

DETERMINATION NO. 23.09.01

**Adjudicator's Determination pursuant to the
Construction Contracts (Security of Payments) Act 2004 (NT)**

Applicant

and

Respondents

I, David Alderman, determine on 27 July 2009 in accordance with s.38(1) of the *Construction Contracts (Security of Payments) Act* (NT) ("the Act") that the amount to be paid by the Respondents to the Applicant is nil.

I determine there is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the Act.

Contact Details	
Applicant	Respondents
Solicitor Marcus Spazzapan Ward Keller Telephone 0889462999 Fax 0889812353	Solicitors Clayton Utz 17-19 Lindsay Street DARWIN NT 0800 Reference Mark Spain Phone 08 8943 2512 mspain@claytonutz.com

APPOINTMENT AS ADJUDICATOR

1. The Respondent Applied on about 26 June 2009 for an adjudication under the *Construction Contracts (Security of Payments) Act (NT)* (the Act), consequent upon which, I was appointed adjudicator on 2 July 2009 by the Law Society of the Northern Territory to determine this application. The Society is a prescribed appointor under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act.

DOCUMENTS RECEIVED BY ADJUDICATOR

2. I received and have considered the application supported by the attachments numbered 1 to 7, together with the response and the documents attached thereto.
3. The response was delivered on 10 July 2009 making my determination initially due on 27 July 2009, there being a public holiday on 24 July 2009.

JURISDICTION

4. The Respondents have raised two points in relation to the Jurisdiction of the Adjudicator to determine the application.
5. The Respondents submit the adjudicator does not have jurisdiction to determine the application because the alleged payment claim in the payment dispute did not arise from a construction contract between the Respondent And the Respondents.
6. Secondly, the Respondents submit that the application has not been made within the period of 90 days after a payment dispute has arisen.

THE CONTRACT

7. Section 33 of the *Construction Contracts (Security for Payments) Act* ("the Act") requires the adjudicator to, within the prescribed time, to dismiss the application without consideration of its merits if one of the following are true:
 - 7.1 The contract concerned is not a construction contract.
 - 7.2 The requirements of section 28 of the Act have not been complied with.
 - 7.3 Other not relevant factors.
8. Section 27 of the Act provides that if a payment dispute arises under a construction contract any party to the contract might apply to have the dispute adjudicated.
9. Section 8 provides that a payment dispute arises if the amount claimed in a payment claim is due to be paid under the contract and the amount has not been paid in full or the claim has been rejected or wholly or partly disputed.
10. The contract referred to in this section must be referring to a construction contract between the parties.
11. Section 5 provides:
 - (1) 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.

12. Section 33 of the Act requires there to be a construction contract for there to be jurisdiction for an adjudicator to consider an adjudication application.
13. Section 5 of the act defines a construction contract as being a contract (whether or not in writing) under which a person (contractor) has, amongst other things, and the obligation to carry out construction work.
14. The Act therefore requires contract to exist and it has to be a construction contract.
15. The Applicant alleges in its application that the Applicant and the Respondents entered it into a construction contract in about July 2007 to design and construct electrical services in relation to the development. The Applicant's allegation appears to be that the contract is partly oral and partly implied and partly in writing.
16. The Applicant alleges the contract was entered into by [AB] on behalf of the Applicant and by [BC] for the Respondents. The consideration agreed, it is alleged, was \$900,000 plus GST and that price included prime cost items.
17. The Applicant alleges it was a term of the contract that the Respondents are liable to the Applicant for the cost of the electrical work done and materials supplied by the Applicant with regard to the development and that it was an oral term that the Applicant was to render it's invoices to [XYZ Pty Ltd] as agent for the Respondents.
18. The Applicant alleges the contract was part performed early in 2007 and execution continued from November 2007 until March 2009.
19. The Respondents allege there is no contract between the Applicant and the Respondents for the payment of monies for work done by the Applicant on the development site.

LEGAL CONSIDERATIONS

20. A contract is legally binding promise or agreement. A contract requires consideration, certainty and completeness. A contract must be made with a person who has capacity to contract and only the parties to the contract are legally bound and entitled to enforce it.
21. A contract does not require an offer and acceptance although analysis of such issues can assist in determining whether a contract exists. A contract can be implied from conduct.

THE CONSIDERATION OF THE ISSUE

22. The issue in this matter is whether the Respondents were parties to a contract with the Applicant for the provision of electrical goods and services to the development and therefore legally bound to pay the consideration agreed or claimed.
23. There is no issue that the Applicant provided electrical goods and services with respect to the development and is entitled to be paid the consideration agreed with the promisee.
24. The question in this adjudication is: who are the parties to the contract alleged by the Applicant?
25. The Applicant claims that it had a contract with the Respondents in or about July 2007 to design and construct the electrical services for the development.
26. The Applicant Alleges the contract was entered into for the Applicant by [AB] and for the Respondents by [BC].
27. [AB] in his declaration says that in September 2006 [CD] asked [AB] if the Applicant was interested in designing and constructing electrical work in relation to a multi-story building. [AB] said words to the effect, yes the Applicant was

interested.

28. At this time the Applicant was contracted to [RST Pty Ltd] being [BC's] construction company in relation to a development carried out by [UVW Pty Ltd]. I understand that [RST Pty Ltd] was the builder and the Applicant was a subcontractor to [RST Pty Ltd]. [AB] says he knew that [BC] and [CD] were in partnership but conducting the development via [UVW Pty Ltd]. [CD] was a director of [UVW Pty Ltd], as was [BC].
29. [CD] at this time then would be known as a representative of [UVW Pty Ltd]. [BC] could be seen as a representative of both [RST Pty Ltd] or [UVW Pty Ltd].
30. Although [AB] is not clear when [CD] and [BC] gave the Applicant drawings to allow the Applicant to "calculate bedding down the design and construct scope and price". This event must have occurred after September 2006.
31. In 2006 [AB] asked [CD] who would be paying the Applicant and [CD] said "we will". This request could have been made in September 2006. [AB] says he understood [CD] to mean, by use of the word "we", the developer/owner's of the development.
32. At that time the developer was either unknown or [UVW Pty Ltd]. I am not made privy as to who the owner of the land was at that time and so consider that fact irrelevant.
33. The timing of the comment also indicates that it is just that, a comment not even made in negotiations and is not a binding promise.
34. I am unwilling to infer from this statement made in 2006 that [AB] and hence the Applicant was promised that if the applicant were ever asked to commence work on the development it would be asked by the developer or its agent, whomsoever they may be at the time, in such circumstances as to bind the developer to pay the applicant for the work it does on the development. I do not accept that that comment is a promise which applied in October or

November 2007 or afterwards or at all.

35. The statement by [CD] is also ambiguous. The use of the word "we" could mean [UVW Pty Ltd], whom [CD] represented at the time or that [UVW Pty Ltd] will be paying [RST Pty Ltd], the builder with whom it is expected the Applicant would contract with if the development went ahead.
36. I understand the principle is that any offer made is only open for a reasonable time if there is no set time stated. If the comment is an offer to pay if the development goes ahead then that offer can only be open for a reasonable time. The period from September 2006 to October 2007 when the Applicant was asked to start work, cannot be considered as a reasonable time. The comment had no effect in October 2007.
37. On 12 October 2006 [AB] says [CD] gave [AB] a "Scope of Work Letter. This letter is written on the header of [CD Holdings Pty Ltd]. [AB] says that at the same meeting he studied drawings. This indicates he was given his own drawings after this date for he would not need to study drawings at the office if he had his own set, as he says. [AB] says that at this meeting [CD] asked [AB] for a quote from the Applicant to design and construct the electrical part of the development and [CD] asked him to attend design brief meetings.
38. The request for a quote is very important in the consideration of this matter.
39. In the same conversation [AB] asked [CD] who would be the project manager and who is going to carry out the other major trades. [CD] replied allegedly, "at this stage we were thinking of bringing in [BC]" or words to that effect. [CD] also told [AB] who the other major trades were that were to be involved in the development.
40. From October 2006 [AB] says he attended many design meetings when other trades were present.

41. The next event that occurs chronologically is that, [AB] says that in January 2007 [BC] asked the Applicant to attend at the site and disconnect power and remove streetlights. [BC] however says that this event occurred in late 2007. [DE] was a consultant quantity surveyor for [UVW Pty Ltd] until August 2007 and later was the contract superintendent for the Respondents. [DE] says the excavation work was done some time before late 2007 and an invoice was sent by the Applicant in September 2007 to Respondent A and was paid. I find that the event occurred in January 2007.
42. The Applicant alleges the contract was entered into in July 2007. The request to do work in January 2007 has no bearing on the issue of whether the Applicant contracted with Respondents in July 2007. I find the work was done at the behest of [BC] who is not a party to the application and was at best an agent for [UVW Pty Ltd] which is also not a party to the application and the event does not assist in determining that the Applicant contracted with the Respondents to do the electrical work on the development.
43. [AB] says that he had a conversation in January 2007 with [CD] and [BC] and agreed a base price of \$620,000 plus GST for design and construct of the electrical works on the project subject to some prime cost items. The Applicant is at pains to establish that this is a base price with the prices subsequently changing as the layouts differed.
44. [AB] says that from February 2007 to July 2007 he attended numerous meetings with [CD] and [BC] at which they discussed repricing electrical design changes.
45. [AB] asserts for the Applicant that a design meeting agenda annexed to his declaration and relating to a meeting held on 23 November 2006 is indicative of the agendas distributed for design meetings. The agenda refers, amongst other things, to [CD] representing [UVW Pty Ltd] and to [BC] representing [RST Pty Ltd]. The agenda notes the Applicant was to deal with Telstra and make

agreements with Telstra and the Applicant is all so to advise on many electrical matters to do with the development.

46. The agenda is informative in that there is no mention of Respondent A or Respondent B. The agenda shows that [CD] was the [UVW Pty Ltd] representative.
47. The agenda shows [BC] as a representative of [RST Pty Ltd] who [AB] says he was told by [CD] would be the project manager. [AB] declares at paragraph 22 of his declaration that he is of the understanding that the company managing the construction is the builder.
48. I infer therefore that [AB] was of the view that [BC] would be the builder of the development and the Applicant would contract with [RST Pty Ltd] as it had in the previous development.
49. The Applicant appears to have assisted the developer with the design work and with providing to the developer a price the developer could agree with the builder for the electrical work in its negotiations with the builder.
50. [BC] says that in July 2007 the development layout changed again and [BC] says he dealt with [AB] and renegotiated a price. The renegotiated price was \$900,000 excl GST. [AB] does not speak of this particular meeting in his statutory declaration but says he had several meetings with [CD] and [BC] from February to July 2007 repricing the works. [AB] declares at paragraph 19 that the \$900,000 plus GST price was agreed with [BC] but does not say when. I find that the use of the words "agreed" and "negotiated" do not properly describe the arrangement in place at that time.
51. I am of the view from the information supplied by the Applicant that the Applicant is providing a price to [RST Pty Ltd] or [UVW Pty Ltd]. For a price to be determined a design must have been agreed upon and hence the Applicant knew on what to base its price.

52. However, the price determined was, I find, for the purposes of a quote which the Applicant gave to [UVW Pty Ltd] in July 2007. The Applicant in July 2007 offered to do the work for [UVW Pty Ltd] for the sum of \$900,000 plus GST, if the development went ahead.
53. I am assisted with this decision by the Applicant providing a copy of the document addressed to [Southern UVW]. Annexure DM4. The document is "RE: electrical quotation". The first page of that document contains the sentence "we are offering our price based on the "design and construct" brief provided and is subject to the attached notes."
54. This quote required some act of acceptance before there was a contract. It also indicates the offer, which is what a quote is, was to [UVW Pty Ltd] and not to either of the Respondents. The quote is addressed to [BC] as if he were an agent of [UVW Pty Ltd].
55. It is informative to ask the question as to what would happen if [UVW Pty Ltd] had decided the overall price of the development was all too expensive or the developer could not get the finance and therefore decided that it would not be proceeding. Could the Applicant sue the Respondents for damages for breach of contract?
56. There is no express agreement in the Applicant's case to a term that the Applicant would be paid anything if the development did not proceed. It follows I think that if the Applicant does no work because the development does not proceed then there would be no payment.
57. The Applicant's assertion is that if there had been work done then the developer, [UVW Pty Ltd], would be responsible.
58. I find from the circumstance recounted above that the Applicant knows he is involved in the planning of a development and being a development it may or may not go ahead for many reasons. [AB] attends many meetings so that he can come up with a design and prepare a quote based on the design which fits

in with the development drawings and designs. The Applicant could not give a quote without attending those meetings or preparing a design. The attending of the meetings does not mean there is a contract. The Applicant gave [UVW Pty Ltd] a quote. The Applicant had an expectation that it will be asked to do the electrical work and if asked could insist on being paid the price stated in the quote.

59. I am of the view that there was no contract between [UVW Pty Ltd] or [RST Pty Ltd] for the Applicant to do the work. I am of the view that there had to be an acceptance of the quote for there to be a contract and that would not happen unless the development went ahead.
60. The Applicant, as at July 2007, has no knowledge as to the arrangements between the developer, [UVW Pty Ltd] and the builder, [RST Pty Ltd]. The Applicant could not be certain that a contract would be entered into between them and so could not be certain it would be asked to do any work at all.
61. The parties contemplated that if the development went ahead then the Applicant would enter into a contract for the Applicant to do the work for the price quoted.
62. I am of the view that the Applicant expected to enter into the contract with the builder [BC] not the developer, [UVW Pty Ltd].
63. I refer to the email of 13 July 2007 from [AB] to [BC]. This is annexure AAL1 to the Declaration of [CD]. Neither [BC] nor [AB] refer to this email in their declarations.
64. The email contains the statement,
"[BC]
What is the status on this project
the electrical design drawings have been ready for weeks
I have quoted you on this project for the job and the design changes

I have met with you and [DE] to clarify the additional items but I don't have an order from you & no longer have a commitment from [Southern UVW] as it is no longer involved.

Please advise where I stand so that I can supply the drawings [AB]"

65. It is clear from the e-mail that [AB] understands that he does not have a binding contract with [UVW Pty Ltd] or [RST Pty Ltd]. The email indicates that [AB] expected to contract with [RST Pty Ltd], the builder, and not with the developer.
66. I find that to the end of July 2007 there has been no acceptance by any entity let alone the Respondents so as to create a binding contract.
67. The developer or builder could legitimately say, in the circumstances that it was possible that at any time the development could be shelved and no liability would attach to the developer or builder for any loss suffered by the Applicant because the project is not going ahead.
68. On the Applicant's case it could have had no intention at the end of July 2007 to enter into a contract with the Respondents.
69. I find that at the end of July 2007 the Applicant had given [UVW Pty Ltd] a quote to do the electrical work described in some unrevealed specifications or designs for the sum of \$900,000 plus GST.
70. I find there was no contract between [UVW Pty Ltd] and the Applicant for the applicant to do the electrical work.
71. I refer to the event that I found occurred January 2007 when the Applicant Assisted [BC] in the excavation of the site. I am unable to find that this incident assists the Applicant with its assertion that it had a contract with the Respondents in July 2007.
72. If the request is made in early 2007 and is made by the then developer then the

request is made by [UVW Pty Ltd] and not the Respondents.

73. If the request was made by [BC] in late in 2007, as [BC] says in his declaration, then the request was made after [AB] was told [BC] was no longer involved in the development. In that case the request was made with respect to a contract the developers had with [RST Pty Ltd] and not the contract the Applicant is alleging.
74. Again, if the Applicant is doing work in September or October 2007 at the request of [BC], the Applicant is carrying out a contract it has with a contractor to the Respondents and not pursuant to a contract it has with the Respondents. [AB] knows by late 2007 that [BC] has no authority to bind the Respondents to anything and so he knows that when he is dealing with [BC] he is not dealing with the Respondents.
75. I determine that in the circumstances put forward by the Applicant and which relate to the period ending July 2007, there was no contract between the Applicant or any of the Respondents in respect of the electrical work for the development.
76. It is unarguable on the circumstances put forward by the Applicant that it had a contract in July 2007 with Respondent A or Respondent B, or both. The only connection to that date of [CD Investments] to the development is that it was a shareholder in [UVW Pty Ltd] and [CD] was a director of [UVW Pty Ltd] and Respondent A and [AB] had been speaking to [CD].
77. I find the Applicant could not have contracted with the joint venture comprised of the Respondents in July 2007 as the Joint Venture did not exist. The Applicant could not have contracted with the present owners of the land as they did not become owners of the land until December 2007. The Applicant provides a search of Respondent B showing it did not come into existence until 29 August 2007. The Applicant Also attaches to its application a property search showing the Respondents became owners of the land in December

2007.

78. The Applicant has provided information in the statutory declarations accompanying the application that relates to the period after July 2007 and I assume is relying on post contract conduct to indicate the formation of a contract in July 2007.
79. I do not find the need to call for further submissions on the alleged after contract conduct as the Respondents have covered the after contract period in the information provided in the response.
80. After July 2007 I find the situation was that the Applicant had delivered a quote to [UVW Pty Ltd] for use by the builder [RST Pty Ltd] and the quote had not been accepted by [RST Pty Ltd], or [UVW Pty Ltd] if that is important, so as to create any contract.
81. The first post contract circumstance [AB] refers to in his statutory declaration is a conversation he had in August 2007 with [CD] to the effect that [BC] was no longer involved in the development and Respondent A would take over the development.
82. I find that the Applicant now knows that [BC] is no longer an agent for the developer nor is [RST Pty Ltd] the preferred builder. Further the Applicant knows that [UVW Pty Ltd] is no longer involved in the development. [AB] says that he has this view in the email of 13 July 2007. The Applicant now knows that Respondent A is the developer. It also knows that [CD] is the agent of the developer. The imparting of this information does not create a contract between Respondent A and the Applicant.
83. The Applicant appears to assume in its application that the situation as pertained between it and [UVW Pty Ltd] automatically carries over to Respondent A. I have decided there was no contract between [UVW Pty Ltd] and the Applicant at the end of July 2007 or at all. The Applicant's argument appears to me to be that the asserted contract it had with [UVW Pty Ltd]

automatically binds Respondent A. I find that assertion is in error.

84. The question that arises from that incorrect assertion is, what is the status of the Applicant's quote? Is Respondent A now the recipient of the quote? Has [CD] conveyed to the Applicant the promise that all the dealings between the Applicant and [BC] and [CD] and [UVW Pty Ltd] are to be treated as dealings with Respondent A?
85. For the purpose of the argument I will assume that the quote is now a quote to Respondent A.
86. In September 2007 [AB] for the Applicant says that he asked [CD] who would manage the construction in the absence of [BC]. He declares he was told that, "we are negotiating with [XYZ Pty Ltd] Construction". [AB] interestingly declares that he only knew of [XYZ Pty Ltd] as a subcontractor and not a builder of multi story buildings.
87. I find that the Applicant now knows that it is likely that [XYZ Pty Ltd] will be the builder. I do not accept that the Applicant thought that [XYZ Pty Ltd] would be a "manager" or "agent" of the developer. I find the Applicant knew the arrangement intended by the developer was that the developer would contract with a builder which would then contract with the Applicant as the provider of electrical goods and services.
88. The Applicant provides no information as to when the Respondents joined together to form the Joint Venture that went forward with the development. The information provided by the Respondents indicates the Joint Venture was formed in August. The Joint Venture must have been formed after Respondent B was registered which was 29 August 2007.
89. In October 2007 [AB] for the Applicant asked [CD], "who I was to direct invoices for work pursuant to the design and contract (sic)." [AB] declares he was told to "forward them to [XYZ Pty Ltd], who will check [the Applicant's] work claimed for had been performed and would then make payment to [the Applicant]." [AB]

also declares that in that conversation he was told that [DE] would be Superintendent of the Project.

90. The asking of the question indicates that the Applicant did not have a contract with the Respondents. If there was a contract then the Applicant would know that it would invoice the Respondents or one of them. The submission that the arrangement with the Joint Venture was that the Applicant had a contract with the Joint Venture that the Joint Venture was liable for the Applicant's work but one of the terms was that the Applicant submit its invoices to another company for payment is not one that I accept.
91. I am assisted in this view as [AB] declares that it was at this time the financial vehicle through which and from which payment for the design and construct work was set in concrete. The vehicle was [XYZ Pty Ltd] not the Joint Venture.
92. I find that [AB] was told by [CD] to look to [XYZ Pty Ltd] for payment. I consider that the Applicant accepted this situation as it forwarded its invoices to [XYZ Pty Ltd] after it had started work and was paid by [XYZ Pty Ltd] until [XYZ Pty Ltd] ran into financial trouble.
93. It is not a case of Respondent A saying to the Applicant, Respondent A and Respondent B are responsible for the payment of the Applicant's invoices but give your invoices to [XYZ Pty Ltd] our agent for payment by the Joint Venture companies.
94. I am of the view that the developer has said don't look to me for payment look to [XYZ Pty Ltd].
95. I find that to this time there was no contract entered into between the Respondents and the Applicant. There is no conduct or language that indicates that the Respondents have accepted the Applicant's quote or agreed to be bound to pay the Applicant. [CD] has said, there is no contract with the developers, the contract, if it comes to pass, will be with [XYZ Pty Ltd].

96. The Joint Venture has also told [AB] that [DE] was the Superintendent of the Project. This is another indication that the Applicant was informed that the organisation of the development was that, [XYZ Pty Ltd] would be the builder who would render claims to the Superintendent acting for the developer and those claims would include claims made by the Applicant to the builder, [XYZ Pty Ltd].
97. There has been no action by Respondent A to this time that can be said to be an acceptance of the Applicant's quote nor any act that can be said to evidence that Respondent A has entered into a contract with the Applicant for the provision of development's electrical works.
98. In late October 2007 the site manager for [XYZ Pty Ltd] asked the Applicant to start work on the construction site. The Applicant does not express any concern about this request. [AB] does not check with [CD] if this is what he wants.
99. I find it is at this time that [XYZ Pty Ltd] and the Applicant enter into a contract for the performance of the electrical work for the development. I note that information provided by the Applicant shows that the Applicant thought the consideration agreed with the builder was \$900,000 plus GST but the developers thought it was \$800,000. It may be that the consideration was for a reasonable price. Fortunately I do not have to determine that question.
100. I find the Applicant entered into a contract in October 2007 with [XYZ Pty Ltd] to do the electrical work and the Applicant can only look to [XYZ Pty Ltd] for payment of its invoices.
101. It is not clear what the terms of the contract are between the Applicant and [XYZ Pty Ltd] and I do not have to consider that issue. What is clear is that it was a term of the contract that [XYZ Pty Ltd] would pay for the Applicant's work. It is also clear that the Respondents had no liability for payment of that work and it follows that the Applicant could not look to the Respondents for payment

if [XYZ Pty Ltd] failed to pay. [AB] had been told this by [CD] and left in no doubt. It had been set in concrete.

102. The next event the Applicant relies on is the reference by [AB] in his declaration to an e-mail dated 23 October 2007 from [AB] to [CD].
103. This e-mail contains a history of e-mails. The subject of the e-mails is a request to the Applicant to deliver drawings sufficient to obtain a 2 stage building permit by 26 October 2007.
104. On 21 October [EF] sent an e-mail to the Applicant. The e-mail starts off with the statement "I assume [the Applicant] is still involved in managing the electrical design drawings for this project." The e-mail contained a request for the delivery of documents requiring confirmation that drawings comply with Australian Standards and that Dynasphere system is not required and submission of revised drawings.
105. The next e-mail is dated 22 October 2007 and is from [FG] to [AB]. It requests [AB] to action the request relating to the electrical drawings as a matter of priority.
106. The next e-mail is from [AB] to [FG] dated 23 October 2007. It states that the drawings are with TCM that morning.
107. This history of e-mails is evidence that the applicant is engaged by someone to provide drawings that are suitable for presentation to the building board sufficient to obtain a building permit.
108. The applicant has no problems in providing the requested drawings.
109. [CD] and [DE] do not raise any objection to the applicant doing this work in relation to the drawings.
110. I am not told of the arrangement between the Developers and the Applicant as to the provision of drawings by the Applicant. There is no information in the

application which shows that the applicant was at any stage paid for any work it did in relation to the drawings. There is no information that anyone agreed to pay the Applicant for the work it did on the drawings.

111. I find that the applicant knew that it was not to be paid specifically for the work it did toward the drawings. The reimbursement for the work done in relation to the drawings would be included somehow in the claims made in relation to the construction phase of the development.
112. By this time the Applicant had been told that [XYZ Pty Ltd] and not the Respondents would pay. The Applicant may have already contracted with [XYZ Pty Ltd] for payment for the construction work.
113. This incident does not assist the Applicant in showing it had a contract with the Respondents. This information does not assist the Applicant's case in relation to the question of who was to pay the applicant for the design work and construction work. The fulfilment of a request, by essentially [CD], for the Applicant to provide drawings, does not make the Respondents liable for payment of the work done by the Applicant on the site.
114. [AB] states that the Applicant commenced work at the site in November 2007.
115. The applicant refers to an invoice number 1028, and states that that invoice included a claim for the work that the Applicant had done during 2007 in relation to the excavation of the site and for work on site during November 2007. I do not accept this submission.
116. Invoice 1028 dated 27/11/07, claims payment for " deep drill earths for lightning protection and transformer HV earths"
117. Reference to this invoice does not assist the Applicant.
118. The Applicant submits it's delivery of progress claim invoices for work done to [XYZ Pty Ltd], was the execution of a request by [CD] and another factor which goes to show that the Applicant had a contract with the Developers.

119. I find the provision of the invoices to [XYZ Pty Ltd] is an indication that the Applicant accepted that it had a contract with [XYZ Pty Ltd] and was to look to [XYZ Pty Ltd] for payment. Asserting that rendering invoices to [XYZ Pty Ltd] was somehow at the request of [CD] and thus an indication of the execution of a contract with the Developers is not accepted by me. I refer to the conversation in which [CD] told [AB] to look to [XYZ Pty Ltd] for payment. I find that [CD] was telling the Applicant that the Developers were not going to contract with the Applicant to get it to do the work nor for the payment of its work.
120. The next matter the applicant seeks to rely on as indicating a contract with the Developers for payment is the request by [DE], the Superintendent, for delivery of a price previously agreed with [BC] but this time he wants the quote made out to Respondent A instead of [UVW Pty Ltd].
121. [AB] states that this request was in line with the statement by [CD] in September 2007 that as [BC] was no longer involved Respondent A would take over the development.
122. The document delivered by e-mail dated 27 February 2008, was a document addressed to [UVW Pty Ltd] for the attention of [BC] and had a date of 4/2/08 on it.
123. The document has "Revised Quote for Respondent B" as its subject matter.
124. The document notes, "we are offering our price based on the design and construct brief provided and is subject to the attached notes".
125. The next day the applicant forwards another e-mail addressed to [DE]. Attached is a document, the same as the previous document, save it is addressed to Respondent A and has the date 27/02/08 appearing on it.
126. The request for the quote does not assist the Applicant. The Applicant already had a contract by February 2008 with [XYZ Pty Ltd]. I agree the request is in

line with the statement by [CD] in September that Respondent A was a developer of the project but it does not indicate that the Applicant had a contract with the Respondents.

127. The next event recounted by [AB] is an email of March 2008 from [AB] to [DE] advising [DE] that [AB] had told Connell Wagners to resize transformers.
128. I do not think this event assists the Applicant. There may be many reasons for this act and the Applicant does not make any attempt to explain how this event arose or its significance.
129. The Applicant explains that in August 2008 [XYZ Pty Ltd] attempted to have the Applicant execute a building subcontract. The document is not provided. [AB] declares that he told [XYZ Pty Ltd] that the Applicant had a contractual relationship with the Developer which is described as the "Respondent B Joint Venture"
130. This event is recounted as it indicates that at this time the Applicant thought it had a contract with the Developers and was not going to enter into another contract with the builder. Unfortunately even if I accepted this belief was held by the Applicant, the Applicant can have a mistaken interpretation of events and think it has a contract with the Developers but that does not make it so. Objectively the Applicant had a contract with [XYZ Pty Ltd] not the Respondents.
131. The Respondents did not have any knowledge of the Applicant's belief as far as I can determine and so could not respond. The action by [XYZ Pty Ltd] to get the Applicant to enter into a subcontract for the provision of the electrical works is a red flag to the Applicant that something is amiss in the arrangements and should have indicated to the Applicant that others thought that [XYZ Pty Ltd] was the builder and not a project manager for the Respondents which is in some way an agent for the Respondents and that [XYZ Pty Ltd] thought it had a contract with the Applicant. [XYZ Pty Ltd] trying to get the contract in writing is

not an attempt by it to try to enter into a contract but rather an attempt to settle the terms of the contract that already existed.

132. I am surprised that given this conflicting attempt by [XYZ Pty Ltd] to get the Applicant to execute written terms of a contract there is no mention of the Applicant going to the Respondents to get them to clarify matters with [XYZ Pty Ltd].
133. I do not consider this event to assist the Applicant in showing it had a contract with the Respondents. The applicant may have had the belief asserted but it has not obtained any admission from the Respondents that its belief is held by them.
134. The next event the Applicant recounts in support of its contention that it has a contract with the Respondents is a meeting in August 2008. [AB] attended on [DE] the superintendent for the Developers and [DE] said he had misread the quote and was \$100,000 out. [DE] asked [AB] to help him out. [AB] thought [DE] was asking for a reduction in price. I think [AB] is correct but the request was not to have the Applicant reduce its contract price with the Developers as there was none.
135. [AB] told [DE] that [CD] and [BC] had agreed the scope of the works and the figures and that the contract had been partly executed and only a small reduction if any was possible unless the scope of the works were reduced. [AB] then states in his declaration that the \$990,000 price was not discussed at that meeting.
136. Perhaps the actual figure of \$990,000 was not mentioned but certainly the price was discussed. If [DE] was asking for a reduction of 10% then it had to be a reduction from something and that would have to be the \$990,000 quote put by the applicant to [BC]. I assume [DE] is referring to the sum listed in the quote sent to him by email in February 2008 by the Applicant.
137. The submitted inference in recounting the event is that [DE] acting for the

Developers wanting the Applicant to reduce its price, could only take place if the Applicant's contract was with the Developers.

138. This is not the only inference. The Developer apparently wanted to reduce the cost of the project and to do that it would have to pay to the builder less and so the subcontractor would have to take a reduction in price. [DE] could have easily been asking the Respondent as a subcontractor to reduce its price so that the developers would not have to pay for their superintendent's mistake in costing the project.
139. This event is an indication that the major subcontractors had a close relationship with the developers but does not influence the making of the contract which contained the term as to whom the applicant had to look to for payment.
140. The Applicant is wrong when [AB] asserts that [CD] and [BC] agreed the price and that is somehow binding on the Developers. The Applicant is wrong in its assertion that anything agreed with [UVW Pty Ltd] and [BC] could carry forward to the Developers. The Applicant's premise that this event is proof of a contract with the Developers is incorrect. The recounting of this event does not assist the Applicant.
141. The next event relied on by the Applicant as indicating the existence of a contract with the Respondents also occurred in August 2008.
142. The event is an e-mail from [DE] to the Applicant bearing date 19 August 2008. The subject is "Respondent B Drawings". The content of the e-mail is, "if we don't get your revised drawings by tomorrow, as requested and previously agreed, I will ddt your payment from the next progress claim.
143. The e-mail contains a threat that the superintendent will deduct from the builders next progress claim, the amount that the applicant has claimed from the builder. The progress claim referred to is the claim by the Builder. It is the only progress claim the Superintendent receives and can have any effect over.

The Superintendent is not referring to the Applicant's progress claim to [XYZ Pty Ltd], the builder.

144. I do not think that this document assists the Applicant by being an admission on the Respondent's part or confirming a direct contractual relationship between the Applicant and the Respondents.
145. The applicant recounts that by December 2008, [XYZ Pty Ltd] was slow in making payments and the amounts paid were less than the invoice sum claimed. [AB] recounts that he was told by [DE] and [GH from XYZ Pty Ltd] that payments would be made.
146. [AB] recounts that [DE] specifically started to direct [XYZ Pty Ltd] to pay the applicants invoices.
147. The first event, namely that [DE] was directing the builder to pay the applicants Invoices accords with the situation of the contract being between the Applicant and [XYZ Pty Ltd], the builder.
148. The applicant then recounts that it then only did work because [DE] assured [AB] that the work would be paid for. [DE] denies making any such statements. I am not satisfied that [DE] made the statement alleged. There is no conduct by the Applicant that it was looking to the Developers for payment until 1 April 2009 and that lack of such action is a factor that supports me in holding that view.
149. Finally, the Applicant recounts that the construction work ceased in February 2009. The Applicant says the reason for this was it became known that trades engaged by the builder and the developer were not being paid or if they were being paid they were being paid very little just to keep them on site.

CONCLUSION

150. I am of the view that on the material before me and for the purposes of this adjudication, on the balance of probabilities no contract was formed between the parties as alleged by the Applicant and so I am of the view that I do not have jurisdiction to adjudicate this dispute.

COSTS

151. The Respondents have sought a determination that the Applicant pay the costs of the Application.

152. Clause 36 (1) of the Act requires the parties to bear their own costs.

153. Clause 36 (2) of the Act empowers the adjudicator to award costs if he is satisfied that the submissions of a party are unfounded or that the conduct of a party is frivolous or vexatious.

154. The submissions from the parties have merit on both sides and are neither frivolous nor vexatious.

155. I find that the obligations as to costs as set out in Clause 36(1) should not be altered.

DETERMINATION

156. In accordance with s 38(1) of the Act I determine that the amount to be paid by the Respondents to the Applicant is nil.

157. I make no order as to costs.

158. I draw the parties' attention to the slip rule in s 43(2) if I have made some correctable error.

Dated:

David Alderman
Registered Adjudicator