

In the matter of

the

Construction Contracts (Security of Payments) Act 2004 (NT)
(“the Act”)

and

[Redacted]
(the “Applicant”)

and

[Redacted]
(the “Respondent”)

ADJUDICATOR’S DETERMINATION

REGULATORY INFORMATION

Applicant's Name	[Redacted]
Applicant's ABN	[Redacted]
Applicant's Address	[Redacted]
Respondent's Name	[Redacted]Pty Ltd
Respondent's ABN	[Redacted]
Respondent's Address	[Redacted]
	c/- [Redacted]
Adjudicator's Name	Warren David Fischer
Date of Determination	28 April 2021
Determination ID Number	NT 54.21.01
Confidential Information	Nil advised by the parties

ADJUDICATOR'S DETERMINATION

NT 54.21.01

I, Warren David Fischer, as the Adjudicator for the adjudication application dated 25 March 2021 made by [the Applicant] pursuant to the *Construction Contracts (Security of Payments) Act 2004* (NT), for the reasons attached to this Determination determine that, on the balance of probabilities, [the Respondent] is to pay [the Applicant] the amounts of:

- a) \$201,022.36 (excluding GST), along with \$20,102.24 GST pursuant to s33(1)(b)(i) of the Act; and,
- b) \$9,679.09 interest, pursuant to s33(1)(b)(i) of the Act;

on or before 6 May 2021, pursuant to s33(1)(b)(ii) of the Act; and,

[the Respondent]:

- c) is to bear 100% of the costs of the adjudication pursuant to s36 and s46 of the Act; and,
- d) is to pay [the Applicant] the amount of \$15,004.00 including GST, being the costs of the adjudication paid by [the Applicant], on or before 6 May 2021, pursuant to s36 of the Act.

Signed

Warren David Fischer

NT Adjudicator Registration No. 54

Date: 28 April 2021

ADJUDICATOR'S REASONS

NT 54.21.01

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PREFACE AND CHRONOLOGY

- 1 On or about 11 August 2020, the Applicant submitted to the Respondent a [project] Maintenance Proposal” which is stated to reflect the Applicant’s understanding of the Respondent’s “desired outcomes and budget constraints” (“**the Proposal**”). The Proposal is for [the project work details redacted] and included a quotation, in a schedule of rates form, for \$1,206,963.45 including GST subject to a mutually agreed form of contract.¹
- 2 The Applicant submits that, on or about 19 August 2020, the Respondent and the Applicant entered into an amended AS2124-1992 Australian Standards contract (“**the Contract**”) for the performance [project work details and location redacted] (“**the Works**”).²
- 3 Annexure D to the Contract is titled “Schedule of Rates” and provides rates and quantities for numerous items (in the same form as the Proposal) and totals, in aggregate, \$1,206,963.45 including GST (“**the Schedule of Rates**”).³
- 4 Annexure C to the Contract is titled “Scope of Works” and provides a brief description of the work included in each of the items included in the Schedule of Rates along with a table setting out the various locations at which each of the various items of work, and the associated quantity, are to be undertaken (“**the Scope of Work**”).⁴
- 5 There is some controversy about the Contract which I will address at paragraphs 31 to 39 below.
- 6 On or around 24 August 2020, the Respondent made an initial advance payment to the Claimant of \$200,000.00 including GST (\$181,818.18 excluding GST), so that the Claimant would commence the Works.⁵
- 7 The Works were subsequently commenced and the Respondent made further payments to the Applicant as follows:

¹ refer attachment SM-1 to the [M] Declaration

² refer paragraph 3.1 of the Application Submissions and Annexure 1 of the [F] Declaration

³ refer Annexure D of the Contract

⁴ refer Annexure C of the Contract

⁵ refer paragraph 5 of the [M] Declaration

- .1 \$131,872.44 excluding GST in September 2020 for works to 26 September 2020;
- .2 \$278,434.63 excluding GST in October 2020 for works to 8 October 2020; and,
- .3 \$201,666.68 excluding GST in November 2020 for works to 20 October 2020,

for a total amount paid of \$793,791.94 excluding GST [\$873,171.13 including GST] prior to the issue of Payment Claim No. 5.⁶

- 8 On 2 December 2020, the Applicant issued Payment Claim No. 5 on the Respondent in the amount of \$529,124.60 including GST (“**the Payment Claim**”) for work up to and including 30 November 2020. The Payment Claim included items and quantities associated with the Schedule of Rates along with 3 variations.⁷
- 9 The Respondent did not respond to the Payment Claim with a payment certificate issued pursuant to the Contract, or otherwise reject or wholly or partly dispute the Payment Claim, before 30 December 2020.⁸
- 10 The Applicant submits that a payment dispute arose on 30 December 2020 when the Respondent did not pay the Applicant the full amount of the Payment Claim when due (“**the Payment Dispute**”).⁹
- 11 The first the Respondent corresponded with the Claimant about the Payment Claim was on 7 January 2021, after the Payment Dispute had arisen.¹⁰
- 12 The Claimant and Respondent discussed the Payment Claim on 14 January 2021 and the Claimant emailed the Respondent further to that discussion on 15 January 2021.¹¹

⁶ refer paragraph 3.3 of the Application Submissions, Annexure 3 of the [F] Declaration and paragraph 3.3 of the Response Submissions

⁷ refer Annexure 3 of the [F] Declaration

⁸ refer paragraphs 7.2, 7.4, 8.4, 9.7, 10.1 and 16.11 to 16.13 of the Application Submissions

⁹ refer paragraph 16.5 of the Application Submissions

¹⁰ refer paragraph 17, and attachment SM-3, of the [M] Declaration

¹¹ refer paragraphs 20 and 21, and attachment SM-4, of the [M] Declaration

- 13 On 3 February 2021, the Respondent paid the Applicant \$280,000.00 excluding GST [\$308,000.00 including GST]. No detail was provided by the Respondent of the composition of that payment.¹²
- 14 On 25 March 2021, the Applicant served an application for adjudication, dated 25 March 2021, (“**the Application**”) on the RICS Dispute Resolution Service (“**RICS DRS**”).
- 15 By the Application, the Applicant seeks a determination that the Respondent pay the Applicant the sum of \$201,022.36 excluding GST [\$221,124.60 including GST] along with interest at 10% per annum from 30 December 2020.¹³ The Applicant also seeks a determination that the Respondent be 100% liable for its own costs, the Applicant’s costs and the Adjudicator’s costs.¹⁴
- 16 On 19 April 2021, the Respondent served the Applicant and me its “Adjudication Response” and additionally emailed a link for download of the annexures to the [M] Declaration (“**the Response**”).
- 17 By the Response, the Respondent seeks a determination that the Applicant pay the Respondent the sum of \$6,023,602.00, or alternatively \$5,717,648.41, excluding GST.¹⁵ The Respondent also seeks a determination that the Applicant be required to pay the Respondent’s costs of the adjudication and that no interest be paid.¹⁶

APPOINTMENT OF ADJUDICATOR

- 18 The RICS DRS is a trading name of RICS Australasia Pty Ltd (ACN 089 873 067) which is a prescribed appointer pursuant to r5 of the *Construction Contracts (Security of Payments) Regulations (NT)* (“**the Regulations**”).
- 19 On 29 March 2021, the RICS DRS enquired of my availability to determine the Application and I confirmed to the RICS DRS on that day that I was available to determine the Application as:

¹² refer paragraphs 7.2 and 10.1 of the Application Submissions

¹³ refer paragraphs 34.1, 31.4 and 30.1 of the Application Submissions

¹⁴ refer paragraphs 34.1 and 33.8 of the Application Submissions

¹⁵ refer paragraph 9.3 of the Response Submissions

¹⁶ refer paragraphs 8.1 and 8.3 of the Response Submissions

.1 I have no personal interest in the Payment Dispute, the Contract or any party to the Contract. Accordingly, I am not disqualified from adjudicating the dispute the subject of the Application on the grounds of conflict of interest pursuant to ss31(1) of the Act; and,

.2 I was not already adjudicating a payment dispute under the Act. Accordingly, I could not lack jurisdiction to adjudicate the dispute the subject of the Application pursuant to ss34(3)(b) or (c) of the Act.

20 On 29 March 2021, pursuant to s30(1) of the Act, the RICS DRS provided me with a copy of the Application and appointed me as the adjudicator to determine the Application.

PROCEDURE

21 On 30 March 2021, I wrote to the parties and requested confirmation of the date of service of the Application on the Respondent, confirmed my service details and confirmed my fees and security requirements.

22 On 1 April 2021, by email, the Applicant confirmed that the Application had been served on the Respondent on 25 March 2021.

23 On 3 April 2021, by email, the Respondent also confirmed that the Application had been served on it on 25 March 2021.

24 On 19 April 2021, the Respondent emailed me the Response and a link for download of the annexures to the [M] Declaration.

25 Pursuant to s33 of the Act, I must either dismiss or determine the Application within 10 working days after I was served with the Response on 19 April 2021. Accordingly, without extension, the latest date for me to decide the Application is by 5 May 2020.¹⁷

26 Consistent with ss34(1)(a) of the Act, in making this Determination, I have considered the following matters only:

- .1 The Application and its attachments comprising;
 - i. submissions in support of the Application (37 pages) (“**the Application Submissions**”);

¹⁷ 26 April 2021 and 3 May 2021 being public holidays

- ii. a statutory declaration of [name redacted], dated 25 March 2021, (“**the [F] Declaration**”) and annexures thereto including;
 - (a) Annexure 1, the Contract;
 - (b) Annexure 3, the Payment Claim;
 - (c) Annexures 4 to 6, Daily Job Reports;
 - (d) Annexure 7, Job Reports and Daily [redacted] Record Sheets;
 - (e) Annexure 8, Quote from [name redacted]; and,
 - iii. copies of case authorities relied upon in the Application;
- .2 The Response and its attachments comprising;
- i. submissions in support of the Response (16 pages) (“**the Response Submissions**”);
 - ii. a statutory declaration of [name redacted], dated 19 April 2021, (“**the [M] Declaration**”) and attachments thereto including;
 - (a) Attachment 1, the Proposal;
 - (b) Attachment 2, [M] email dated 16 November 2020;
 - (c) Attachment 3, [M] email dated 7 January 2021;
 - (d) Attachment 4, [F] email dated 15 January 2021;
 - (e) Attachment 5, [D] email dated 5 January 2021;
 - (f) Attachment 6, 18 No photographs;
 - (g) Attachment 7, 27 No [transport company name redacted] tax invoices dated from 12 October 2020 to 12 April 2021; and,
 - (h) Attachment 8, 3 No. [employment agency] tax invoices dated from 28 March 2021 to 4 April 2021.
- 27 In making this determination I did not request any further substantive submissions from the parties pursuant to s34(2)(a) of the Act.
- 28 In making this determination I did not conduct a conference with the parties pursuant to s34(2)(b) of the Act.
- 29 In making this determination I did not inspect or test any work or arrange any expert report pursuant to s34(2)(c) of the Act.

JURISDICTION

30 Section 33(1)(a) of the Act requires that I dismiss the Application in certain circumstances without making a determination on its merits. It is therefore necessary that I consider each circumstance set out in the Act to determine whether I have jurisdiction to make a determination of the Application on its merits.

➤ IS THERE A CONTRACT AND, IF SO, HOW IS IT COMPRISED?

31 In the Response Submissions, the Respondent submits that:

“[The Applicant] has not established a construction contract exists between the parties and that the adjudicator must therefore dismiss the adjudication application for lack of jurisdiction pursuant to section 5 of the Act.

Further and in the alternative, if the Contract at Annexure 1 to the [F] Statement was in place, the parties by their actions amended clause 42 to the Contract.”¹⁸

32 The Respondent further expands upon those submissions as follows:

“[The Applicant], as the claimant, bears the onus of proving the elements required to make out its claim but it has not provided any evidence that the parties agreed to be bound by the contract attached at Annexure 1 to the [F] Statement or that [the Respondent] accepted the terms of that contract. This is notwithstanding the fact that:

- (a) Pages 1 to 21 of the Annexures to the [F] Statement are all watermarked 'DRAFT';*
- (b) Pages 1 to 21 of the Annexures to the [F] Statement was not executed by either party; and*
- (c) that document was preceded by a contractual proposal not referred to by [the Applicant].*

The Adjudication Application states that the Contract was "entered into" on or about 19 August 2020 but provides no evidence for this assertion.

¹⁸ refer paragraphs 3.1 and 3.2 of the Response Submissions

A signed document is not always necessary in order for there to be a valid contract as the foundation of contractual relations is the agreement of the parties. However, where a party seeks to rely on an unsigned document, the Courts will review the circumstances surrounding the creation of the document to determine whether an intention to create legally binding relations by the parties can be objectively found. In this case, [the Applicant] has provided no evidence of an intention by [the Respondent] to be legally bound to the various contract terms provided by [the Applicant].

The Courts have found that a decisive issue as to whether the parties intended to be bound to a contract is to be objectively ascertained from the terms of the unsigned document when read in the light of the surrounding circumstances.

Paragraph 2 of the [F] Statement states that "The Contract was never executed by [the Applicant] or [the Respondent] and remained in draft form." [The Applicant] is plainly aware that the Contract was not executed and yet provides no basis in law for why it should be treated as a binding document.

As such, [the Respondent] submits that there was no 'construction contract' for the purposes of the Act and [the Applicant] is therefore not entitled to submit an adjudication application under section 27 of the Act.

Section 27 of the Act states that "If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part..."

For the reasons set out above, [the Respondent] submits that [the Applicant] has failed to demonstrate that there is a binding construction contract between the parties and that therefore, the adjudicator should dismiss the adjudication application for lack of jurisdiction".¹⁹

33 The Proposal, to which the Respondent has referred, expressly provides that the Applicant's offer was "*subject to a mutually agreed form of contract and appropriate risk allocation, including mutually acceptable terms and conditions*".

34 With the Application, the Applicant has provided a copy of the Contract which it submits the parties entered into on or around 19 August 2020. Whilst the

¹⁹ refer paragraphs 4.12 to 4.19 of the Response Submissions

Contract is marked as draft and is unsigned, the Respondent has acknowledged that it was aware of the Contract prior to making an advance payment to the Applicant on or around 24 August 2020 so that the Applicant would begin work.

- 35 The Respondent has acknowledged that the Claimant has been undertaking the work as described by the Scope of Works. The Respondent has also acknowledged that it has made four separate payments to the Applicant in respect of that work prior to the Payment Claim. The work items claimed in the Payment Claim reflect the work descriptions and rates included in the Schedule of Rates.²⁰
- 36 Notwithstanding its acknowledgement that it was aware of the Contract, the Respondent submits that it was referring to the Proposal in relation to the Applicant's scope of work.²¹
- 37 The Proposal includes some detail of the scope of various work items, however, it does not expressly identify the locations at which that work is to be carried out. That information is only expressly contained in the Scope of Works included the Contract.²² Accordingly, I do not accept the Respondent's submission that it was referring to the Proposal to determine the Applicant's scope of works as the Applicant's scope of works is only fully described in the Contract.
- 38 The Applicant has submitted that the Contract was entered into by the parties. As already identified, the Proposal was "*subject to a mutually agreed form of contract ...*" and the Respondent has acknowledged that it was aware of the Contract prior to making an advance payment to the Applicant so that the Applicant would commence work. The Contract is the only document which identifies the works sufficiently for the work to be commenced, that is, the Contract is the only document which identifies the locations at which the various work items to be carried out. In my view, there has been offer, acceptance and consideration. The Respondent accepted the Contract as

²⁰ with the exception of 3 variations for similar work which the Respondent has assessed as completed and payable at the amounts claimed by the Applicant.

²¹ refer paragraph 4 of the [M] Declaration.

²² refer Attachment SM-1 to the [M] Declaration and Annexure 1 to the [F] Declaration.

offered when it subsequently made the advance payment so that the Applicant would commence the Works.

39 It follows that I do not accept the Respondent's submission that the Applicant has not established that a contract exists between the parties. I determine that the Contract²³ is the contract between the parties for the works the subject of the Application.

➤ **IS THE CONTRACT A CONSTRUCTION CONTRACT TO WHICH THE ACT APPLIES?**

40 Subsection 33(1)(a)(i) of the Act, requires that I decide whether the Contract is a *construction contract*.

41 Sub-section 5(1) of the Act relevantly provides:

*"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:*

- (a) to carry out construction work;*
- (b) to supply to the site where construction work is being carried out any goods that are related to construction work;*
- (c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work;*
- (d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work."*

42 Sub-section 6(1) of the Act relevantly provides:

"Construction work is any of the following work on a site in the Territory:

- (a) reclaiming land, draining land or preventing the subsidence, movement or erosion of land;*
- (b) installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing any works, apparatus, fittings, machinery or plant associated with any work mentioned in paragraph (a);*
- (c) constructing the whole or a part of any civil works, or a building or structure, that forms or will form (whether permanently or not and*

²³ Annexure 1 to the [F] Declaration.

- whether or not in the Territory), part of land or the seabed (whether above or below it);*
- (d) fixing or installing on or in anything mentioned in paragraph (c) any fittings forming, or to form, (whether or not permanently) part of the thing, including:*
 - (i) fittings for electricity, gas, water, fuel oil, air, sanitation, irrigation, telecommunications, air-conditioning, heating, ventilation, fire protection, cleaning, the security of the thing or the safety of people; and*
 - (ii) lifts, escalators, insulation, furniture or furnishings;*
 - (e) altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing anything mentioned in paragraph (c) or any fittings described in paragraph (d) that form part of the thing;*
 - (f) any work that is preparatory to, necessary for, an integral part of or for the completion of any work mentioned in paragraph (a), (b), (c), (d) or (e), including:*
 - (i) site or earthworks, excavating, earthmoving, tunnelling or boring; and*
 - (ii) laying foundations; and*
 - (iii) erecting, maintaining or dismantling temporary works, a temporary building or a temporary structure, including a crane or other lifting equipment and scaffolding; and*
 - (iv) cleaning, painting, decorating or treating any surface; and*
 - (v) site restoration or landscaping;*
 - (g) any work that is prescribed by the Regulations to be construction work for this Act.*

43 Section 7 of the Act relevantly provides:

- “(1) Goods are related to construction work if they are:*
- (a) materials or components (whether or not pre-fabricated) that will form part of anything mentioned in section 6(1)(b) or (c) or of any fittings mentioned in section 6(1)(d); or*
 - (b) any fittings mentioned in section 6(1)(d) (whether or not pre fabricated); or*

- (c) *plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of the construction work at the site of the construction work; or ...*
- (2) *Professional services are related to construction work if they are:*
 - (a) *services that are provided by a 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, but not including accounting, financial or legal services; or ...*
 - (3) *On-site services are related to construction work if they are services (other than professional services):*
 - (a) *that relate directly to construction work, including providing labour to carry out construction work; or ...”*

44 As identified at paragraph 4 above, the Contract includes the Scope of Works.
[List of work details redacted]

45 From my review of the Contract, it is not apparent that the work to be performed is of the nature of that excluded by s6(2) of the Act and neither party has made a submission in that regard.

46 As identified at paragraph 2 above, the Works are to be undertaken [site details redacted] in the Northern Territory. Therefore, I am satisfied that the nature of the work required to be performed by the Contract is *construction work* pursuant to s6 of the Act falling within the descriptions of the work described by, at least, ss6(1)(a), ss6(1)(b), ss6(1)(e) and ss6(1)(f) of the Act.

47 It follows that I determine that the work required by the Contract includes *construction work* within the meaning of s6 of the Act.

48 The Applicant is also required to supply goods and on-site services related to the *construction work* required by the Contract, falling within the descriptions of the goods described by, at least, ss7(1)(a) and ss7(1)(c) and the services described by ss7(3)(a) of the Act.

49 Consistent with my determinations at paragraphs 46 to 48 above, I determine that the Contract is a *construction contract* within the meaning of s5 of the Act as under the Contract the Applicant has obligations described in each of ss5(1)(a), ss5(1)(b) and ss5(1)(d) of the Act.

50 In summary, the Contract:

- .1 was entered into after 1 July 2005;²⁴
- .2 is a *construction contract* within the meaning of s5 of the Act; and
- .3 is not of a class excluded by the Regulations.

51 I have not identified any provisions of the Contract relating to any construction work to be undertaken by the Applicant as a prescribed employee of the Respondent, which is excluded by s9(3) of the Act.

52 The Contract is not a high value construction contract within the meaning of s4A of the Act and accordingly the Contract is not subject to s10A of the Act.²⁵

53 In view of my above determinations, I determine the Contract to be a *construction contract* to which the Act applies pursuant to s9 of the Act.

➤ **CONTRACT PROVISIONS**

54 Before proceeding further, it is appropriate that I first turn to consideration of the Contract and whether it includes any prohibited or relevant implied provisions.

55 Clause 42.1 of the Contract relevantly provides (my underlining):

“Payment Claims, Certificates, Calculations and Time for Payment

...

Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown

²⁴ by 24 August 2020, when the Respondent paid the Applicant to commence the Works

²⁵ s5A of the *Construction Contracts (Security of Payments) Regulations 2005* provides that the high value construction contract amount is 500 000 000 monetary units. From 1 July 2020, the value of a monetary unit is \$1.02 and accordingly the threshold value for a high value contract is \$510,000,000. By comparison, the initial value of the Contract was \$1,206,963.45.

in the Certificate as due to the Contractor or to the Principal as the case may be, or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable. ...”

56 Section 12 and s13 of the Act relate to prohibited payment provisions, I am satisfied that clause 42.1 of the Contract does not fall foul of s12 or s13 of the Act as it is not a ‘pay if paid’ or ‘pay when paid’ provision and it does not provide for payment (of undisputed amounts) to be made more than 30 working days after the payment is claimed by the Applicant.

57 Clause 40 of the Contract provides for variations of contractual obligations in the context of s16 of the Act. In the circumstances of the Application that provision is not in issue as the Respondent has accepted the Applicant has undertaken the variations claimed and has accepted the Applicant’s valuation of those variations.

58 Clause 3.1 of the Contract relevantly provides:

“Performance and Payment

The Contractor shall execute and complete the work under the Contract.

The Principal shall pay the Contractor ...

(b) for work for which the Principal accepted rates, the sum ascertained by multiplying the measured quantity of each section or item of work actually carried out under the Contract by the rate accepted by the Principal for the section or item,

adjusted by any additions or deductions made pursuant to the Contract”.

59 I am satisfied that clause 3.1 of the Contract is a provision about the amount, or a way of determining the amount, that the Applicant is entitled to be paid for the obligations the Applicant performs for the purposes of s17 of the Act.

60 Clause 42.1 of the Contract relevantly provides (my underlining):

“Payment Claims, Certificates, Calculations and Time for Payment

At the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor arising out of or in connection with the Contract or for any alleged breach thereof. ...”

61 The “Times for Payment Claims” in Annexure A states “*TBC pending credit terms*”

62 As the “Times for Payment Claims” in Annexure A states “*TBC pending credit terms*”, the Contract does not provide a provision about whether or not the Applicant is able to make a claim on the Respondent for a progress payment for the obligations under the Contract that the Applicant has performed for the purposes of s18 of the Act. Accordingly, the provisions in Schedule 1, Division 3 of the Act are implied in the Contract, namely:

“3 Entitlement to make claim

The contractor is entitled to make one or more claims for a progress payment in relation to the contractor's obligations it has performed and for which it has not been paid by the principal.

4 When claim can be made

(1) A claim by the contractor for a progress payment can be made at any time after the contractor has performed any of its obligations.

(2) *The making of a claim for a progress payment does not prevent the contractor from making another claim for an amount payable to the contractor under or in connection with this contract.*”

63 The extracted provisions of clause 42.1 of the Contract set out at paragraph 60 above includes provisions³³ about how the Applicant must make a claim to the Respondent for payment for the purposes of s19 of the Act.

64 Clause 42.1 of the Contract relevantly provides:

“Payment Claims, Certificates, Calculations and Time for Payment

...

Within 14 days after receipt of a claim for payment, the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. The Superintendent shall allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issued pursuant to Clause 42.8 or a Certificate issued pursuant to Clause 44.6, amounts paid under the Contract and amounts otherwise due from the Principal to the Contractor and/or due from the Contractor to the Principal arising out of or in connection with the Contract including but not limited to any amount due or to be credited under any provision of the Contract. ...”

65 The extracted provisions of clause 42.1 of the Contract set out in the preceding paragraph are provisions about when and how the Respondent must respond to a payment claim made by the Applicant for the purposes of s20(a) of the Act.

66 The underlined extracted provisions of clause 42.1 of the Contract set out at paragraph 55 above are provisions about when payment must be made for the purposes of s20(b) of the Act.

67 Clause 42.9 of the Contract relevantly provides:

“Interest on Overdue Payments

If any moneys due to either party remain unpaid after the date upon which or the expiration of the period within which they should have been paid then interest shall be payable thereon from but excluding the date upon which or the expiration of the period within which they should have been paid to and including the date upon which the moneys are paid. The rate of interest shall be the rate stated in the Annexure and if no rate is stated the rate shall be 18 percent per annum. Interest shall be compounded at six monthly intervals.”

68 “The rate of interest on overdue payments” stated in Annexure A is “10%”

69 Clause 42.9 and the Annexure A of the Contract is a provision about interest to be paid on any payment that is not made at the time required by the Contract for the purposes of s21 of the Act.

70 There are no other implied provisions in the Act relevant to the subject matter of the Application.

➤ **HAS THE APPLICATION BEEN PREPARED AND SERVED IN ACCORDANCE WITH S28 OF THE ACT?**

71 Section 33(1)(a)(ii) of the Act, requires that I dismiss the Application if it has not been prepared and served in accordance with s28 of the Act.

72 Section 28(1) of the Act relevantly provides that *“to apply to have a payment dispute adjudicated, a party to the contract must, within 65 working days after the dispute arises or, if applicable, within the period provided for by section 39(2)(b):*

- (a) prepare a written application for adjudication; and*
- (b) serve it on each other party to the contract; and*
- (c) serve it on:*
 - (i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents – the adjudicator; or*
 - (ii) if the parties to the contract have appointed a prescribed appointer – the appointer; or*

(iii) otherwise – a prescribed appointer chosen by the party; and ..”

73 Accordingly, it is necessary to determine if there is a *payment dispute* which in turn requires the determination of whether there was a *payment claim* within the meaning of the Act.

➤ **WAS THERE A PAYMENT CLAIM WITHIN THE MEANING OF S7A OF THE ACT?**

74 Section 7A of the Act relevantly provides that:

“A 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 under the contract; or ...”

75 There is no controversy that the Payment Claim was served by the Applicant on the Respondent on 2 December 2020.²⁶ The Payment Claim was served by the email from [F], dated 2 December 2020.²⁷

76 The Payment Claim comprises a Tax Invoice, attached Claim Sheet and a listing of all previous claims made. The Tax Invoice is addressed to the Respondent and identifies that it relates to [work location redacted] for “Claim Number 5 – Works to 30th November 2020 as per attached claim sheet” and is for the amount of \$481,022.36 excluding GST, \$529,124.60 including GST. The attached claim sheet is in the same form as the Schedule of Rates, including the same items and applicable rates with the exception of one varied rate and one additional item and three variations. Numerous of the quantities are varied from those in the Schedule of Rates, the Applicant has identified that the Respondent varied the Scope of Works on 21 September 2020²⁸ and that is reflected in the heading over the “Original Contract” quantities and in those quantities. The claim sheet headings are: Schedule (item and description), Original Contract (Revised Scope 21 Sept) (quantity, unit, rate and total), Previous Claims (quantity, unit, rate and total), Current Claim

²⁶ refer paragraphs 3.4, 7.1, 14.4 and 16.1 of the Application Submissions, paragraph 17 of the [F] Declaration, paragraphs 2.1 and 4.6 of the Response Submissions and paragraphs 17 and 18 of the [M] Declaration.

²⁷ refer Annexure 3 of the [F] Declaration.

²⁸ refer paragraphs 13 and 14 of the [F] Declaration.

(quantity, unit, rate and total), Forecast Remaining Claim (quantity, unit, rate and total) and Total Claim to Date. The Totals row, under the Current Claim heading, bears the amount \$481,022.36.

77 Having reviewed the Payment Claim, I determine that it complies with the requirements for a claim made under the Contract as:

- .1 it is addressed to the Respondent, the Principal, and identifies the project and the works undertaken;
- .2 the amount claimed is calculated in accordance with clause 3.1 of the Contract,²⁹ reflecting the items and rates in the Schedule of Rates;
- .3 to the extent that the amount claimed includes variations, the value of those variations has been calculated in accordance with clause 40 of the Contract;³⁰
- .4 it includes the information required by clause 42.1 of the Contract;³¹
- .5 it is made in respect of work the Applicant claims to have completed in compliance with the implied provisions in Schedule 1, Division 3 of the Act; and,³²
- .6 it is made within the time permitted by the implied provisions in Schedule 1, Division 3 of the Act.³³

78 I am therefore satisfied that the amount of \$481,022.36 excluding GST, \$529,124.60 including GST, claimed in the Payment Claim arises in relation to the performance of the Applicant's obligations under the Contract asserted to be completed to 30 November 2020.

79 I consider that the Payment Claim is "*a claim made under a construction contract by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract*".

80 It follows that I determine that the Payment Claim is a payment claim within the meaning of s7A the Act as contended for by the Applicant.³⁴

²⁹ see paragraph 58 above

³⁰ see paragraph 6.3 and Table 1, items 6, 7 and 8 of the Response Submissions, the Respondent has agreed the amounts claimed by the Applicant for the variations (cf clause 40.3 of the Contract).

³¹ see paragraph 60 above

³² see paragraph 62 above

³³ see paragraph 62 above

³⁴ see paragraph 13.4 of the Application Submissions

➤ **IS THERE A PAYMENT DISPUTE WITHIN THE MEANING OF S8 OF THE ACT AND, IF SO, WHEN DID IT ARISE?**

81 Section 8 of the Act relevantly provides:

“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 partly disputed; or

(ii) when the amount claimed is due to be paid, the amount has not been paid in full; or ...”

82 The Applicant submits that the Respondent did not provide a payment certificate in response to the Payment Claim pursuant to clause 42.1 of the Contract.^{35 36} The Respondent does not make any contrary submission and has not included with the Response any such document.

83 Clause 42.1 of the Contract provides that, in circumstances where a payment certificate has not been issued, the Respondent is to pay the Applicant the full amount of the Payment Claim within 28 days after receipt of the Payment Claim.³⁷

84 In the circumstances of the Application, the Payment Claim was received by the Respondent on 2 December 2020. Accordingly, as no payment certificate was issued, the Respondent was required to pay the Applicant the full amount of the Payment Claim by 30 December 2020, being 28 days after receipt of the Payment Claim.

85 It is uncontested that the Respondent has not paid the Applicant the full amount of the Payment Claim.³⁸

86 The Respondent submits that there is no payment dispute as payment was made in accordance with an agreement reached by the parties.³⁹ The discussion upon which the Respondent relies to give rise to the agreement

³⁵ see paragraphs 3.5, 7.4 and 8.1 of the Application Submissions

³⁶ see paragraph 64 above

³⁷ see paragraph 55 above

³⁸ see paragraphs 3.6, 3.8, 7.2, 8.3, 16.4 and 33.37 of the Application Submissions and paragraphs 2.1, 3.15, 4.10, 6.1, 7.8 of the Response Submissions

³⁹ see paragraphs 2.3, 4.2 of the Response Submissions

purportedly avoiding a payment dispute occurred on 14 January 2021;⁴⁰ that is subsequent to the payment dispute arising under the Act.

87 Accordingly, I reject the Respondent's submission that there is no payment dispute within the meaning of s8 of the Act.

88 The Respondent also submits that the Applicant is estopped from relying on the Payment Claim to assert the Respondent owes it the amount claimed in the Application.⁴¹ The Respondent has failed to develop and provide proper foundation for that submission. It is not clear to me how an estoppel could arise in respect of the Applicant's entitlement to make the Application relying on the Payment Claim when:

- .1 a payment dispute for the purposes of s8 of the Act had arisen prior to the agreement upon which the Respondent relies;
- .2 accordingly, the Applicant's statutory right to make an adjudication application had accrued prior to the agreement upon which the Respondent relies;
- .3 any purported waiver of an entitlement under the Act has no effect, pursuant to s10(3) of the Act;
- .4 the payment terms upon which the Respondent relies are prohibited pursuant to s13 of the Act (being in excess of 30 working days from 2 December 2020 to 3 February 2021); and,
- .5 the Applicant's contractual right to payment of the full amount of the Payment Claim, pursuant to clause 42.1 of the Contract, had accrued prior to the agreement upon which the Respondent relies.

No relevant detriment to the Respondent is apparent to me in those circumstances.

89 I also observe that the Applicant's email of 15 January 2021, upon which the Respondent relies to corroborate the purported agreement, does not suggest any undertaking was given by the Applicant that it would not make an adjudication application relying upon the Payment Claim.⁴²

⁴⁰ see paragraphs 2.1, 3.12 and 4.8 of the Response Submissions

⁴¹ see paragraph 2.1 of the Response Submissions

⁴² see Attachment SM-4 to the [M] Declaration

90 Accordingly, I also reject the Respondent's submission that the Applicant is estopped from founding the Application on the Payment Claim and the payment dispute arising pursuant to s8 of the Act in respect of it.

91 In view of my findings on the matters discussed at paragraphs 81 to 90 above, I determine that a payment dispute arose pursuant to s8(a)(ii) of the Act when the Respondent failed to pay the full amount of the Payment Claim to the Applicant when due on 30 December 2020 as the Applicant submits.⁴³

➤ **HAVE THE REQUIREMENTS OF S28 OF THE ACT BEEN SATISFIED?**

92 Given my determination of the date that the *payment dispute* the subject of the Application arose, to comply with the requirements of ss28(1) of the Act, the Applicant was required to prepare and serve the Application within 65 working days after 30 December 2020 at the latest, I calculate that to be by 13 April 2021.

93 As identified at paragraph 26.1 above, the Application is in writing as required by s28(1)(a) of the Act.

94 As identified at paragraphs 22 and 23 above, there is no controversy that the Application was served on the Respondent on 25 March 2021.

95 As identified at paragraph 14 above, the Application was served on a prescribed appointer on 25 March 2021. Neither party has drawn my attention to, and I have not located, any provision of the Contract where the parties have appointed a registered adjudicator or a prescribed appointer.

96 Accordingly, I determine that the Application was served within the time required by s28(1) of the Act.

97 No deposit or security for the costs of the adjudication was required to be made by the prescribed appointer with the service of the Application.

98 Accordingly, I consider that the Application *prima facie* satisfies the requirements of s28(1) of the Act.

⁴³ see paragraph 16.5 of the Application Submissions

99 The Application additionally:

- .1 complies with the requirements of the Regulations, including containing the details required by r6,⁴⁴ as required by ss28(2)(a) of the Act;⁴⁵
- .2 includes a copy of the Contract⁴⁶ in compliance with ss28(2)(b)(i) of the Act;
- .3 includes a copy of the Payment Claim⁴⁷ in compliance with ss28(2)(b)(ii) of the Act; and
- .4 states or has attached to it all of the information, documents and submissions on which the Applicant relies in the adjudication⁴⁸ as required by ss28(2)(c) of the Act.

100 Accordingly, I consider that the Application satisfies the requirements of ss28(2) of the Act.

101 As the Application satisfies ss28(1) and ss28(2) of the Act, I determine that the Application satisfies the requirements of s28 of the Act.

➤ **IS THE DISPUTE THE SUBJECT OF ANOTHER APPLICATION?**

102 Subsection 33(1)(a)(iia) of the Act requires that I dismiss the Application if the dispute the subject of the Application is also the subject of another application that has not been dismissed or determined.

103 Neither party has made any submission that the dispute the subject of the Application is also the subject of another application that has not been dismissed or determined.

104 Absent such a submission, ss33(1)(a)(iia) of the Act provides no grounds for me to dismiss the Application.

⁴⁴ the name and contact details (as defined in r4 of the Regulations, to the extent known; the address, telephone, facsimile and ABN or ACN numbers) of the Prescribed Appointer, the Applicant and the Respondent.

⁴⁵ see the first 2 pages of the Application Submissions

⁴⁶ Annexure 1 to the [F] Declaration

⁴⁷ Annexure 3 to the [F] Declaration.

⁴⁸ see paragraph 26.1 above and paragraph 4.1 of the Application Submissions.

➤ **IS ANOTHER BODY DEALING WITH THE DISPUTE?**

105 Subsection 33(1)(a)(iii) of the Act requires that I dismiss the Application if an arbitrator or other person or a court or other body dealing with a matter arising under the Contract makes an order, judgment or other finding about the dispute that is the subject of the Application.

106 Neither party has made any submission that an arbitrator or other person or a court or other body has made an order, judgment or other finding about the dispute that is the subject of the Application.

107 Absent such an order, judgment or other finding about the dispute the subject of the Application, ss33(1)(a)(iii) of the Act provides no grounds for me to dismiss the Application.

➤ **IS IT POSSIBLE TO FAIRLY MAKE A DETERMINATION?**

108 Subsection 31(1)(a)(iv) of the Act requires that I dismiss the Application if I am satisfied that it is not possible to fairly make a determination because of the complexity of the matter or because the prescribed time or any extension of it is not sufficient for any other reason.

109 I am satisfied that the Application is not of such complexity that it is not possible to fairly make a determination on it. I am additionally satisfied that I have sufficient time to fairly make a determination on the Application.

110 Accordingly, I do not consider that the Application must be dismissed pursuant to ss33(1)(a)(iv) of the Act.

➤ **CONCLUSION ON JURISDICTION**

111 Having considering the matters addressed at paragraphs 30 to 110 above, I am not of the view that there is any basis to dismiss the Application without making a determination on its merits pursuant to ss33(1)(a) of the Act.

112 Accordingly, I determine that I do have jurisdiction to proceed and that, pursuant to ss33(1)(b) of the Act, I am required to determine on the balance of probabilities whether any party to the payment dispute is liable

to make a payment and, if so, the amount to be paid, any interest payable on it and the date on or before which it must be paid.

THE SUBSTANTIVE ISSUES

➤ THE AMOUNTS CLAIMED

113 The items claimed in the Payment Claim reflect items in the Schedule of Rates along with 3 ‘variation’ claims, VO1, VO2 and VO3. The items and amounts claimed are:

SoR Item	Description	Qty	Unit	Rate	Total (ex GST)
1.2	[Redacted]	0.5	Visit	\$40,396.35	\$20,198.18
2.4	[Redacted]	1,224	M2	\$15.39	\$18,837.36
3.2	[Redacted]	7,546	M2	\$21.78	\$164,351.88
3.3	[Redacted]	1,724	M2	\$30.89	\$53,254.36
4.2	[Redacted]	13,560	M2	\$8.91	\$120,819.60
VO1	[Redacted]	4,952	M2	\$4.49	\$22,234.48
VO2	[Redacted]	2,640	M2	\$8.35	\$22,044.00
VO3	[Redacted]	1	Item	\$59,292.50	\$59,282.50
TOTAL					\$481,022.36

114 In the Application, the Applicant has submitted that each item of work claimed was completed to the standard required by the Contract,⁴⁹ and, by failing to issue a payment certificate, the Respondent has not disputed any item or quantity of work referred to in the Payment Claim.⁵⁰

115 In the Response, the Respondent has assessed items 2.4, VO1, VO2 and VO3 as claimed by the Applicant. I therefore carry the relevant amounts for those items to Collection.

116 In the Response, the Respondent has not denied that the work claimed by the Applicant for the remaining items 1.2, 3.2, 3.3 and 4.2 was completed as claimed by the Applicant. Rather the Respondent submits that “(a)s a result of [the Applicant's] abandonment of the work, the work has continued to deteriorate and amounts which were previously paid to [the Applicant] in good faith (i.e. items 1, 3, 4 and 5) are now determined to not be payable because those areas have become damaged as a result of [the Applicant's] breach”.

⁴⁹ see paragraphs 21.5, 22.6, 23.6, 24.5, 25.5, 26.5, 27.5 and 28.7 of the Application Submissions.

⁵⁰ see paragraphs 9.7 and 21.5, 22.6, 23.6, 24.5, 25.5, 26.5, 27.5 and 28.7 of the Application Submissions.

- 117 I also observe the admission in the Respondent's material regarding the work claimed in the Payment Claim that "*I know that the work was of high quality and standard, but due to water egress (sic) have now deteriorated due to [redacted]*".⁵¹
- 118 Therefore, it would appear that the work was carried out by the Applicant to the standard required, as the Applicant submits, and that the completed work has subsequently deteriorated due to water ingress and emulsion seal stripping.
- 119 In the circumstances, I accept the Applicant's submission that it had completed the works claimed in the Payment Claim and that it had done so to the standard required by the Contract. At paragraph 77 above, I have also found that the amount claimed by the Applicant in the Payment Claim is calculated in accordance with the Contract.
- 120 Accordingly, I determine that the Applicant is entitled to payment of the full amount claimed in the Payment Claim for the remaining items 1.2, 3.2, 3.3 and 4.2. I therefore carry the relevant amounts for those items to Collection.
- 121 In the Application the Applicant has also submitted that "*(a)s per clause 42.1 of the Contract ..., in circumstances where no payment certificate is served, payment of the full amount of the Payment Claim became due 28 days after the date of the Payment Claim, being 30 December 2020*". Furthermore, the Applicant submits that as "*[the Respondent] has not provided [the Applicant] with a payment certificate as required by the Contract*", "*[the Respondent] has not 'stated' reasons for withholding payment*" and consequently "*(t)he payment dispute is confined to the contents of the Payment Claim, and [the Respondent's] failure to pay the full amount of the Payment Claim*".⁵²
- 122 Clause 42.1 of the Contract relevantly provides, "*... within 28 days after receipt by the Superintendent of a claim for payment ... if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim*".

⁵¹ see Attachment SM-3 to the [M] Declaration.

⁵² see paragraphs 16.3 and 16.10 to 16.13 of the Application Submissions.

123 Therefore, in the present circumstances where no payment certificate has been issued, in determining on the balance of probabilities whether any party to the payment dispute is liable to make a payment, it is appropriate to apply clause 42.1 to the determination of the Respondent's obligation to pay. Accordingly, in the alternative, I determine that the Respondent is to pay the Applicant the full amount of the Payment Claim in accordance with clause 42.1 of the Contract.

124 I observe that the adoption of such a course has been confirmed as appropriate by Kelly J in *INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45 in the following terms, at [58] (my underlining): "... I do not agree that an adjudicator must always 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. As has been said many times in cases connected with this Act, the focus of the Act is on the contract. If the contract between the parties provides for a claim to be paid in full if not disputed within a given time, then there is no reason why an adjudicator ought not give effect to that provision in making a determination on the merits under s 33(1)(b), and every reason why he should".⁵³

125 I have, in any event, already determined at paragraphs 115 and 120 above that the Applicant is entitled to payment of the full amount claimed in the Payment Claim for each of the individual items claimed as the underlying work has been performed to the appropriate standard and correctly valued under the Contract.

➤ **SET-OFFS**

126 The Respondent has raised five (5) items in the Response which it claims it is entitled to set-off from the Payment Claim "*which have arisen as a result of [the Applicant's] abandonment of its work*".⁵⁴

⁵³ which was upheld on appeal: *JKC Australia LNG Pty Ltd v Inpex Operations Australia Pty Ltd & Ors* [2018] NTCA 6 at [62]-[69]

⁵⁴ see paragraph 7.2 of the Response Submissions.

127 That statement identifies that any entitlement to set-off the costs the Respondent claims had not accrued at the time of issue of the Payment Claim as the Applicant was working until that time and accordingly the purported “*abandonment of its work*” could not yet have occurred.

128 The set-off items the Respondent has raised are as follows:

Set-off No.	Description	Set-off claimed (excl GST)
1	Management and supervision	\$109,000.00
2	[Redacted]	\$1,776,000.00*
3	[Redacted]	\$1,114,000.00*
4	[Redacted]	\$3,147,000.00
5	Amount previously paid (work subsequently damaged)	\$157,601.66
Total		\$6,303,601.66

* estimates only, competitive tenders being obtained

129 The Respondent submits that all of the costs outlined above have been incurred. In view of the Respondent’s identification that at least two of those costs are estimates only, as relevant contractors only attended the site in the week commencing 12 April 2021 to review the work required for the purpose of providing tenders, that submission is plainly wrong.⁵⁵

130 The Respondent submits that because it “*has been required to step in as a result of [the Applicant’s] breach, repudiation and/or negligence, these steps should have been taken at the Contractor’s cost*”. As such, pursuant to the terms of clause 39 [Urgent Protection], the costs incurred by [the Respondent] in stepping in to rectify the [works] in order to protect personnel and infrastructure are “*a debt due from the Contractor*”.

131 In the Application, the Applicant submits that the Respondent has not engaged in any formal mechanism under the Contract in respect of the alleged defects such that the Applicant’s entitlement to payment should be reduced. The Applicant has expressly identified special condition 5 to be relevant to the circumstances.

⁵⁵ see paragraphs 7.19 and 7.4 to 7.6 and Table 2 of the Response Submissions.

132 Despite being raised in the Application, the Respondent has failed to address those submissions in the Response.

133 Special condition 5.1 provides that a defect does not include: “*defects which are caused by:*

(i) *fair wear and tear of the [redacted]; ...*

(iii) *The effects of adverse weather conditions, including but not limited to the following ... wet weather and any effects thereof ...”*

134 The Respondent’s 7 January 2021 emails identify (my underlining):⁵⁶

“The job was due to be completed months ago and is miles off completion and further deteriorating as they were not completed before the wet kicked in”.

and

“Thanks for your response but just to note that had the [details of materials redacted] been applied as per the original [Applicant] program (before [the Applicant’s] annual shut down) then I am sure that 90% of current damage would not have occurred, as I was responsible for the [Applicant’s] repairs I know that the work was of high quality and standard, but due to water egress (sic) have now deteriorated due to [redacted]”.

135 Consistent with the Respondent’s position, the Applicant’s email of 15 January 2021 provides (my underlining):⁵⁷

“Confirming our discussion yesterday, it remains [the Applicant’s] position that had the previous invoice been paid in a timely manner the final [redacted] work would have been completed prior to Christmas as planned and the reported damage from t[redacted] and water ingress would not have occurred. ...”

⁵⁶ see Attachment SM-3 to the [M] Declaration.

⁵⁷ see Attachment SM-4 to the [M] Declaration.

- 136 In light of the parties above statements, prima facie, it appears to be uncontentious that the alleged defects that the Respondent now claims require “Urgent Protection” were due to wet weather and its effects, and, wear and tear [redacted]. Those are not defects in the Applicant’s work as defined by the Contract.
- 137 In any event, in accordance with the Applicant’s uncontested submission, the Respondent has not engaged the formal Contract mechanisms, consequently, pursuant to special condition 5.2 *“Until the parties have complied with the Defect Resolution Procedure under this SC5 the Principal may not enforce any rights it has under the Subcontract (sic)”*.
- 138 Given the extended period over which the alleged defects have been apparent, prior to the Respondent’s 7 January 2021 emails, the Respondent has had adequate opportunity to engage in the formal procedures set out in special condition 5 of the Contract. Whilst compliance with those procedures should not take longer than 3 weeks, the Respondent has elected not to engage them but rather, several months later, sought to claim estimated rectification costs (along with supervisory costs and stand down costs) on the basis of ‘urgent protection’ pursuant to clause 39 of the Contract.
- 139 I also observe that the costs of the engineer that the Respondent is claiming for assessing, planning and managing the tender process to rectify the damage date back to 22 March 2021 or earlier.⁵⁸ That identifies that, even within the period that the Respondent is claiming for the engineer as ‘urgent protection’, there has been adequate time for the Respondent to comply with the formal procedures set out in special condition 5 of the Contract prior to rectification work being undertaken, but the Respondent has elected not to do so.
- 140 Furthermore, clause 39 of the Contract relevantly provides:

“ ...

⁵⁸ the Respondent has claimed \$109,000 (which it declares is either paid or is outstanding and will be paid) for “management and supervision”, identified to be a civil engineer. The Respondent has only provided 3 invoices, they date back to 22 March 2021 and for the civil engineer they total only \$22,680.00. Accordingly, it would seem, the Respondent’s claim for the civil engineer extends significantly earlier than 22 March 2021.

If time permits, the Superintendent shall give the Contractor prior written notice of the Principal's intention to take action under Clause 39”.

141 As the Respondent has clearly had a significant time to undertake the ‘urgent protection’ and, based on its claim for ‘management and supervision’, has been assessing and planning that ‘urgent protection’ for a substantial period; I also consider that there has been sufficient time to permit the Respondent to issue the requisite notice to the Applicant pursuant to clause 39 of the Contract.

142 The Respondent has not provided a copy of any written notice issued to the Applicant that it intends to take action under clause 39 of the Contract with the Response. Neither has the Respondent made any submission that it issued such a written notice as required by that clause “if time permits”, or submitted any reasons why time did, or does, not permit the issue of the requisite notice.

143 For the reasons referred to at paragraphs 126 to 142, I reject the Respondent’s claim for set-off on the basis of ‘urgent protection’ under clause 39 of the Contract as the Respondent has not established that:

- .1 it has issued the requisite notice pursuant to clause 39 of the Contract;
- .2 the claimed amounts have all been incurred; or,
- .3 when properly construed, the claimed amounts all relate to ‘urgent protection’.

144 In the alternative, in reliance on clause 44.4 of the Contract, the Respondent has submitted that it is entitled to suspend payment to the Applicant pursuant to clause 44.4 of the Contract on the basis that the Respondent issued the Applicant a ‘notice to show cause’ pursuant to clause 44.2 of the Contract on 12 April 2021.

145 The Respondent’s “Notice to Show Cause” dated and sent on 12 April 2021,⁵⁹ requires the Applicant to show cause “*by no later than 7 days of receipt of this notice*”, that is by on or around 19 April 2021.

146 Clause 44.4 of the Contract relevantly provides (my underlining):

⁵⁹ see paragraph 37 and Attachment SM-9 to the [M] Declaration.

“Upon giving a notice under Clause 44.2, the Principal may suspend payments to the Contractor until the earlier of–

- (i) the date upon which the Contractor shows reasonable cause;*
- (ii) the date upon which the Principal takes action under Clause 44.4(a) or 44.4(b); or*
- (iii) the date which is 7 days after the last day for showing cause in the notice under Clause 44.2.*

If the Principal exercises the right under Clause 44.4(a), the Contractor shall not be entitled to any further payment in respect of the work taken out of the hands of the Contractor unless a payment becomes due to the Contractor under Clause 44.6”.

147 The Respondent has not provided any documentation to establish that it has taken out of the hands of the Applicant the whole or part of the work remaining to be completed, pursuant to clause 44.4(a) but has identified that as at the date of the Response it had not done so.⁶⁰

148 The date which is 7 days after the last day for the Applicant to show cause, on or around 19 April 2021, as identified at paragraph 145 above, is on or around 26 April 2021.

149 Accordingly, as at the date of this determination, in the above circumstances any entitlement that the Respondent may have had to suspend payments to the Applicant has expired.

150 If the Respondent has taken work out of the hands of the Applicant pursuant to clause 44.4(a) of the Contract, the Respondent is then only entitled to suspend payment in respect of the work taken out of the hands of the Applicant. That is not the work the subject of the Payment Claim which I have determined at paragraph 119 above to have been completed in accordance with the Contract.

⁶⁰ see paragraph 7.31 of the Response Submissions.

151 For the reasons referred to at paragraphs 144 to 150 above, I reject the Respondent’s submission that it is entitled to suspend the Applicant’s entitlement to payment of the amount claimed in the Payment Claim which was due on, and accrued from, 30 December 2020.

152 I also reject the Respondent’s submission that it is entitled to set-off “*the difference between the costs of having the [damaged infrastructure] rectified by a third party and the cost of [the Applicant] to complete*”. Pursuant to clause 44.6 of the Contract, such a right might only accrue “*when work taken out of the hands of the Contractor under Clause 44.4(a) is completed*”. That is not the present circumstance.

➤ **PAYMENT MADE SUBSEQUENT TO THE PAYMENT CLAIM**

153 It is uncontroversial that the amount of \$280,000.00 excluding GST was paid by the Respondent to the Applicant on 3 February 2021 and that amount should be taken into account in determining the balance payable on the Payment Claim (subject to interest adjustment).⁶¹

COLLECTION AND AMOUNT DUE FOR WORK UNDER THE CONTRACT

154 Section 31(1)(b)(i) of the Act relevantly requires that I am to determine the amount to be paid in respect of the payment dispute. Incorporating the amounts that I have found due above, I calculate the amount to be paid (excluding interest and costs) as follows:

Item	Description	Payment Claim and Application	Response	DETERMINED (excl GST)
1.2	[Redacted]	\$20,198.18	\$0	\$20,198.18
2.4	[Redacted]	\$18,837.36	\$18,837.36	\$18,837.36
3.2	[Redacted]	\$164,351.88	\$0	\$164,351.88
3.3	[Redacted]	\$53,254.36	\$0	\$53,254.36
4.2	[Redacted]	\$120,819.60	\$0	\$120,819.60
VO1	[Redacted]	\$22,234.48	\$22,234.48	\$22,234.48
VO2	[Redacted]	\$22,044.00	\$22,044.00	\$22,044.00
VO3	[Redacted]	\$59,282.50	\$59,282.50	\$59,282.50

⁶¹ see paragraph 3.8, 19.2 of the Application Submissions and paragraphs 2.1 and 6.1 of the Response Submissions.

Item	Description	Payment Claim and Application	Response	DETERMINED (excl GST)
Set-off 1	Management and supervision		-\$109,000.00	\$0.00
Set-off 2	[Redacted]		-\$1,776,000.00	\$0.00
Set-off 3	[Redacted]		-\$1,114,000.00	\$0.00
Set-off 4	[Redacted]		-\$3,147,000.00	\$0.00
Set-off 5	Amounts previously paid by [the Respondent] in good faith		-\$157,601.66	\$0.00
SUB-TOTAL		\$481,022.36	\$6,303,601.66*	\$481,022.36
LESS payment made		\$280,000.00	\$280,000.00	\$280,000.00
TOTAL		\$201,022.36	\$6,023,602.00*	\$201,022.36

* the amounts shown are as per the Response however, in my view, the Respondent has made an error in its figures. It accepts a value of work completed of \$122,398.34, \$280,000.00 has been paid, and it claims set-offs of \$6,146,000.00 (excluding the set-off related to the difference between the amount previously paid and the Respondent's assessed value of work completed), that totals \$6,303,601.66.⁶²

The Respondent has also, alternatively, submitted that it is entitled to \$5,717,648.41 (excluding GST), based on damages for breach of contract by making allowance for the balance of work to be completed on the Contract of \$585,953.25.

155 I determine that, on the balance of probabilities, the amount to be paid from the Respondent to the Applicant in respect of the Payment Dispute was \$481,022.36 excluding GST and the amount remaining to be paid is \$201,022.36 excluding GST, along with \$20,102.24 GST.

INTEREST

156 Section 33(1)(b)(i) of the Act relevantly requires that I am to determine any interest payable pursuant to s35 of the Act on the amount that I determine to be paid in respect of the payment dispute.

➤ RATE OF INTEREST

157 The Applicant has submitted that clause 42.9 of the Contract and the Annexure provide for interest to be paid at 10% per annum.

158 I agree with that submission as set-out at paragraphs 67 to 69 above.

⁶² \$122,398.34 - \$280,000.00 - \$6,146,000 = \$6,303,601.66

159 Accordingly, pursuant to s35(1) of the Act, I determine that the rate of interest payable by the Respondent to the Applicant on any unpaid portion of the determined amount is 10% per annum.

➤ **AMOUNT OF INTEREST**

160 Clause 42.9 of the Contract provides for interest to be paid on any moneys due that “*remain unpaid after the date upon which or the expiration of the period within which they should have been paid then interest shall be payable thereon from but excluding the date upon which or the expiration of the period within which they should have been paid to and including the date upon which the moneys are paid*”.

161 Accordingly, interest is to be paid on the entire amount of the Payment Claim from 31 December 2020⁶³ to 3 February 2021⁶⁴ inclusive.

162 That is an amount of \$131.79⁶⁵ per day for 35 days, totalling \$4,612.65.

163 Additionally, interest is to be paid on the amount remaining to be paid of \$201,022.36 for the inclusive period from 4 February 2021 until paid.⁶⁶

164 That is an amount of \$55.07⁶⁷ per day for 92 days, totalling \$5,066.44.

165 Accordingly, I determine the total amount of interest to be paid is \$9,679.09.

DATE FOR PAYMENT OF THE DETERMINED AMOUNT

166 Section 33(1)(b)(ii) of the Act requires that I decide the date on or before which the determined amount is to be paid.

167 Neither party has made a submission as to a reasonable time for the payment of any amount determined to be payable.

168 I consider that payment in the order of 7 days following the date of this determination is reasonable.

⁶³ The day following the due date for payment of the Payment Claim

⁶⁴ The date that the part payment of the Payment Claim was made by the Respondent

⁶⁵ \$481,022.36 excluding GST x 10% / 365 days = \$131.79 interest per day

⁶⁶ The date that I have determined as the date for payment of the determined amount, 6 May 2021

⁶⁷ \$201,022.36 excluding GST x 10% / 365 days = \$55.07 interest per day

169 Accordingly, I determine that payment of the amount of \$201,022.36 excluding GST along with \$20,102.24 GST is to be made by no later than 6 May 2021.

COSTS AND ADJUDICATOR'S FEES

170 Section 36 of the Act provides that each party bear their own costs in relation to an adjudication of the dispute (which includes the costs the parties are liable to pay under s46 of the Act). However, 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.

171 The Applicant has submitted that, by failing to provide it with any formal reasons under the Contract as to why it has not paid the Payment Claim in full, the Respondent has acted frivolously and has caused the Applicant to take steps to enforce its right to payment when it was unnecessary. Therefore, the Respondent should pay the whole amount of [the Applicant's] costs, [its own] costs and the Adjudicator's costs.

172 I observe that the Act does not provide for an adjudicator to make a determination in regard to a party's own costs wider than the 'costs of the adjudication' as defined in s46(12) of the Act.

173 The Respondent has submitted that the Applicant submitted the Application in contravention of the agreement reached between the parties. It is clear from the surrounding circumstances that the Applicant was well aware that there was an agreement between the parties about how the Payment Claim would be dealt with. The Respondent paid the Applicant in accordance with that agreement. In these circumstances, the Applicant should be required to pay the Respondent's costs of the adjudication.

- 174 In the circumstances, I found the Respondent's set-off submissions to be unfounded. I also found the Applicant's 15 January 2021 email upon which the Respondent relies gives no undertaking that the Applicant would not make an adjudication application. I consider that, having failed to issue a payment certificate, the Respondent's failure to pay the entire amount of the Payment Claim when due in accordance with the provisions of the Contract, or subsequently, thereby causing the Applicant to make the Application was frivolous.
- 175 Accordingly, I consider it is an appropriate circumstance to exercise my discretion and decide that the Respondent is to pay 100% of my fees and expenses being the 'costs of the adjudication'.