

**ADJUDICATOR'S AMENDED DETERMINATION**

**CONSTRUCTION CONTRACTS  
(SECURITY OF PAYMENT)  
ACT 2004  
(NORTHERN TERRITORY)**

**IN THE MATTER OF AN ADJUDICATION BETWEEN:**

**[Redacted]**

**APPLICANT**

**And**

**[Redacted]**

**RESPONDENT**

**BY**

**GRAHAM ANSTEE-BROOK (ADJUDICATOR)**

**ISSUED: 17 August 2020**

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## 1. DETAILS OF PARTIES

**Applicant:**  
[Redacted]

AND

**Applicant:**  
[Redacted]

### **ADJUDICATOR**

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## **2. ADJUDICATOR'S DETERMINATION**

I Graham Ivan Anstee-Brook the appointed adjudicator in the matter of the payment dispute between Sterling NT Pty Ltd and BSR EPC determine that:

- 2.1. The Respondent must pay the Applicant the sum of \$71,227.41 by 24 August 2020.
- 2.2. The Respondent must pay the Applicant interest on \$71,227.41 at the rate of 6.25% per annum from 5 August 2020 to date of payment.
- 2.3. In respect of the Adjudicator's costs the Respondent must pay the sum of \$1,552.50 to the Applicant by 24 August 2020.

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Graham Anstee-Brook  
Adjudicator

### **3. ENGAGEMENT**

- 3.1. A contract was entered into on 10 June 2019 between the Applicant and Respondent (**the Contract**) pursuant to which the Applicant was to provide [redacted] and construct [redacted] (**the Works**) for [redacted] (**Project**) near [redacted] in the Northern Territory.
- 3.2. The Works form part of the design and construction of the Project.

### **4. APPOINTMENT OF ADJUDICATOR**

- 4.1. On 16 July 2020 I was appointed adjudicator by the Master Builders Northern Territory pursuant to section 30(1)(a) of the *Construction Contracts (Security of Payments) Act 2004 (CCA)*.
- 4.2. The Applicant commenced an adjudication application (**Application**) which was delivered to Master Builders on 14 July 2020.
- 4.3. I accepted the appointment of adjudicator and wrote to the Applicant and Respondent on 17 July 2020.

### **5. CONFLICT OF INTEREST**

- 5.1. I have no material personal interest in the payment dispute or in the Contract under which the dispute has arisen.
- 5.2. I see no reason to disqualify myself pursuant to Section 31 of the CCA.

### **6. DISMISSAL UNDER SECTION 33(1)(a) OF THE CCA**

- 6.1. I am obliged to dismiss the Application without making a determination on the merits depending on my findings of fact relating to section 33(1)(a)(i) to (iv) of the CCA. I am obliged to consider each of the subsections to determine whether I am obliged to dismiss the Application without making a determination on the merits. *Moroney Anor and Murray River North Pty Ltd [2008] WASAT 111 at [82]*.

Section 33(1) provides as follows:

*An appointed adjudicator must within the prescribed time or any extension of it made under section 34(3)(a) –*

*(a) dismiss the application without making a determination of its merits if –*

- (i) the contract concerned is not a construction contract; or*
- (ii) the application has not been prepared and served in accordance with section 28; or*
- (iia) the dispute that is the subject of the application is also the subject of another application that has not been dismissed or determined; or*

- (iii) *an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgement or other finding about the dispute the subject of the application; or*
- (iv) *satisfied that it is not possible to fairly make a determination;*
  - (A) *because of the complexity of the matter; or*
  - (B) *because the prescribed time or any extension of it is not sufficient for any other reasons; or*

## **7. CONSTRUCTION CONTRACT**

- 7.1. If the contract between the parties is not a construction contract I must dismiss the Application.
- 7.2. The scope of work under the Contract included civil engineering works for the Project. This work falls within the definition of construction work as defined in section 6 of the CCA.
- 7.3. I am satisfied that the Contract is a construction contract.

## **8. APPLICATION PREPARED IN ACCORDANCE WITH SECTION 28 OF THE CCA**

- 8.1. To satisfy the requirements of section 28 of the CCA:
  - 8.1.1. within 65 working days after a payment dispute arises the Applicant must prepare a written application for adjudication, serve the application on the other party to the contract and on a Prescribed Appointer
  - 8.1.2. the Applicant must if the parties to the contract have appointed a Prescribed Appointer serve the application for adjudication on that Prescribed Appointer.
- 8.2. On 26 March 2020 the Applicant issued a Notice of Completion requesting a Certificate of Completion and the return of 50% of the retention being held by the Respondent. On 9 April 2020 the Respondent advised the Applicant that it would claim for damage to [redacted] and inadequate project management. The Respondent sent further correspondence to the Applicant on 27 April 2020 quantifying its claim in the sum of \$81,080.00 in relation to [redacted] damage and inadequate project management.
- 8.3. A payment dispute pursuant to the CCA arose either on 10 April 2020 or on 28 April 2020. In either event the Application has been brought within time.
- 8.4. I am satisfied that the Application otherwise satisfies the requirements of the section 28 of the CCA other than for the question of service on the Prescribed Appointer.

**9. PRESCRIBED APPOINTER SECTION 28(1)(c)(ii)**

9.1. In the Response the Respondent contends that the Applicant has not served the Application on the agreed Prescribed Appointer and accordingly I have no jurisdiction in relation to this Application as I have not been properly appointed.

9.2. The following are matters not in issue between the parties.

9.2.1. The Application was served on the Master Builders Northern Territory Limited as the Prescribed Appointer; which is a named Prescribed Appointer in the Regulations of the CCA

9.2.2. The Contract in Appendix 1 contains the following:

<i>Item 36</i>	<i>Authorised Nominating Authority or Prescribed Appointer (Clause 23.7)</i>	<i>Royal Institute of Chartered Surveyors Dispute Resolution Service (RICS DRS)</i>
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9.3. *The Royal Institute of Chartered Surveyors Dispute Resolution Service (RICS DRS)* is not named as such in the Regulations of the CCA however *RICS Australasia Pty Ltd ACN 089 873 067 trading as RICS Dispute Resolution Service* is named in the Regulations of the CCA as a Prescribed Appointer.

9.4. The Contract at clause 23.7.4 provides as follows:

*The parties agree that any adjudication application under the SOP Legislation must be made to the Authorised Nominating Authority or Prescribed Appointer.*

9.5. The Respondent contends that the Application should have been served on RICS Australasia Pty Ltd (ACN 089 873 067) trading as RICS Dispute Resolution Service.

9.6. The CCA in section 4 provides as follows:

***Prescribed Appointer*** means a person prescribed as such by the Regulations

9.7. The regulations clearly articulates the names and descriptions of prescribed appointers for the purposes of the CCA.

9.8. The Applicant contends that the entity named in the Contract (*Royal Institute of Chartered Surveyors Dispute Resolution Service (RICS DRS)*) is not the entity described in the Regulations and accordingly the parties to the Contract did not agree an entity as a Prescribed Appointer under the CCA and accordingly the Applicant was entitled to choose any of the entities named in the Regulations as a Prescribed Appointer.

9.9. The Respondent contends that the Contract must be construed in accordance with the principles found in *Mount Bruce Mining Pty Ltd v Wright Prospecting*

*Pty Ltd (2015) 256 CLR. The Respondent relies on the extract from [46 of Mount Bruce].*

*The rights and liabilities of parties under a contract are determined objectively, by reference to its text, content (the entire text of the Contract as well as any Contract, document or statutory provision referred to in the text of the Contract) and purpose.*

- 9.10. The Respondent further contends that as the Contract makes reference to the CCA in numerous instances the interpretation of clause 23.7.4 in conjunction with Item 26 of the Appendix 1 must be interpreted to mean that the entity named in Item 26 of Appendix 1 must be read as *RICS Australasia Pty Ltd* which is the entity named in the Regulations of the CCA. Further a common sense approach must be taken to determining the meaning of Item 36 of Appendix 1 and if this is done it is logical that the Respondent and Applicant intended by the entity named in Item 36 of Appendix 1 means *RICS Australasia Pty Ltd*.
- 9.11. The provisions of section 28 of the CCA are couched in mandatory terms – a *party to the Contract must* ...(emphasis added). If a failure to comply with the provisions of section 28 of the CCA require an adjudicator to dismiss the application pursuant to section 33(1) of the CCA without making a determination on the merits then the question arises as to whether Prescribed Appointer under the Regulations must be clearly and properly named.
- 9.12. The Prescribed Appointer to which reference is made in section 28 of the CCA is that Prescribed Appointer in the definitions at section 4 of the CCA. That Prescribed Appointer in section 4 is the person prescribed as such in the Regulations. In further submissions from the Respondent reliance is had to *JKC Australia LNG Pty Ltd v CH2M Hill Companies Limited* [No. 2] [2020] WASCA112. The Respondent cites:

[71]

*Where a constructional choice is available it is important to consider what a reasonable business person reading the relevant clause or agreement would understand it to mean. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purposes and objects to be achieved by it.*

- 9.13. In further support of the Respondent's contentions regarding the Prescribed Appointer the Respondent cites *JKC Australia LNG Pty Ltd v CH2M Hill Companies Limited* [No. 2] [2020] WASCA112.

*A contract should be construed practically so as to give better effect to its commercial purpose. The law seeks to uphold commercial contractual obligations and the expectations that derive from them. The court should not adopt a narrow or pedantic approach to construction, particularly in the case of commercial arrangements.*

The provisions of the CCA and the Regulations have a commercial purpose and that is to provide certainty to a party where it seeks to commence an adjudication application in relation to the entity that is able to appoint an



adjudicator. The CCA specifically nominates certain entities as Prescribed Appointers.

- 9.14. In my view the issue is not one of the construction of a contract but the issue is to be resolved by reference to the CCA. The CCA provides for a statutory regime which in certain instances such as section 28 of the CCA contain mandatory provisions. Deciding on whether the Prescribed Appointer as named in the contract is the same entity as is named in the Regulations is not a matter of interpretation of a contract and is distinguishable and therefore must be decided upon the provisions of the CCA. In my view it can only be the entity named in the Regulations that is a Prescribed Appointer.
- 9.15. I find that as the entity named in the Contract is not a named entity in the Regulations as a Prescribed Appointer the parties to the Contract did not agree on a Prescribed Appointer and accordingly the arguments of the Respondent that there has been no proper appointment of an adjudicator are rejected.

## 10. APPLICANT'S CLAIM

- 10.1. The Applicant's claim is for the return of security held by the Respondent as a performance guarantee under the Contract. The amount claimed is \$71,227.41 (including GST) with interest thereon at the rate of 6.25% per annum calculated from 29 April 2020.

## 11. [Redacted] DAMAGE

- 11.1. On 12 January 2020 [*an electrical cable*] was discovered as damaged by [*name redacted*], an electrician from [C] while conducting [*redacted*] testing. On 27 January 2020 a report was prepared followed by a further report on 3 February 2020 both of which stating *evidence suggests that during the trenching installation carried out by [C] of the [redacted], [electrical cabling] was punctured by the teeth of an excavator bucket.*
- 11.2. The Respondent contends that [C] was a subcontractor of the Applicant and pursuant to the Contract the Applicant is liable for the actions of its subcontractors.
- 11.3. The Respondent engaged [*name redacted*] (R) to undertake rectification works of the damaged cable and on 3 February 2020 R issued a payment claim for January 2020 which included claims for rectification of the damaged cable. The payment claim was used by the Respondent to assess the value of the rectification works to the damaged cable. There is no separate identifiable claim from R which specifically sets out the amounts R incurred to rectify the cable. The Respondent claims the amount of \$21,680.00 in relation to the rectification of the damaged cable.
- 11.4. The Respondent's claim for damage to the [*redacted*] is supported by a statutory declaration of [*name redacted*] (H). H states that he used the payment claim from R to extrapolate amounts due being as follows:
- [*redacted*] damage investigation – 10 hours at \$130 per hour
  - [*redacted*] damage discovery with machinery – 35 hours at \$130 per hour

- [redacted] damage assessment & report – electrical engineer employed by the Respondent for 10 hours at \$125 per hour
  - [redacted] damage rectification and retest works – plant and equipment for various items at \$2760; \$1380 and \$590 respectively and a supervisor for 20 hours at \$105
- 11.5. The Applicant denies that it damaged the [redacted] and states that as at 15 October 2019 the Applicant had demobilised from site and as the cable damage was only identified on 12 January 2020 it is not conceivable that the cable which was buried by no later than 15 October 2019 would not have been tested earlier than 12 January 2020.
- 11.6. The Respondent states in the Response that where the Respondent does not expressly dispute a matter in the Application that should not be taken as an admission by the Respondent. Whilst that is an acceptable way of dealing with matters given the direct statement of the Applicant regarding demobilisation in October 2019 the issue of testing and the conduit work having been removed from the Applicant's Works, it was incumbent upon the Respondent to respond to these critical matters. I infer that the allegations by the Applicant are correct.
- 11.7. The Applicant further contends that the photographs which have been attached to the Response indicate conduit work which had been removed from the scope of the Applicant's services and the Applicant proffers the position that C was engaged by the Respondent after the Applicant had demobilised from site to perform services in the vicinity of the damaged [redacted] and damaged the [redacted]. This is not directly contested by the Respondent.
- 11.8. I am not persuaded by the Respondent that the damage was caused to the cable by the Applicant and further the amount claimed by the Respondent for rectification works is not supported by any independent information from Run but the amount is calculated as an extrapolation of the payment claim made by Run by an employee of the Respondent.
- 11.9. On balance I am not satisfied that the Applicant caused the damage to the cable nor am I satisfied about the quantum claimed by the Respondent.
- 11.10. I determine that the Respondent has no valid setoff.

## **12. INADEQUATE PROJECT MANAGEMENT**

- 12.1. The Respondent contends that it is entitled to setoff an amount claimed in relation to inadequate project management provided by the Applicant. The amount claimed by the Respondent is \$59,400.00.
- 12.2. The Respondent's claim in relation to project management services is supported by the statutory declaration of H. H states that he calculated the cost to [the Respondent] of the Applicant's reduced project management services on the following basis:

- 12.2.1. The rate for a project management is \$132.00 per hour as set out in Appendix 7 of the Contract;

- 12.2.2. The project manager under the Contract was required to work 50 hours per week for 9 weeks. H states that 50 hours per week is a reasonable estimate.
- 12.3. The 9 week period is based on the basis of when the Applicant's project manager [Z] left the Project on 14 August 2019 until the Date for Completion under the Contract which was 15 October 2019.
- 12.4. H further states that by reason of the departure of [Z], employees of the Respondent were required to work longer hours.
- 12.5. The Applicant denies that it did not properly provide project management services and that there is no merit to the claim by the Respondent.
- 12.6. The basis of the Respondent's claim is that the contract value of the Contract must be reduced by reason of the departure of Mr [Z]. I am not persuaded that this is the correct measure of loss or damage and therefore I am not prepared to make a determination in favour of the Respondent in relation to a setoff.
- 12.7. I determine that the Respondent has no valid claim for setoff in relation to project management services.

### **13. COMPLETION**

- 13.1. The Applicant served a Notice of Completion on 26 March 2020 requesting a return of the security the subject of this Application. The Respondent responded on 9 April 2020 and 27 April 2020 to the effect that it had claims against the Applicant for cable damage and inadequate project management in the sum of \$81,080.00.
- 13.2. The Respondent contends that any security that is to be released is governed by clause 9.3.1 of the Contract.

*Subject to Clause 9.3.2 the Security held by the Contractor under the Contract will be released as follows:*

- (a) *50% of the security will be released within 20 business days of a written request from the Subcontractor after a Certificate of Completion for the Work Under Subcontract has been issued.*

The Respondent issued a Certificate of Completion on 4 August 2020 at which time the Respondent had set off against the Security the sum of \$81,080.00.

- 13.3. Even though the Respondent issued a certificate of completion on 4 August 2020 the Respondent contends that on or about 5 August 2020 it became aware that the Applicant had not completed reinstatement works pursuant to clause 25 of the Contract. I am not persuaded by the Respondent's contentions given the Applicant's issuing of a Notice of Completion on 26 March 2020 and the issuing of the certificate by the Respondent on 4 August 2020. Given the substantial length of time between the Applicant's claim relating to completion and the issue of the certificate it seems to me

implausible that during that interim period the Respondent would not have known about any incomplete works.

- 13.4. On a balance of probabilities I am not persuaded that the Respondent has any entitlement to a setoff and that at least by 4 August 2020 the Security should have been returned.
- 13.5. I determine that the Respondent must pay the Applicant the sum of \$71,227.41 being half the Security by 24<sup>th</sup> August 2020.

#### **14. INTEREST**

- 14.1. The Applicant claims interest pursuant to section 35 of the CAA at the rate of 6.25% per annum being the rate prescribed by regulation 9 of the CCA from 28 April 2020 to 14 July 2020.
- 14.2. As I have determined that the Security should have been returned by at least 4 August 2020 I determine that the Respondent must pay interest to the Applicant at the rate of 6.25% per annum on \$71,227.41 from 5 August 2020 to date of payment.

#### **15. COSTS**

- 15.1. Both parties have made submissions in relation to costs as provided for in section 36(2) of the CCA. I am not satisfied that either party *incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party* and make no order under section 36 of the CCA.

#### **16. ADJUDICATOR'S COSTS**

- 16.1. An Adjudicator is entitled to payment pursuant to Section 46(1A) and that the parties to the dispute pursuant to Section 46(4) are jointly and severally liable to pay such costs.
- 16.2. I determine that the parties each pay half the Adjudicator's costs.
- 16.3. The Applicant provided a deposit of \$5,000.00 for the Adjudicator's fees and disbursements and the Respondent is required to pay the Applicant half of the Adjudicator's fees and disbursements.
- 16.4. The Adjudicator's fees and disbursements are \$3,105.00 and accordingly I determine that the Respondent must pay the Applicant \$1,552.50.