carry out an analysis as to whether the penalty interest rate applies to this work, so I am content to only allow the lower interest rate to apply to this work as well.
30. Accordingly, s15(2)(a) of the Act applies because I have found that there is no rate of interest under the contract. The Supreme Court rate of 10% is prescribed under s48(1) of the *Supreme Court Act 1995* as regulated by Regulation 4 of the *Supreme Court Regulations*.
31. I therefore find interest at the **rate of 10% on the unpaid payment claim**.

Authorised Nominating Authority and Adjudicator's fees

32. s34 and 35 of the Act refer to equal contributions from both parties for both these fees unless I decide otherwise. The claimant has succeeded in its claim and the respondent did not provide a payment schedule, even after having been invited to do so under the notice, and it has not provided an adjudication response.
33. Accordingly, I am prepared to decide otherwise than the default provision in ss34(3) and 35(3) of the Act and decide that the Respondent should pay all the ANA's fees and all my fees.

Chris Lenz
Adjudicator



6 January 2011