

ADJUDICATOR'S DETERMINATION

Pursuant to *section 33(1)(b) of the Construction Contracts (Security of Payments) Act 2004* as amended

[Applicant's details redacted]

(Applicant)

and

[Respondent's details redacted]

(Respondent)

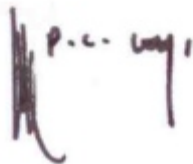
DETERMINATION

I, Philip Loots, as the registered Adjudicator appointed under section 30(1)(a) of the *Construction Contracts Security of Payments) Act 2004* as amended (“the Act”) determine that for the reasons set out in this Determination:

- a) the Respondent is liable to pay to the Applicant \$38,500.00 (inclusive of GST) on or before 5 pm on 20 January 2022;
- b) the Respondent is liable to pay interest to the Applicant on this amount from 8 September 2021 to the date the determined amount is paid to the Applicant at the rate 6.10% per annum;
- c) with my costs and fees for the adjudication and my reasonable disbursements amounting to \$6930.00 and the Applicant having provided security of \$7,000.00 for the anticipated costs of the adjudication, \$70.00 is to be returned to the Applicant by me upon receipt of its bank details;
- d) each party must pay one half of the costs of the adjudication;
- e) the Respondent is accordingly liable to pay \$3.465.00 to the Applicant in respect of costs of the adjudication on or before for 5 pm on 20 January 2022.

The reasons for my decision are annexed as Schedule 1.

A list of information that, because of its confidential nature, is not suitable for publication by the Registrar is annexed as Schedule 2.



PHILIP LOOTS

Registered

Adjudicator

No.15 (NT)

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SCHEDULE 1: REASONS FOR DETERMINATION

APPOINTMENT OF ADJUDICATOR

1. By email to the Applicant and the Respondent (the “parties”) dated 8 December 2021, the prescribed appointer appointed me to as adjudicator pursuant to s 30(1)(a) of the Act to determine this payment dispute. I accepted the appointment on 8 December 2021.
2. From my review of the written application, I formed the view that I had no material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen or in any party to the contract. This absence of material personal interest was declared to the parties in my letter and no objection was given by either party to such declaration.
3. The Applicant is represented by Mr [BF].
4. The Respondent is represented by Mr [GK].

SERVICE OF ADJUDICATION APPLICATION

5. The Application was served on the Respondent on 3 December 2021 and received by me on 8 December 2021.

FEES

6. My fees on the matter are \$450.00 per hour plus GST and disbursements as set out in my letter to the Parties dated 9 December 2021 and agreed to by the Applicant.

LETTER TO THE PARTIES

7. By letter to the parties dated 8 December 2021, the prescribed appointer recorded that the Applicant served its written application on it on 3 December 2021. In a letter dated 9 December 2021 addressed to the Parties, I gave the directions set out below:
 - a. it was noted that assuming service on 3 December 2021, the Response was due on 24 December 2021;
 - b. the Applicant confirmed that service of the Application was effected at the Respondent’s address on 3 December 2021;
 - c. the Response was accordingly due on 24 December 2021;
 - d. despite service on the Respondent, no response was filed and served by the Respondent timeously or at all;
 - e. the Determination is due by 11 January 2022.

- f. the Applicant provided a sum of \$7,000.00 by way of security, and
- g. the parties were requested to advise me in writing by 15 December 2021 as to whether there has been any order, judgement or other finding by an arbitrator or other person or court or other body about the dispute that is the subject of the application.
- h. As I had received no response from the Respondent, I emailed each of the parties by email on 17 December 2021, 23 December 2021, 30 December 2021 and 5 January 2021 requesting acknowledgement of service of the application and receipt of my letter of 9 December 2021 by email, but received no response from the Respondent.
- i. the Applicant acknowledged of service of the application and receipt of my letter of 9 December 2021 by email dated 23 December 2021.
- j. I accept the evidence contained in [BF's] Declaration that the application was served on the Respondent on 3 December 2021.

THE CONTRACT

- 8. The Applicant and the Respondent entered into a Contract for the supply of professional services¹ relating to the design, supply and installation [redacted] being civil works undertaken by the Respondent for the Northern Territory Department of Infrastructure Planning and Lands on or about 21 April 2021.
- 9. The professional services to be supplied by the Applicant to the Respondent for the [works] included undertaking and procuring:
 - (a) civil design;
 - (b) digital ground survey;
 - (c) on-site service location;
 - (d) geotechnical investigation;
 - (e) independent [redacted] safety audit;
 - (f) Stage 3 detailed design; and

¹ s7(2)(a) of the Act defines professional services to include: 'services that are provided by profession and that relate directly to construction work or to assessing its feasibility (whether or not it proceeds), including surveying, planning, costing, testing, architectural, design, plan drafting, engineering, quantity surveying and project management services...'

(g) Stage 4 pre-opening services;

(collectively referred to as “the Services”).

10. The Applicant made an offer to the Respondent to undertake the Services by emails on 1 March 2021. (See [5] of [BF’s] Declaration of 3 December 2021). The item prices and/or rates for the Services were included in the Schedule of Rates.
11. The Applicant says that the Respondent verbally accepted the Applicant’s offer comprised by the Schedule of Rates in a telephone call on 21 April 2021. (See [7] of the [BF’s] Declaration of 3 December 2021),
12. The Applicant undertook substantive services for the Respondent during this period. (See [18] of the [BF] Declaration dated 3 December 2021).
13. On 6 August 2021 and on 9 August 2021 the Applicant issued letters to the Respondent with adjusted schedules of rates attached, to document variations in the scope of the Services that had been requested by the Respondent including:
 - (a) [redacted] Safety Audit, Detailed GPR in-ground and Feature Survey, geotechnical technical memo and ‘as constructed’ drawings for each site (P01);
 - (b) geotechnical site investigation and s.40 engineering construction certificates for each site (P02); and
 - (c) detailed design of the combined precast maintenance/structural footing slab (PO 3),(together, the varied scope of Services).

JURISDICTIONAL FACTS

14. The Act sets out the jurisdictional facts that must exist in order for an Adjudicator to be able to consider and proceed to make a determination in respect of a dispute in relation to the payment of money between Parties, in the absence of which I must dismiss the Application without making a determination of its merits.
15. The jurisdictional facts which must exist in order for me to have jurisdiction include the existence of:

- a) a “construction contract” within the meaning of the Act²;
 - b) a “payment claim” made under a “construction contract”³ ;
 - c) a “payment dispute”⁴ must have arisen in relation to the relevant “payment claim”;
 - d) a payment dispute that arose less than 65 working days⁵ before this adjudication Application was lodged;
 - e) the Application must have been prepared and served in accordance with the Act;⁶ and
 - f) the payment dispute has not been subject to a valid determination nor is the dispute the subject of an order, judgement or other finding by an arbitrator or other person or court or other body dealing with a matter arising under the Contract⁷;
 - g) the “payment dispute” must not be too complex to fairly determine within the prescribed time;⁸
 - h) the payment dispute has not come before an adjudicator previously.⁹
16. None of the exclusions provided for in the Act relating to high-value construction Contracts, or Contracts with prescribed employees, apply to the Contract.
 17. I find that all of the jurisdictional facts listed above can be found in the Application; and that none of the disqualifying criteria in section 33(1)(a) apply to this Application.
 18. The Applicant is therefore permitted to apply to have this payment dispute adjudicated pursuant to section 33(1)(b) of the Act, and
 19. I have jurisdiction and am required to determine the merits of this Application on the balance of probabilities pursuant to section 33(1)(b) of the Act.

² s 5(1) of the Act provides that: ‘a construction contract is a contract (whether or not in writing) under which a person (the Contractor) has one or more of the following obligations... (c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work;’ and s 33(1)(a)(i) of the Act.

³ s 19 of the Act.

⁴ s 8(a)(ii) of the Act

⁵ s 28(1) of the Act

⁶ clause 5 of Schedule 1, Division 4 of the Act and s33(1)(ii) of the Act

⁷ ss 27(b) and 33(1)(ii)(a) of the Act

⁸ s 33(1)(iv)(A) or (B) of the Act

⁹ s 33(1)(a)(iii) of the Act

20. **DOCUMENTS REGARDED IN MAKING THIS DETERMINATION**

21. In making this determination I have had regard to the following:

- a) the Applicant's application for adjudication;
- b) the Applicant's submissions enclosed in support of the Application;
- c) Supporting documents referred to in the submissions;
- d) The Statutory Declaration of [BF]
- e) Supporting documents referred to in [BF's] Declaration;

(comprising 387 pages in total).

I did not consider it necessary to inspect the site of the Project or the Works, nor did either party request an inspection.

CONSTRUCTION CONTRACT FOR THE PURPOSES OF THE ACT

22. the Applicant's Services including the varied scope of Services described above were for professional services related to construction work¹⁰ in the Northern Territory being the civil works required of the Respondent to construct the [works].

23. The Contract was a construction contract under the Act¹¹ and the Applicant is a 'contractor' and the Respondent is a 'principal' for the purposes of the Act.

24. The Act applies to the Contract as a construction contract¹² irrespective of the Contract being partly written and partly oral.¹³

25. I find that a number of provisions are implied into the Contract in accordance with Part 2, Division 2 of the Act, as it does not contain written provisions about any or all of the following matters:

- (a) variations of the Contractor's obligations under the Contract;¹⁴

¹⁰ s 6(1)(c) of the Act provides that construction work is any of: '(c) constructing the whole or any part of any civil works, or a building or structure, that forms will form (whether permanently or not and whether or not in the Territory), part of land...'

¹¹ s 5(1) of the Act provides that: 'a construction contract is a contract (whether or not in writing) under which a person (the Contractor) has one or more of the following obligations...(c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work;'

¹² s 9(1) of the Act.

¹³ s 9(2)(a) of the Act.

¹⁴ s 16 of the Act.

- (b) the Contractor's entitlement to be paid progressively for the obligations the Contractor performs under the Contract, even though it has not completed all its works or services;¹⁵
- (c) an entitlement to claim progress payments for the obligations under the Contract the Contractor has performed;¹⁶
- (d) the making of the payment claim;¹⁷
- (e) the manner of the principal's response to payment claims and time for payment;¹⁸
- (f) interest on overdue payments.¹⁹

PAYMENT CLAIM

26. I find that the Applicant is entitled to be paid for the Services under the implied provisions²⁰ of the Contract, including for variations, and is entitled to make progressive Payment Claims for payment for its Services including the varied scope of the Services (that is, the Applicant does not have to await completion of the whole of the Services (as varied) before it gets paid.
27. On 12 August 2021, the Applicant issued to the Respondent Invoice No. D 0006280 dated 11 August 2021 in the sum of \$38,500 (Inc GST) (see [21] of [BF's] Declaration dated 3 December 2021) which invoice is a Payment Claim under the Contract in accordance with the provisions implied by clause 5 of Schedule 1, Division 4 of the Act by:
- (a) being in writing;
 - (b) being addressed to the Respondent;
 - (c) stating the Applicant's name as the claimant;
 - (d) stating the date of the claim of 11 August 2021 and specifying the period of the services claimed being up to 30 July 2021;
 - (e) stating the amount claimed of \$36,500 (Inc GST);

¹⁵ s 17 of the Act.

¹⁶ s 18 of the Act.

¹⁷ s 19 of the Act.

¹⁸ s 20 of the Act.

¹⁹ s 21 of the Act.

²⁰ Schedule 1 Division 2, clause 2; Schedule 1 Division 3, clauses 3 and 4; and Division 4, clause 5.

(f) itemising and describing the obligations that the Applicant had performed the subject of the claim; and

(g) the claimed amount calculated by reference to the Contract's items and rates found in the Schedule of Rates (as varied by the reference letters P01-P03)

enabling the Respondent to assess the claim (the Payment Claim).

28. The Payment Claim was given by the Applicant to the Respondent by email as all written communications between the Applicant and the Respondent under the Contract occurred by email, and there is no Contractual requirement for notices or Payment Claims to be made by any other method of delivery.

RESPONSE TO PAYMENT CLAIM AND TIME FOR PAYMENT

29. I find that pursuant to the term implied into the Contract by clause 6(2)(a) of Schedule 1, Division 5 of the Act, if the Respondent upon receipt of the Payment Claim believed the Payment Claim should be rejected because it was not made in accordance with the Contract or disputed the whole or part of the claim, then the Respondent must have given to the Applicant a notice of dispute within 10 working days after receiving the Payment Claim which notice of dispute must:

(a) be in writing; and

(b) be addressed to the claimant; and

(c) state the name of the party giving the notice; and

(d) state the date of the notice; and

(e) identify the claim to which the notice relates; and

(f) if the claim was rejected under subclause (1)(b)(i) - state the reasons for believing the claim was not made in accordance with this Contract; and

(g) if the claim was disputed under subclause (1)(b)(ii) - identify each item of the claim that was disputed and state, for each of the items, the reasons for disputing it; and

(h) be signed by the party giving the notice.

30. I find that the Respondent did not give the Applicant a notice of dispute conforming with the implied provisions of the Contract within 10 working days of 12 August 2021, being by 25 August 2021 or at any time thereafter, and that the Respondent agreed to pay the claim. (see [22] of [BF's] Declaration of 3 December 2021).

31. The subsequent communications between the Applicant and the Respondent in which the Respondent pressed for the withdrawal and resubmission of the Payment Claim,

and in which the Applicant clarified and particularised some parts of the Payment Claim (see [23] to [26] of [BF's] Declaration of 3 December 2021) did not:

- (a) result in any adjustment to the claimed amount of \$38,500 by the Applicant;
 - (b) result in a withdrawal of the Payment Claim or the substitution of a new Payment Claim; and
 - (c) constitute a notice of dispute being given in the prescribed form or time (or at all) by the Respondent to the Applicant.
32. The accepted evidence is that the Applicant, after providing the further information and clarifications sought by the Respondent, pressed for the Payment Claim to be paid on 30 September 2021.
33. I find that, pursuant to the term implied into the Contract by clause 6(2)(b) of Schedule 1, Division 5 of the Act, absent the Respondent giving the Applicant a notice of dispute, the Respondent was obliged to pay the whole amount of the Payment Claim of \$38,500 (Inc GST) within 20 working days of the receipt of the Payment Claim, being 8 September 2021.
34. The Payment Claim amount of \$38,500 (Inc GST) became a debt due pursuant to the operation of the Contract's implied provisions.²¹
35. The Respondent is not permitted under the implied provisions of the Contract to withhold, set off or deduct any claim of damage, or otherwise assess a lesser amount as being payable to the Applicant, if those claimed rights of deduction or set off or lesser assessment are not adequately set out in a notice of dispute that is consistent with the required requirements and given within the prescribed period.
36. I consider myself to be bound by the comments of Kelly J in *Inpex Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45, in which it was noted at [58] that in determining whether there is a deemed liability to pay under the implied terms, the Adjudicator ordinarily need not look into the underlying merits of whether or not an amount claimed in a payment claim was due in the sense that the underlying work had been performed and correctly valued under the contract, and find that *Total Eden Pty Ltd v Charteris* [2018] WASC 60 does not, with respect, apply.

²¹ *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46, per Mildren J at [56]-[57]. (This judgement refers to the earlier drafting of Schedule Division 5 that provided for payment in 28 days, rather than 20 working days, from the payment claim).

37. I therefore accept that I am not required or empowered to descend into the merits of the Payment Claim once it is established it is a Payment Claim under the Contract, if a notice of dispute in the prescribed form was not provided by the Respondent within the prescribed period under the implied provisions of the Contract.
38. I accept the submission of the Applicant that the full amount of the Payment Claim became due, and that my determination ought to be that the full amount claimed of \$38,500 (Inc GST) is to be paid promptly to the Applicant by the Respondent.

PAYMENT DISPUTE AND APPLICATION FOR ADJUDICATION

39. The Applicant submits that a payment dispute as defined in s8(a)(ii) of the Act arose on 8 September 2021.
40. The Respondent failed to pay the Applicant the Payment Claim amount of \$38,500 (Inc GST) or any amount at all when it was due to be paid to the Applicant under the Contract on 8 September 2021.
41. A payment dispute arises if the Payment Claim has been made under a Contract and has not been paid in full when the amount claimed is due to be paid under s8(a)(ii) of the Act. The Respondent's failure to pay the Applicant the amount of \$38,500 (Inc GST) or any amount at all within 20 working days of the Payment Claim under the Contract consequently means a payment dispute arose under s8(a)(ii) of the Act on 8 September 2021 (the Payment Dispute).
42. I find that the Applicant is entitled to apply to have the Payment Dispute adjudicated under s 28(1) of the Act because it applied within 65 working days after the Payment Dispute arose, being before 7 December 2021.

ADJUDICATION IRRESPECTIVE OF ANY TERMINATION OF CONTRACT

43. If the Contract was terminated on or after the email sent by [GK] on 17 September 2021, (see [27] of [BF's] Declaration of 3 December 2021), I find that the Applicant is still entitled to bring an Adjudication Application in respect of the unpaid Payment Claim.
44. It is clear that the Applicant's right to payment of the August Payment Claim accrued on 8 September 2021 before any alleged termination of the Contract. That accrued right remains enforceable, post any termination.
45. The Supreme Court of the Northern Territory has upheld an adjudicator's determination that a Contractor had to pay a subcontractor's accrued rights to payment under three Payment Claims submitted by the subcontractor under a subcontract that was subsequently terminated before the adjudication application was brought (see *Trans-*

Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd unreported 2008 NTSC per Southwood J at [61]).

46. Similarly the Western Australian Court of Appeal in *Laing O'Rourke Australia Construction Pty Ltd* (2016) 50 WAR 399 addressed and upheld an Adjudicator's determinations made under the nearly identical Western Australian Construction Contracts Act 2004 that the Contractor's payment claims made under a subcontract against Samsung as the principal ought to be paid, even though the adjudication applications came after termination of the subcontract by Samsung.

DETERMINATION SOUGHT BY the Applicant

47. In this Application the Applicant seeks a determination that:
- a) the Respondent shall pay the Applicant \$38,500 (Inc GST) promptly (e.g. within 7 days of determination)
 - b) the Respondent shall pay interest on \$38,500 (including GST) from for the period of 8 September 2021 to the date the determined amount is paid to Applicant at the rate 6.10% per annum.

THE ACT

48. The Act requires that I am to determine:
- a) on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to return any security and, if so, determine the amount to be paid or security to be returned, and any interest payable on it under section 35, (the adjudicated amount) and the date on or before which the amount must be paid or the security must be returned;
 - b) s34(5) of the Act states that an adjudicator's power to make a determination is not affected by the failure of either or both of the parties to make a submission or provide information or documents within time or to comply with the adjudicator's request to attend a conference with the adjudicator.

INTEREST

49. the Applicant claims that pursuant to section 35(1)(a) of the Act, if the Adjudicator determines that a party to a payment dispute is liable to make a payment, the Adjudicator may also determine that interest must be paid on the payment in accordance with the Contract.

50. An implied provision of the Contract²² provides that 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.
51. the Applicant says that payment of the Payment Claim was due on 8 September 2021. As to the rate of interest payable, the implied provision of the Contract provides that the rate of interest at any time is equal to that prescribed by the Construction Contracts (Security of Payments) Regulations (NT) (the Regulations) for that time.
52. Regulation 9 of the Regulations prescribes the interest rate under clause 7 of the Schedule to the Act to be the interest rate fixed from time to time for section 85 of the Supreme Court Act (NT).
53. Section 85 of the Supreme Court Act provides that a judgement debt carries interest from the date of the judgement at such a rate as is fixed by Supreme Court Rules (NT).
54. Rule 59.02(3) of the Supreme Court Rules provides that a judgement debt carries interest from the date of judgement at the rate per annum fixed for section 52(2)(a) of the Federal Court of Australia Act 1976 (Cth) from time to time.
55. Section 52(2)(a) of the Federal Court of Australia Act 1976 (Cth) provides that interest is payable at such rates as is fixed by the Federal Court Rules 2011 (Cth).
56. Rule 39.06 of the Federal Court Rules 2011 (Cth) provides that interest is payable under section 52(2)(a) of the Federal Court of Australia Act 1976 (Cth):
 - (a) for the period from 1 January to 30 June in any year - the rate that is 6% above the cash rate last published by the Reserve Bank of Australia before the period commenced; and
 - (b) for the period 1 July to 31 December in any year - the rate that is 6% above the cash rate last published by the Reserve Bank of Australia before the period commenced.
57. The Federal Court published the applicable interest rates referred to in the preceding paragraph on its website <http://www.fedcourt.gov.au/forms-and-fees/interest-rates>. The applicable interest rate to apply for the period of 8 September 2021 to the date the determined amount is paid to the Applicant is 6.10% per annum.
58. I find that interest is payable by the Respondent as claimed by the Applicant.

²² Schedule 1, Division 6 Item 7(2) of the Act stop

COSTS

59. My costs and fees for the adjudication and my reasonable disbursements amount to \$6930.00
60. the Applicant submits that there is no basis to make an extraordinary determination on costs, and that each party ought to bear its own costs in relation to an adjudication of the dispute, including the costs the parties are liable to pay under s46 of the Act.
61. I find that neither party has engaged in frivolous or vexatious conduct. The Application was not misconceived, and that each party must pay their own costs in relation to this Adjudication.

DETERMINATION AND REASONING

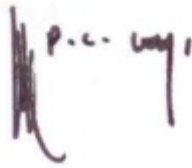
62. I have read the documentation presented by the Applicant, including the Declaration [of BF] supporting the contentions of the Applicant;
63. I have had regard to the amounts claimed by the Applicant at the time of this Determination;
64. Bearing in mind the absence of a Response, I have been cautious;
65. I accept the submissions of the Applicant and evidence contained in [BF's] Declaration because they are substantiated by contemporaneous documentation.
66. For the reasons set out in the foregoing paragraphs, and on the basis of my findings set out above, I determine that:
 - a) the Respondent is liable to pay to the Applicant \$38,500.00 (inclusive of GST) on or before 5 pm on 20 January 2022;
 - b) the Respondent is liable to pay interest to the Applicant on this amount from 8 September 2021 to the date the amount determined in a) is paid to the Applicant at the rate 6.10% per annum;
 - c) with my costs and fees for the adjudication and my reasonable disbursements amounting to \$6,930.00 and the Applicant having provided security of \$7,000.00 for the anticipated costs of the adjudication, \$70.00 is to be returned to the Applicant by me upon receipt of its bank details;
 - d) each party must pay one half of the costs of the adjudication; and
 - e) the Respondent is accordingly liable to pay \$3,465.00 to the Applicant in respect of costs of the adjudication on or before for 5 pm on 20 January 2022.

67. This determination of liability is made as at the date of this Determination.

SCHEDULE 2: CONFIDENTIAL INFORMATION

The following information is confidential:

1. the identity of the Parties;
2. the identity of the individuals referred to in the Reasons;
3. the location and nature of the works.

A handwritten signature in dark ink, appearing to read 'Philip Loots'.

Philip Loots

Registered Adjudicator No. 15 (NT)

8 January 2022