

Adjudicator's Determination
Pursuant to the Construction Contracts (Security of Payments) Act

Adjudication Number	34.14.01
Prescribed Appointor	RICS Dispute Resolution Service.
Adjudicator	Colin Bond (Adjudicator 34)
Applicant:	
Respondent:	
Project:	.
Amount to be paid by Respondent	\$442,789.74 including GST
Due Date For Payment	Within 7 days of release of determination
Adjudication Fees Apportionment	Applicant: 50% Respondent: 50%
Date of Determination or Dismissal	22 nd August 2014
Payment Claim	Claimed Amount : \$692,034.07 including GST Dated : 20 th March 2014
Notice of Dispute / Response to Payment Claim	Notice of Dispute Amount : N/A
Adjudication Application	Dated: 29 th July 2014
Adjudicator Acceptance	Dated: 29 th July 2014
Adjudication Response	Dated: 8 th August 2014

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The Determination or Dismissal

1. I, Colin Bond, Registered Adjudicator Number 34, as the Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act* (the Act), for the reasons set out in this determination, determine that:
 - a. The amount to be paid by the respondent to the applicant is **\$442,789.74** including GST.
 - b. Interest is due on the adjudicated amount at a rate of 8.5% per annum from 30th May 2014.
 - c. The respondent is to pay the amount due to the applicant within 7(seven) days of the date of the determination being released.

Background

2. The application arises from an unpaid payment claim made by the applicant on the respondent in respect of construction work carried out under a contract between the parties for the supply and installation of electrical equipment [specific location details omitted] in Alice Springs, Northern Territory (the Project).

Appointment

3. The applicant served its adjudication application on the RICS Dispute Resolution Service, a Prescribed Appointor under the Act, pursuant to section 28(1)(c)(iii) of the Act.
4. The adjudication application was referred to me as adjudicator on 29th July 2014 by the RICS Dispute Resolution Service pursuant to section 30(1)(a) of the Act.
5. The RICS Dispute Resolution Service served a notice of my acceptance of the appointment on the claimant and the respondent on 29th July 2014.

Material

6. The following material was provided to me:
 - Adjudication Application dated 29th July 2014
 - Adjudication Response dated 8th August 2014

7. On 7th August 2014 pursuant to section 34(2)(a) of the Act I requested further submissions from the parties. The following responses were received:
 - The respondent's further submission dated 7th August 2014
 - The applicant's further submission dated 8th August 2014
8. On 8th August 2014 pursuant to section 34(2)(a) of the Act I requested further submissions from the parties in respect of the service of the adjudication application on the respondent. The following responses were received:
 - The applicant's further submission dated 8th August 2014
 - The respondent's further submission dated 8th August 2014

Jurisdiction

9. The work executed under the construction contract is 'construction work' as defined under section 6(1) of the Act.
10. The construction contract was entered into after the commencement of the Act pursuant to section 9(1) of the Act.
11. The claimant is a party who, under the construction contract concerned and under which a payment dispute has occurred, is entitled to apply to have the dispute adjudicated pursuant to section 27 of the Act.
12. The respondent has stated in its response to my submissions on 7th August 2014 that "*we're not sure whether the claim falls within the purpose or intent of the Construction Contracts (Security of Payments) Act, mainly due to the claim being lodged in excess of 3 years after the work was completed and also due to the fact that there were formal contracts in place for work which in effect time bar such a claim so long after such claims were requested*".
13. The respondent also states that several of the claims have been referred to a third party for adjudication. The respondent in its adjudication response makes reference to claims being rejected by [the principal] and [the head contractor] and then the respondent was left with no option but to accept their adjudication on those claims even on occasions where it wasn't in agreement with these agreements.
14. No evidence of any third party adjudication in relation to this dispute has been provided and I am therefore satisfied that neither of the events stated in section 27(a) or 27(b) of the Act has occurred in respect of this matter.
15. The applicant states in its adjudication application that it has not previously issued a final consolidated claim for all amounts owed. In the adjudication response the respondent has stated

“it has taken a long time for you to submit what I presume is your Final Claim, and it’s a pity you couldn’t produce it when requested, but at last we are now able to examine the extent of it.”

16. I am therefore satisfied that a final payment claim has not yet been submitted for the construction works and in accordance with the implied provisions of the Act, Division 3 section 4(1) “a claim by the contractor for a progress payment can be made at any time after the contractor has performed its obligations”.
17. Whilst I acknowledge that this payment claim has been submitted several years after completion of the construction works as the subcontract terms are silent in relation to the time for submission of a final claim I am satisfied that the Implied terms of the Act now apply and I am therefore satisfied that the adjudication application falls within the jurisdiction of the Act.

Payment Claim

18. The applicant served the respondent with its Payment Claim dated 20th March 2014 in respect of the supply and installation of electrical equipment [specific locations omitted] in Alice Springs, Northern Territory (the Project).
19. The respondent has not denied receiving the applicant’s payment claim.
20. It is common ground that a construction contract exists.
21. The respondent does however state in its adjudication response that the adjudicator does not have jurisdiction to determine the bulk of the claims made by the applicant as they are out of time to be adjudicated, however I have addressed this in the jurisdiction section above.
22. I am satisfied that the payment claim has not been issued in previous months and therefore do not consider it to be out of time.

Notice of Dispute / Response to Payment Claim

23. An adjudication response was served by the respondent in accordance with section 29 of the Act and within the prescribed timeframes.
24. Pursuant to section 8(a) of the Act, the dispute is taken to have arisen on the day the amount claimed in a payment claim is due to be paid, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed.

Adjudication Application

25. Section 28(1) of the Act provides for the applicant to apply for adjudication of a payment dispute within 90 days after the dispute arises.
26. I am satisfied with the alternative calculation provided by the applicant that the payment dispute arose on 30th May 2014 and therefore the 90 day period in relation to when the adjudication application is due to be submitted expires on 28th August 2014.
27. Clause 22(a) of the contract between the parties provides that a claim submitted after the 10th of the month is deemed to have been received on the 10th of the following month. The payment claim is therefore deemed to have been received on 10th April 2014 and therefore the due date for payment was 30th May 2014.
28. The applicant applied for adjudication of the payment dispute on 29th July 2014 and within the time allowed pursuant to section 28(1) of the Act.
29. The application is in writing pursuant to section 28(1) (a) of the Act.
30. The application was served on the respondent pursuant to section 28(1) (b) of the Act.
31. The application was served on RICS Dispute Resolution Service pursuant to section 28(1) (c) (iii) of the Act.
32. I am therefore satisfied that the adjudication application complies with the requirements of section 28 of the Act.

Adjudication Response

33. Pursuant to section 29(1) of the Act the respondent has 10 working days after the date on which it is served with an application for adjudication in which to prepare and serve its written response on the adjudicator and the applicant.
34. I am satisfied that the respondent served its response within the timeframes prescribed in the Act.

Reason for the Determination

35. In making this determination I have had regard to the following matters, pursuant to section 34 of the Act:
 - the application and its attachments; and
 - the further written submissions validly made by the parties.

Contract

36. The applicant in its adjudication application has provided a copy of the Subcontract Contract Conditions.
37. It is common ground that a Construction Contract exists between the parties for supply and installation of electrical equipment at [the 1st and 2nd locations] in Alice Springs, Northern Territory (the Project).

Issues in Dispute

38. As discussed above the respondent has disputed the validity of the adjudication application and payment claim for reasons as detailed in the Adjudication Response. I have addressed these issues above and I am satisfied that both the adjudication application and payment claims comply with the requirements of the Act.
39. In the Adjudication Response the respondent also states that the agreement between the parties was on the basis of accepting the terms and conditions of contract that the respondent had in place with [the head contractor], which includes determination on such claims.
40. Section 12 of the Act states “a provision in a construction contract has no effect if it purports to make the liability of a party (**party A**) to pay an amount under the contract to another party contingent (whether directly or indirectly) on party A being paid an amount by another person (whether or not a party)”.
41. I therefore do not consider that existence of any contractual provision which attempts to impose a pay if paid or pay when paid provision from a third party (i.e. the head contractor) on the applicant has any effect and consequently I do not consider this as a valid reason for withholding payment.
42. The respondent also states in its Adjudication Response that as a Notice of Dispute was not forthcoming and this is a reason for withholding payment. The Act makes no such stipulation on the applicant as a requisite to submitting its payment claim. I therefore conclude that this is also not a valid reason for withholding payment.
43. The respondent also states that as this payment claim was received over 3 years after Practical Completion was awarded on 8 April 2011 and over 1 year after Final Completion in April 2013 this ambush claim gives us no opportunity to represent them or either the Head Contractor or the Principal, which was a requirement of the terms and conditions of our agreement.

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44. I have addressed the issue of the payment claim being issued 3 years after Practical Completion in paragraph 16 above and I have also addressed the issue of paid when paid in paragraphs 40 and 41 above.
45. In its Payment Claim the Claimant submitted a progress payment in the sum of \$692,034.07 (inclusive of GST).
46. The more specific issues in dispute in relation to the Payment Claim I have addressed in detail below.
47. **Contract Value** – The original contract sum for the works as evidenced in attachment A of the adjudication application is \$2,094,287.00. However from the evidence provided it appears to be common ground that the contract scope was reduced and the amended contract sum was \$2,046,865.76.
48. The applicant has confirmed the amount previously paid for the contract works and this has not been disputed by the respondent.
49. I therefore value the contract sum at \$2,046,865.76 excluding GST less sums previously paid \$2,000,609.47 which equates to **\$46,256.29**.
50. **Variations** – the applicant in its adjudication application stated that the works commenced on the basis of the [the principal] Tender Issue Drawings and carry out any alterations necessary as a Variation when [the principal] issued the “For Construction” Drawings. It was made clear to the applicant that [the principal] agreed to take the risk of any additional cost and time impacts as a consequence of changes that flowed from the issue of the “For Construction” drawings.
51. Many revisions and changes followed. The original 159 Tender Drawings increased to over 800 drawings issued “For Construction”. The principal has paid for the majority of the value of the variations work.
52. None of these statements were refuted by the respondent in its adjudication response.
53. **Variation H0700-15 & H0668-12 – Upgrade from Neon to Sulphur Conductors** – The respondent in its adjudication response states “*we have already sought and received one adjudication on this claim by [the principal]’s [name omitted] and although it was initially rejected, we were able to negotiate a part settlement as per CV*41, which has been paid*”.
54. For the reasons stated in paragraphs 40 & 41 paid when or paid if provisions have no effect in the Act and therefore I consider that this is not a valid reason for withholding payment.
55. After carefully reviewing the documentation presented by the applicant in relation to the upgrade from Neon to Sulphur conductors at each location I concur with the outstanding value of the works being **\$89,488.95** for [the 2nd location] and **\$58,210.47** for [the 1st location] excluding GST.

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56. **Variation H0700-51 & H0668-68– Testing of Earthing Systems** – The respondent in its adjudication response states “*despite our protracted argument on your behalf this work was deemed to be included in the contract scope of work and the entire claim was rejected as per attachment No. 3 the e-mail of the 17/08/11.*”
57. For the reasons stated in paragraphs 40 & 41 paid when or paid if provisions have no effect in the Act and therefore I consider that this is not a valid reason for withholding payment.
58. In addition after careful review of attachment No. 3 of the adjudication response it appears that the queries raised between [the principal] and [the head contractor] are specific to their own arrangements and do not directly relate to the contractual arrangements between the applicant and the respondent that are subject to this adjudication application.
59. After carefully reviewing the documentation presented by the applicant in relation to the testing of earthing systems, in particular the quotations from [a third party expert] I concur with the outstanding value of the works being **\$26,540.25** for [the 2nd location] and **\$27,984.30** for [the 1st location] excluding GST.
60. **Variation H0700-55 Re align Steel Structures for Rigid Busbar System** – The respondent in its adjudication response states “*..... we are prepared to pay \$26,363.64 (\$29,000 less 10% mark-up) to settle this claim provided we are successful in being paid by [the head contractor] after all this time*”.
61. For the reasons stated in paragraphs 40 & 41 paid when or paid if provisions have no effect in the Act and therefore I consider the reference to being paid by [the head contractor] is inappropriate. If adopted would not be a valid reason for withholding payment.
62. After carefully reviewing the documentation presented by the applicant in relation to the re alignment of steel structures for rigid bus Bars of earthing systems, in particular the build-up of the variation cost in variation # H0700-55 I concur with the outstanding value of the works being **\$31,064.47** for [the 2nd location] excluding GST.
63. **Variation H0668-71– Fire Stop Conduits** – The respondent in its adjudication response states “*this claim is dated 18th of May 2011 but not received by us to enable it to be submitted for consideration by [the head contractor] until 27th June 2011, after what was considered to be your final claim, but this is also the first advice from you to us of it being outstanding. It doesn't appear to have been addressed by [the head contractor] and we're not sure if it was included with payment for other claims but if we had more time we could comb through files to confirm if it was combined with other payments or rejected altogether.*”
64. For the reasons stated in paragraphs 40 & 41 paid when or paid if provisions have no effect in the Act and therefore I consider that this is not a valid reason for withholding payment. In addition the respondent doesn't appear to know if indeed this claim has been paid or not.

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65. After reviewing the documentation presented by the applicant in relation to the fire stop conduits and attachment I of the adjudication application I concur with the outstanding value of the works being **\$2,684.00** for the 1st location] excluding GST.
66. **Variation H0700-12 & H0668-9– RTU Panels Installation** – The respondent in its adjudication response has conceded these variations.
67. I therefore value RTU Panels at **\$1,625.00** for [the 2nd location] and **\$1,625.00** for [the 1st location] excluding GST.
68. **Additional Variations H0700-35, 53 H0668-10, 26, 40 & 42– value claimed \$140,213.12** - The respondent in its adjudication response states “.....*I don’t believe we have seen previously.....we would need to review our records to determine if/when we received them and if they were combined with other claims but from your calculations, you don’t seem to be seeking payment for them.....it appears to me that they may well be time barred under the contract as we’ve received them far too late to submit to our clients*”.
69. **Additional Variation H0700-35 – Preliminaries, Insurances & Logistics Costs – value claimed for [the 2nd location] \$38,900.00 excluding GST.** The applicant has included a brief description of the variation justification within the Request for Variation document #H0700-35 – “*due to the extension of the project completion date beyond 2010. Costs include additional airfare, accommodation expenses inc meals, insurances and outgoings for premises*”.
70. No evidence of any agreement to extend the project completion date has been provided. The applicant has not provided any evidence of actual additional costs incurred in relation to these items. I consider that the burden of proof is with the applicant to demonstrate an entitlement to an extension of time and indeed to provide appropriate documentary evidence to demonstrate the extent of the actual costs incurred beyond the original project completion date.
71. In the absence of the evidence mentioned in paragraph 70 above I value this variation at **Nil**.
72. **Additional Variation H0700-53 – Additional attendance by [applicant] during Testing & Commissioning – value claimed for [the 2nd location] \$19,800.00 excluding GST.** The applicant has included a brief description of the variation justification within the Request for Variation document #H0700-53 – “*as of the 12th October 2010 [the testing contractor] was reassigned to directly report to, and work under the guidance/instruction of [the head contractor, at the request of [the principal’s] representative [name omitted]. Although not in direct control of [the testing contractor], [the applicant] has committed resources, materials, office space and workshop in direct support of all organisations in order for them to successfully meet their testing outcomes*”.
73. The variation provides a brief calculation of 180 man-hours @ \$110/hour, however no evidence has been provided to either demonstrate that these additional hours were actually worked on the project or indeed any evidence to justify actual costs. I consider that the burden of proof is with the applicant therefore in the absence of this evidence I have valued this variation at **Nil**.

74. **Additional Variation H0668-10 – Cable Support System in Basement – value claimed for [the 1st location] \$18,788.59 excluding GST.** The applicant has included a brief description of the variation justification within the Request for Variation document #H0688-10 – *“no drawings of cable support system were supplied at time of tender. This variation is for the construction of cable support structure in the basement of the control building.”*
75. The variation provides a brief calculation of the labour, materials and cost of providing as built drawings, however no evidence has been provided to either demonstrate that these additional hours were actually worked or material supplied on the project. I consider that the burden of proof is with the applicant therefore in the absence of this evidence I have valued this variation at **Nil**.
76. **Additional Variation H0668-26 – Additional Cable Support in Existing Control Room– value claimed for [the 1st location] \$4,024.53 excluding GST.** The applicant has included a brief description of the variation justification within the Request for Variation document #H0688-26 – *“no drawings of cable support system were supplied at time of tender. This variation is for the construction of cable support structure in the existing control room.”*
77. The variation provides a brief calculation of the labour, materials, however no evidence has been provided to either demonstrate that these additional hours were actually worked or material supplied on the project. I consider that the burden of proof is with the applicant therefore in the absence of this evidence I have valued this variation at **Nil**.
78. **Additional Variation H0668-40 – Additional attendance by [the applicant] during Testing & Commissioning – value claimed for [the 2nd location] \$19,800.00 excluding GST.** The applicant has included a brief description of the variation justification within the Request for Variation document #H0668-40 – *“as of the 12th October 2010 [the testing contractor] was reassigned to directly report to, and work under the guidance/instruction of [the head contractor], at the request of [the principal’s] representative [name omitted]. Although not in direct control of [the testing contractor], [the applicant] has committed resources, materials, office space and workshop in direct support of all organisations in order for them to successfully meet their testing outcomes”.*
79. The variation provides a brief calculation of 180 man-hours @ \$110/hour, however no evidence has been provided to either demonstrate that these additional hours were actually worked on the project or indeed any evidence to justify actual costs. I consider that the burden of proof is with the applicant therefore in the absence of this evidence I have valued this variation at **Nil**.
80. **Additional Variation H0668-42 – Preliminaries, Insurances & Logistics Costs – value claimed for [the 2nd location] \$38,900.00 excluding GST.** The applicant has included a brief description of the variation justification within the Request for Variation document #H0668-42 *“due to the extension of the project completion date beyond 2010. Costs include additional airfare; accommodation expenses inc meals, insurances and outgoings for premises”.*

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81. No evidence of any agreement to extend the project completion date has been provided. The applicant has not provided any evidence of actual additional costs incurred in relation to these items. I consider that the burden of proof is with the applicant to demonstrate an entitlement to an extension of time and indeed to provide appropriate documentary evidence to demonstrate the extent of the actual costs incurred beyond the original project completion date.
82. In the absence of the evidence mentioned in paragraph 81 above I value this variation at **Nil**.
83. **Retentions** – The respondent in the adjudication response states that if it were to accept this claim as the Final Claim it has not been submitted within the required time and the WAE drawings still haven't been received.
84. As stated above I have addressed the issue of the payment claim being issued 3 years after Practical Completion in paragraph 16. No evidence has been provided by the respondent that any of the works remain incomplete, including the issue of the WAE drawings.
85. I therefore do not consider this to be a valid reason to continue to withhold retention monies and I have therefore value the retention at **Nil**.
86. **Interest** – The respondent in the adjudication response states *“that there is no interest applicable as the claimant has not notified the respondent of the outstanding amounts in a timely manner and is substantially the cause of the delay for which interest is being sought.”*
87. Interest is payable on the adjudicated amount in accordance with clause 35(1) (b) of the Act which I have addressed below in more detail.
88. The applicant has included claims for interest on retentions, [first and second locations] from 1 May 13 through to 14 March 2014. No evidence has been provided that would demonstrate any entitlement for interest relating to any progress claim submitted on or around 1 May 2013. I therefor value these interest claims at **Nil**.

Valuation of issues in dispute

89. My determination in relation to this adjudication is as follows:

		<i>Summary of Adjudicated Amount</i>
1.	Contract sum works claimed	\$46,256.29
2.	Variations	
	[1st location]	
H0688-9	Supply & Install RTU Panels	\$1,625.00
H0688-12	Twin Sulphur Conductors	\$58,210.47
H0688-64	Testing of Earthing System	\$27,984.30
H0688-71	Fire Stop Conduits	\$2,684.00
	Sub-total	\$90,503.77
	[2nd location]	
H0700-12	Supply & Install RTU Panels	\$1,625.00
H0700-15	Twin Sulphur Conductors	\$89,488.95
H0700-51	Testing of Earthing System	\$26,540.25
H0700-55	Re alignment steel structures	\$31,064.47
	Sub-total	\$148,718.67
	Total Contract sum Plus Variations	\$285,478.73
	Release of Retention Money – 2.5%	\$117,057.40
	Total	\$402,536.13
	GST	\$40,253.61
	Adjudicated Amount	\$442,789.74

90. I therefore find that the adjudicated amount is **\$442,789.74**

Adjudication costs

91. Pursuant to section 36(1) of the Act I determine that the parties shall bear their own costs in relation to this dispute and that the costs of the adjudication shall be shared equally by both parties.
92. The adjudication costs for this determination amount to 36.5 hours @ \$325.00 plus GST = \$13,048.75 including GST and as stated in paragraph 91 above, is to be paid equally by both parties. Tax invoices will be issued accordingly.

Interest Costs

93. I determine that interest is payable on the adjudicated amount in accordance with clause 35(1) (b) of the Act at rate of 8.5% per annum from the 30th May 2014.

Confidential information

94. Pursuant to section 38(e) identify the following information, that because of its confidential nature, is not suitable for publication by the Registrar under section 54 of the Act:
- a. The identity of the parties.
 - b. The identity and location of the project.



Signed:

Colin Bond – Registered Adjudicator No. 34

Dated: 22nd August 2014