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Adjudicator's Determination

Pursuant to the

Construction Contracts (Security of Payments) CCA 2004

Adjudication Number	**35.17.02**
Prescribed Appointor	**RICS Dispute Resolution Service**
Adjudicator	**John Tuhtan**[1]
Applicant:	
Respondent:	
Project:	
Amount to be paid by Respondent	**$1,558,899.06 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	3 November 2017
Payment Claim	Claimed Amount: **$3,287,804.00** including GST Dated: 25 June 2017
Notice of Dispute / Response to Payment Claim	Notice of Dispute Amount: $ Nil
Adjudication Application	Dated: 18 September 2017
Adjudicator Acceptance	Dated: 18 September 2017
Adjudication Response	Dated: 29 September 2017

[1] Registered Adjudicator Number 35

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DETERMINATION

1) I, John Tuhtan[2], the adjudicator appointed pursuant to section 30(1)(a) of the *Construction Contracts (Security of Payments) Act* (NT) (the **CCA**), for the reasons set out below, determine that:

   a) The amount to be paid by the Respondent to the Applicant is $1,558,899.06 including GST.

   b) Interest is due on the adjudicated amount at a rate of 10% per annum commencing on 16 July 2017 and up until the date of payment of the adjudicated amount.

   c) The Respondent is to pay the adjudicated amount to the Applicant within 7 days of the date of the notice advising that the determination has been released.

BACKGROUND

2) The application arises from an unpaid payment claim made by the Applicant on the Respondent under section 8(a) of the CCA for construction work carried out under a construction Contract at the [*site details redacted*] (the **Site**).

APPOINTMENT OF ADJUDICATOR

3) Pursuant to section 28(1)(c)(iii) of the CCA, the Applicant served its adjudication application on the RICS Dispute Resolution Service, which is a prescribed appointor under the CCA, on 18 September 2017.

4) The adjudication application was referred to me as adjudicator on 18 September 2017 by the RICS Dispute Resolution Service pursuant to section 30(1)(a) of the CCA.

5) The RICS Dispute Resolution Service served a notice of my acceptance of the appointment on the Applicant and the Respondent on 18 September 2017.

DOCUMENTS

6) The following documents were provided to me:

   a) Adjudication application signed by the solicitor for the Applicant and submissions dated 18 September 2017 (contained in 9 A4 lever arch folders) on 18 September 2017;

   b) Adjudication response signed by the Respondent dated 29 September 2017 2017 (contained in 8 A4 lever arch folders) on 29 September 2017;

   c) The Applicant's further submissions dated 11 and 16 October 2017;

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d) The Respondent's further submissions dated 11 and 16 October 2017.

JURISDICTION

7) On or about 15 August 2016, the parties entered into a Contract (the **Contract**) for the construction of civil works on the Site. The Contract was entered into after the commencement of section 9 of the CCA.

8) The civil work performed under the Contract is '*construction work*' as defined in section 6(1) of the CCA.

9) Accordingly, the Contract is a construction Contract as defined in section 5(1) of the CCA and the CCA applies to disputes arising under the Contract.

10) Pursuant to section 27 of the CCA, the Applicant is a party to the Contract under which the payment dispute has arisen and is, therefore, entitled to apply to have the dispute adjudicated.

11) I am not aware of any unresolved application for adjudication or order, judgment or finding by an arbitrator or court dealing with a matter arising under the Contract as referred to in sections 27(a) or 27(b) of the CCA.

12) I am, therefore, satisfied that I have jurisdiction to determine the application for adjudication under the CCA.

CONTRACT

13) On or about 12 June 2016, the Respondent sent by email a request for tender (the **RFQ**) to the Applicant (and other tenderers) and invited the Applicant to submit a price for the construction of civil works on the [*project details redacted*]. The Respondent sent additional design and its procedural requirements to the tenderers during the period up to 24 June 2017.

14) On or about 4 July 2016, the Applicant provided to the Respondent a detailed break up of its price to perform the civil works.

15) During the period 5 July 2016 to 13 July 2016, the Respondent sent to the Applicant revised or additional drawings, schedules and the proposed form of Contract and on 13 July 2107 it requested the Applicant to up-date its pricing accordingly.

16) On 13 July 2016, the Applicant sent its revised offer to perform the civil works. The revised offer included a detailed pricing schedule (the **Tender Schedule**) and 16 terms that qualified the revised offer.

17) On 21 July 2016, the Respondent [*superintendent's name redacted*] sent the Applicant a purchase order and a draft form of Contract for execution. The email stated;

> "*I understand a PO is being issued today and just in need of signing the contract, then we are set to go…*"

18) On 16 August 2016, the Applicant signed and returned the Contract to the Respondent.

19) On 1 September 2016, the Respondent signed and returned the contract.

20) On 1 September 2017, the Applicant mobilised to the Site and commenced the performance of the WUC.

PAYMENT CLAIM

21) On 25 June 2017, the Applicant served the Respondent a payment claim in the amount of $3,287,804.00 incl. GST. The payment claim was comprised of 31 claims for variations referenced V001, V002, V004, V005, V007, V008, V010 to V012, V014, V015, V018 to V021, V023, V025, V028, V030, V032 to V034, V036, V037, V039, V040, V042 and V046 to V049.

22) The payment claim was made in accordance with Item 28 and clause 37.1 of the Contract and was a payment claim for the purposes of the CCA.

23) The payment claim was comprised of 13 pages including:

    a) A cover letter;

    b) A 11 page detailed breakdown of the claim that set out the value of the completed work under the Contract and other amounts said to be due pursuant to the Contract referred to above at paragraph 21);

    c) A statutory declaration that all workers and subcontractors had been paid all money that was due and payable to them as of 23 June 2017.

24) Specifically, the payment claim indicated that:

    a) the Applicant claimed 100% of the original Contract works in the amount of $1,286,833 excl. GST;

    b) the Applicant claimed $2,779,338.00 excl. GST across 31 variations performed to 30 June 2017;

    c) the Respondent had to date paid $1,077,258.00 excl. GST; and

    d) the amount claimed under the payment claim the subject of the adjudication application was $2,998,912.00 excl. GST.

PAYMENT CERTIFICATE

25) On 7 July 2017, the Respondent served a payment certificate under clause 37.2 of the Contract, which was the notice of dispute for the purposes of the CCA.

26) Specifically, the payment certificate indicated;

a) That the Respondent certified as 100% complete, the original Contract works valued at $1,286,833. There was no dispute in relation to this part of the payment claim.

b) That the Respondent assessed and certified the claims for variations referenced as VO 1, 2, 4, 5, 7, 11, 12, 19, 23, 24, 25, 26 and 28 in the cumulative amount of $89,714.00 excl. GST. The Respondent referred to previous correspondence it had previously sent to the Applicant, which contained the reasons for withholding payment.

c) That the Respondent assessed and certified the claim for variation referenced as VO 47 in the amount of $143,853.14 excl. GST. There was no dispute in relation to this part of the payment claim.

d) All other claims for variations that formed a part of the payment claim but that are not listed in above sub-paragraphs b) and c) were assessed as $Nil. The Respondent indicated that many of the claims for variations had been previously assessed and it had not completed its assessment of the claims for variations referred to in its payment certificate and gave no other reasons for withholding payment.

e) That the Respondent assessed and certified variation referenced as VO 49 in the amount of $Nil. The Respondent indicated that this claim had been previously rejected because the Applicant did not make its claim for an extension of time in accordance with clause 34.3(b) of the contract.

f) The Respondent also set off an amount of $345,497.55 excl. GST and referred to previous correspondence that gave reasons for the set-off(s) and was comprised of the following:

    i) Liquidated damages in the amount of $64,341.65 excl. GST that was particularised in its previous letter referenced C1217-01-GNO-151 dated 10 May 2017;

    ii) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $99,522.50 excl. GST that was particularised in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017;

    iii) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $7,572.00 excl. GST that was particularised in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017;

    iv) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $54,061.40 excl. GST that was particularised in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017; and

    v) Negative variations (work deleted from the Applicant's contract) in the amount of $120,000.00 excl. GST.

g) That the Respondent would retain $97,644.44 and pay the Applicant $Nil.

27) The Respondent served its payment certificate within the time prescribed by clause 37.2 of the Contract, which is within 14 days of receiving a progress claim, referred to herein as the payment claim.

28) In a letter referenced C1217-01-GNO-244 dated 7 July 2017, the Respondent re-stated or changed its position in relation to the amount it proposed to deduct and set-off as follows:

a) Liquidated damages in the amount of $64,341.65 excl. GST and particularised in its previous letter referenced C1217-01-GNO-151 dated 10 May 2017;

b) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $99,522.50 excl. GST in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017 was reduced to $7,850.00 excl. GST;

c) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $7,572.00 excl. GST in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017 was increased to $13,322.70 excl. GST; and

d) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $54,061.40 excl. GST in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017 was increased to $100,000.00 excl. GST;

e) Negative variations (work deleted from the Applicant's contract) in the amount of $120,000.00 but the Respondent particularised variations V00A to V00I in the aggregate amount of $84,353.00 excl. GST. Other negative variations making up the balance of $35,647.00 were not particularised.

29) In a letter referenced C1217-01-GNO-248 dated 27 July 2017, the Respondent further changed its position and particularised negative variations V00A to V00K in the aggregate amount of $84,353.00 excl. GST.

DATE OF PAYMENT DISPUTE

30) The Respondent made it clear to the Applicant that it would not be paying any of the amount claimed on 7 July 2017 by the service of its payment.

31) Pursuant to section 8(a) of the CCA, the payment dispute occurred on the day the amount claimed in the payment claim was due to be paid but was not paid in full or the claim was rejected or wholly or partly disputed.

32) Clause 37.2 of the Contract indicates that the Respondent must make payment of the amount certified by the Superintendent within 21 days of the receipt of the payment claim.

33) But for the dispute, the payment claim was due to be paid on 16 July 2017.

34) The date the payment dispute arose on 7 July 2017[3] for the purposes of the CCA, which is the date that the payment claim was wholly disputed.

APPLICATION FOR ADJUDICATION

35) Section 28(1) of the CCA entitles an Applicant to make an application for adjudication of a payment dispute within 90 days of the occurrence of the payment dispute.

36) I am satisfied that the payment dispute occurred on 7 July 2017, which is the date the Respondent notified the Applicant (by way of the payment certificate) that it wholly disputed the payment claim and would not be making any payment in response to the payment claim.

37) The Applicant applied for adjudication of the payment dispute on 18 September 2017, which is within the time permitted by and in accordance with section 28(1) of the CCA. Specifically;

a) The application is in writing as required by section 28(1)(a) and 28(2) of the CCA.

b) The application was served on the Respondent on 18 September 2017, pursuant to section 28(1)(b) of the CCA.

c) The application was served on RICS Dispute Resolution Service on 18 September 2017, pursuant to section 28(1)(c)(iii) of the CCA.

38) On 4 October 2017, the adjudicator requested an equal deposit or security for the costs of the adjudication from the Applicant and the Respondent. Both parties duly provided the deposit as requested on 7 October 2017.

39) I am, therefore, satisfied that the adjudication application satisfies the requirements of section 28 of the CCA.

ADJUDICATION RESPONSE

40) Pursuant to section 29(1) of the CCA, the Respondent has 10 working days after the date on which it is served with an application for adjudication to prepare and serve its written response on the adjudicator and the Applicant.

41) The Respondent served its adjudication response on the appointer (acting as agent for the adjudicator) and the Applicant on 29 September 2017.

42) I am satisfied, therefore, that the Respondent served its response within the timeframes prescribed in the CCA.

[3] *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited and Ors [2017] NTSC 1*
Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd [2012] NTSC 22 at 20.

DETERMINATION OF JURISDICTIONAL ISSUES RAISED BY THE RESPONDENT IN THE RESPONSE & FURTHER SUBMISSIONS

43) The Respondent has raised two jurisdictional issues and asserts that I must dismiss the application. The jurisdictional issues were:

a) The matters the subject of the adjudication are too complex and the adjudicator will not be able to fairly make an adjudication and I must exercise my power under s. 33(1)(a)(iv) of the CCA; and

b) Many parts of the payment claim were also made in earlier payment claims. Accordingly, the adjudication application has not been made within the time prescribed by S 28 of the CCA and, therefore, I must dismiss those parts of the adjudication application.

44) The jurisdictional issues were raised by the Respondent for the first time in the response.

45) Accordingly, on 8 October 2017 pursuant to section 34(2)(a) of the CCA, in order to ensure that the Applicant was afforded natural justice, I requested the Applicant to provide me its submissions in response to the new reasons raised by the Respondent.

46) Furthermore, I noted that both parties had submitted extensive submissions as to whether this payment claim was in breach of s 28 of the CCA. I asked the parties to consider the implications of the judgment of Kelly J in *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited and Ors [2017] NTSC 1* and the judgments of Olsson J A and Kelly in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Ors [2011] NTCA 1* in relation to the second jurisdictional issue and to provide me submissions by 12 October 2017.

47) My determination of these jurisdictional issues is set out below.

Jurisdictional Issue 1 - The matters the subject of the application for adjudication are too complex and the adjudicator will not be able to fairly make a determination

48) The Respondent asserts that this adjudication is too complex and it is not possible for the adjudicator to fairly make a determination.

49) In light of the Respondent's assertion, I reviewed the materials provided by the parties and note that:

a) the Applicant's application for adjudication consists of 9 volumes and the Respondent response consists of 8 volumes. The documents provided are such that they can reasonably be reviewed and considered in a reasonable time;

b) the payment claim involves issues that are within the adjudicator's jurisdiction to determine the application;

c) the form and content of the application for adjudication is of a type envisaged by the CCA in order that an Applicant's claims under a construction contract can be determined informally and rapidly thereby promoting security of payment and cash flow; and

d) adjudicators are often asked to determine the causes of delay for works under construction contracts and the Applicant's corresponding entitlement to extension of time. Similarly, adjudicators are often required to determine costs to which an Applicant is entitled under a construction contract regardless that they have not been involved in the works on a day-to-day basis.

50) The Respondent has referred me to *Classic Stone (Qld) Pty Ltd and Julie Mauretta Pitcher [2012] WASAT 80* (**Classic Stone**) in support of its assertion that this application is too complex and should be dismissed by me.

51) In Classic Stone, the State Administrative Tribunal upheld the adjudicator's dismissal of the application, which was made because the adjudicator could not determine;

a) whether a Contract existed;

b) the parties to the contract; and

c) the terms of the Contract relating to purchase orders; and

d) The complexity related to uncertainty of relationship of the parties and agreed terms. That case, therefore, is distinguished and not relevant to the extant circumstances.

52) Neither party to this application for adjudication contests the existence of a construction contract or its terms. Additionally, the parties have provided detailed submissions and supporting documents required to comprehend the payment dispute and make a determination accordingly.

Jurisdictional Issue 2 - Many parts of the payment claim were also made in earlier payment claims. Accordingly, the adjudication application has not been made within the time prescribed by S 28 of the CCA. The parts of the payment claim that were previously made that are now out of time must not be considered by the adjudicator.

53) The Respondent asserts that the payment dispute arises on the occasion that a payment claim is made that is partly or wholly rejected or not paid in full on the due date.

54) The Respondent further asserts that s 28 of the CCA provides that if the Applicant does not exercise its right to have the payment dispute adjudicated within 90 days of the payment dispute, then the Applicant's right to have the payment dispute adjudicated is forever lost.

55) Additionally, the Respondent asserts that the payment claim is a "*repeat claim*", which is not permitted under the CCA pursuant to the decisions of the NT Court of Appeal in;

- *AJ Lucas Operations Pty Ltd v Mac-Attach Equipment Hire Pty Ltd (2009) 25 NTLR 14* (**Mac-Attack**); and

- *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Ors* [2011] NTCA 1 (**K&J Burns**).

56) Accordingly, the Respondent asserts that the Applicant is not entitled to make this application for adjudication because the adjudication application was made more than 90 days after the payment dispute arose.

57) Furthermore, the Respondent asserts that I must dismiss the application under section 33(1)(a)(ii) of the CCA because the application is made more that 90 days after the payment dispute arose.

58) The claimant asserts that the payment claim the subject of this application for adjudication is a valid payment claim because none of its earlier claims for payment for work completed under the Contract were valid claims for the purposes of the Contract and, therefore, for the purposes of the CCA.

59) The Respondent asserts that the parties waived their rights under the Contract in relation to the requirement to satisfy certain conditions precedent in order for there to be a valid claim. In other words, the parties amended the Contract during the execution of the works and the payment claims that would have been invalid under the original Contract were valid payment claims under the amended contract.

60) I have put it to the parties that this point has been judicially considered and determined in the judgment of Kelly J in *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited and Ors [2017] NTSC 1* and the judgments of Olsson J A and Kelly in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Ors [2011] NTCA 1.*

61) In any event, I have set out my reasoning below for determining that the Applicant made the application for adjudication within the 90 day period prescribed in section 28 of the CCA.

62) Section 28 of the CCA states:

> *Applying for adjudication*
>
> *(1) To apply to have a payment dispute adjudicated, a party to the Contract must, <u>within 90 days after the dispute arises</u> or, if applicable, within the period provided for by section 39(2)(b):* [Emphasis added]

63) The Respondent asserts that if the Applicant fails to make the application for adjudication within the prescribed 90 days from the time that the payment dispute arises, then it loses the right to have that payment dispute adjudicated forever.

64) The Respondent's interpretation is consistent with the judicial interpretation from *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA 4 (**Mac Attack**).

65) It should be noted however, that the rule established in Mac Attack was formulated on the basis of a contract that required the submission of disparate invoices each month. The contract provided no opportunity to re-submit an invoice each month.

66) The Contract in this case expressly requires a rolling claim being the progress claim system typically found in most construction contracts.

67) Subsequent judicial review in judgment of Kelly J in *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited and Ors [2017] NTSC 1* and the judgments of Olsson J A and Kelly in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Ors [2011] NTCA 1* of this issue has concluded that rolling or repeat claims are permissible under the CCA and a payment dispute may arise in relation to each validly made payment claim under a contract for the following reasons.

68) Section 4 of the CCA states:

> *payment claim means a claim made under a construction contract:* [Emphasis added]
>
> *(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*
>
> *(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.*

69) Pursuant to section 4 of the CCA a "*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.

70) In order for there to be a payment claim under a construction contract, the payment claim must be made in accordance with the terms of the construction Contract relating to how a party must make a claim to another party for payment. The word "*under*" does not mean "*in relation to*" or "*associated with*", it means "*in accordance with*".

71) Section 8 of the CCA states:

> *Payment dispute*
>
> *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 [Emphasis added]

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

(b) when an amount retained by a party under the Contract is due to be paid under the contract, the amount has not been paid; or

(c) when any security held by a party under the Contract is due to be returned under the contract, the security has not been returned.

72) Section 33(1) of the CCA states:

Adjudicator's functions

(1) An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a):

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

(i) the Contract concerned is not a construction contract; or

(ii) the application has not been prepared and served in accordance with section 28; or

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction Contract makes an order, judgment or other finding about the dispute that is the subject of the application; or [Emphasis added]

(iv) satisfied it is not possible to fairly make a determination:

(A) because of the complexity of the matter; or

(B) because the prescribed time or any extension of it is not sufficient for another reason; or

73) Section 4 and section 8 and section 33 when read together, only authorise an adjudicator to determine an application for adjudication if the payment claim is validly made and the application for adjudication made within 90 days of the occurrence of the payment dispute.

74) At paragraphs [118]-[124] of K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd, Kelly J stated:

[118] The second matter I want to comment upon is the question of "repeat claims".

[119] In AJ Lucas, Southwood J made the following remarks:

Clause 13 of the appellant's standard hire agreement provides for the rendering of accounts at monthly intervals and for the payment of accounts within 30 days from the end of the month in which a valid tax invoice is received. The clause contains no express provision for the making of repeat claims and there is no basis for implying such a provision in the standard hire agreement. Further, s 8 of the Act

does not permit a payment dispute to be retriggered by the making of a repeat claim in respect of the performance of the same obligations under a construction contract.

[120] The underlined words in this passage were used as the basis for a submission that, as a matter of law, the Act does not allow for (indeed prohibits) what have been referred to as "repeat claims". It was said that s 8 defines when a payment dispute arises, and once a dispute has arisen about a particular amount, it cannot arise again. Read in the context of the whole passage, the underlined words are not authority for such a proposition.

[121] As Southwood J made clear, the Contract in question in AJ Lucas provided for monthly invoices and made no provision for "repeat claims".

[122] In this case, the Contract contained a form of provision for the making of payment claims which is common in construction contracts. It provided for what is effectively a "rolling claim". That is to say, each payment claim is to specify the whole of the value of the work said to have been performed, from which must be deducted the amount already paid, the balance being the amount claimed on that payment claim. It is readily apparent that if any payment claim is not paid in full:

(a) a payment dispute will arise in relation to the part unpaid when the claim is due for payment under the contract; and

(b) despite that, each subsequent payment claim must include a "repeat claim" for that unpaid part.

[123] There is nothing in the Act which renders this form of contractual provision unenforceable – or takes it outside the power of an adjudicator to adjudicate upon. What the adjudicator is obliged to do when faced with a payment claim under a Contract of this kind is the same as he does for any other contract: he should look at the Contract and determine whether the payment claim complies with the provisions of the contract, when the amount claimed would be due for payment under the Contract (if payable), and whether the application has been lodged within 90 days of that date.

> *[124] I agree with Southwood J (in his reasons on this appeal) that a payment dispute does not come to an end – or a fresh payment dispute necessarily arise – simply because a further claim is presented seeking payment of precisely the same amounts for the performance of precisely the same work. However, I also agree with Olsson AJ that there is no reason why a Contract could not authorise the inclusion in a progress payment claim of earlier unpaid amounts, so as to generate a new payment claim, attracting a fresh 90 day period. In each case one must look to the Contract to determine when a payment was due and hence when the payment dispute arose. One imagines that in most contracts, a "repeat invoice" claiming no new work and simply served in an attempt to "re-set the clock" for the purpose of an application for adjudication, would not have the desired effect. However, one cannot be dogmatic. There are contracts, for example, where the contractor is to put in a final claim setting out all amounts claimed: each of these may have been the subject of one (or more) progress claims, and there may have been no new work done. It is always a matter of going to the Contract to determine when the payment dispute arose according to the express and/or implied terms of the contract."*

75) Further, at [236]-[238] in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd*, Olsson A-J stated:

> *"[236] Applying the concepts of such meanings to the relevant definition in s 4 of the statute, the clear intent of the definition is that, to constitute a payment claim, the claim must be shown to be a claim for moneys in accordance with or subject to the conditions of a construction contract.*
>
> *[237] In other words, it is not merely a claim at large in respect of works under a construction contract, it must be one that can properly be categorised as a genus of claim provided for by that contract. The existence of a mere causal nexus with a construction Contract is plainly not what is in contemplation by the legislation.*
>
> *[238] Moreover, as a matter of simple logic, a dispute can only arise under s 8 of the statute when a payment claim is properly said to be due to be paid under the relevant construction Contract and has been disputed and/or not fully paid. That situation can only arise in relation to a payment claim that purports to be of a genus recognised and provided for by the contract, that is, in the instant case, one that, on the face of it, complies with and answers the description in the mandatory provisions of cl 12.2 of the sub-contract."*

76) At paragraphs [257]-[261] of K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd, Olsson A-J stated:

> [*257] In view of that conclusion, it becomes unnecessary to dilate at length on the question of whether the statute contemplates or permits, for its purposes, the lodgement of repeat payment claims, so as to re-trigger the relevant 90 day limit.*

> *[258] It was argued on behalf of GRD that the issue as to whether the subject contract, as opposed to the statute, provides for or permits the resubmission of former payment claims is not to the point. Counsel contended that the critical issue is whether the statute permits the re-triggering of the 90 day limit in that manner, by giving rise to a valid payment dispute in relation to earlier payment claims. Reliance was placed on what fell from Southwood J in Mac-Attack117.*
>
> *[259] In the last mentioned case all of the members of the Court were of the opinion that the statute made no provision for and thus did not directly authorise, the resubmission or re-formulation of payment claims.*
>
> *[260] Whilst I respectfully accept that the manner in which s 8 sets out to define what constitutes a payment dispute does not make any provision for the re- triggering, by a repeat payment claim, of a payment dispute in respect of a payment claim that had been made earlier, as to which the 90 day limit has expired, nevertheless, it does not prohibit such a practical situation arising if such a situation is expressly stipulated for by the relevant construction contract.*
>
> *[261] I see no reason why such a Contract could not authorise the inclusion in a progress payment claim of earlier unpaid amounts, so as to generate a new payment claim, attracting a fresh 90 day period. Such a situation did not arise in Mac-Attack.*

77) These passages confirm that I must look to the Contract to assess whether the payment claim is a valid payment claim which complies with the Contract and as such as impose an obligation on the Respondent under the Contract to make payment by a particular date. If the payment claim does not satisfy the requirements of the Contract to trigger the obligation under the Contract on the Respondent to pay, then no payment dispute can have arisen.

78) I determine that the payment claim is a payment claim for the purposes of the CCA and the Contract because it satisfied all of the requirements the Contract.

79) Accordingly, I have determined that the payment claim was a valid payment claim for the purposes of the CCA, and the payment dispute arose on the date that the payment claim was rejected, which was 7 July 2017.

80) The Applicant asserts that none of its previous payment claims were made in accordance with the requirements of the Contract and, therefore, were not valid payment claims for the purposes of the Contract. It further asserts that this payment claim is made in accordance with the Contract and is, therefore a valid payment claim and the first time that the payment dispute arises.

81) The Respondent asserts that the payment claims previously made by the Applicant were assessed and paid by the Respondent. Accordingly, the parties, by their conduct, agreed that the previous payment claims were valid payment claims and implicitly changed the terms of the contract and or the Respondent waived its rights to insist on strict compliance with the Contract.

82) As an alternative to my above conclusion, I prefer the Applicant's submission on this point because neither party has provided any evidence that the parties knowingly elected to change the terms of the Contract in relation to what constitutes a valid payment claim. In other words, there was no new agreement to abandon a right[4]. Similarly, there is no evidence of any representation upon which to found any argument in estoppel.

83) In that context, previous payment claims were not claims made under the Contract and, therefore, could not found a payment dispute for the purposes of the CCA.

REASONS FOR THE DETERMINATION

84) Pursuant to section 34 of the CCA, I have considered the following matters in making this determination:

a) the application for adjudication and its attachments;

b) the response and its attachments; and

c) the further written submissions validly made by the parties.

DETERMINATION OF THE PAYMENT DISPUTE

85) I have considered the claims for variations and claims for extensions of time with claims for delay damages separately.

VARIATION V001 ADDITIONAL DEMOLITION OF CULVERT SURROUND AND BOLLARD REMOVAL

86) The Applicant has claimed $4,420.00 excl. GST to carry out V001 and the Respondent has certified $1,300.00 excl. GST[5].

87) The Applicant has changed its position in the application for adjudication and now accepts the Respondent's assessment of V001.

VARIATION V002 EXTRA SURVEY (DATA AND CONTROL POINTS) WORKS ARISING FROM MULTIPLE DESIGN CHANGES.

88) The Applicant has claimed $13,246 excl. GST to carry out V002 and the Respondent has certified $Nil.

89) The Applicant asserts that 24 revisions to 9 drawings necessitated the updating of its surveyor's set-out files and the installation of additional control points.

90) The Applicant asserts that the issue of amended drawings were instructions to vary the Contract pursuant to clause 36.1 of the Contract and/or a direction to re-sequence the works pursuant to clause 32 of the contract.

[4] The Commonwealth v Verwayen (1990) 64 ALJR 540 per Mason CJ at 543, 544
[5] *Paragraph 43 of statement of [SC]*

91) The work actually performed by the Applicant's surveyors is particularised in;

a) The statement of [*name redacted*];

b) The [*surveyor 1 name redacted*] invoice numbers: 101728, 97490, 97487, 97471, 97465, 97454, 97447, 95054, 94141;

c) The [*surveyor 2 name redacted*] invoice number; 7662;

92) The Respondent rejected claim V002 on the bases that;

a) that the changes were minor in nature and did not cause the Applicant to incur any additional cost.

b) The manner in which the drawings were issued, did not substantially alter the manner in which the works had to be performed.

c) The Applicant did not comply with the requirements of clause 36.2 of the contract;

Determination of V002

93) Clause 4 of the Instrument of Agreement states:

> "*The following documents constitute the "Contract" and (save where otherwise expressly stated) are in the <u>following descending order of priority</u>.*
>
> *(a)* *This Instrument of Agreement*
>
> *(b)* *Part B - Annexure to AS4000-1997*
>
> *(c)* *Part A - Annexure to AS4000-1997*
>
> **(d)** *<u>General conditions of Contract AS4000-1997</u> (not attached)* **(** the **General Conditions)**
>
> *(e)* *Schedules A to F as contained in document titled– C1217–06 – CON–002 Schedules*
>
> *(f)* *Technical specification– C1217–04 – CRP – 001 rev 0 Geotechnical Report*
>
> *(g)* *<u>Drawings as per drawing list</u>* (the **<u>Drawing List</u>**)
>
> (h) *Technical specification– C1 217–04– GSP– 001 rev B General design specification*"

Is the Applicant *disentitled to make this claim by the operation of clause 36.2?*

94) Pursuant to clause 2.2 of the contract, the Applicant must

> "*carry out and complete WUC in accordance with the Contract and directions authorised by the Contract.*"
>
> *"WUC (from 'work under the Contract') means the work which the Contractor is or may be required to carry out and complete under the Contract and includes variations, remedial work, construction plant and temporary works, and like words have a corresponding meaning."*[6]

95) Clause 1 defines a direction as

> *"includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement".*

96) Clause 36.1 of the Contract states:

> *"Directing variations*
>
> *The Contractor shall not vary WUC except as directed in writing.*
>
> *The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract:* [Emphasis added]
>
> *a) increase, decrease or omit any part;*
>
> *b) change the character or quality;*
>
> *c) change the levels, lines, positions or dimensions;*
>
> *d) carry out additional work;*
>
> *e) demolish or remove material or work no longer required by the Principal"*

97) The drawings referred to by the Applicant were a written document given by the superintendent under the Contract that changed the levels, lines, positions and dimensions of the WUC and sometimes added work or removed work from the WUC.

98) In that context, I am satisfied that a drawing issued by the superintendent under the Contract was a direction given under clause 36.1 for the purposes of the contract, with which the Applicant was required to comply.

[6] Clause 1 of the AS 4000 General Conditions of Contract

99) If there is any inconsistency between a drawing mentioned in the Drawing List and a direction given by the superintendent under clause 36.1, then by the operation of clause 4 of the Formal Instrument of Agreement, the direction given under the General Conditions has a higher precedence than a drawing incorporated by the Drawing List. Accordingly, the Applicant was required to perform the WUC in accordance with a drawing given by the superintendent which effectively superseded the corresponding (earlier revision) drawing referred to in the Drawing List

100) The Respondent asserts that the Applicant failed to comply with the requirements of clause 36.2 and, therefore, the Applicant has no entitlement to claim[7].

101) Clause 36.2 of the Contract states:

> *"Proposed variations*
>
> *The Superintendent may give the Contractor written notice of a proposed variation.*
>
> *The Contractor shall as soon as practicable after receiving such notice, notify the Superintendent whether the proposed variation can be effected, together with, if it can be effected, the Contractor's estimate of the:*
>
> *a) effect on the construction program (including the date for practical completion); and*
>
> *b) cost (including all time-related costs, if any) of the proposed variation.*
>
> *The Superintendent may direct the Contractor to give a detailed quotation for the proposed variation supported by measurements or other evidence of cost.*
>
> *The Contractor's costs for each compliance with this subclause shall be certified by the Superintendent as moneys due to the Contractor.*

102) I do not accept that this clause is relevant in the circumstances where the Respondent has issued drawings for the purposes of construction, which increase, decrease or omit, change the character or quality, change levels, lines, dimensions or make any material change to some work described on the previous drawing. I have determined above, such drawings are directions given under clause 36.1 with which the Applicant must comply.

103) Clause 36.2 only applies to the Respondent's proposed variations. In other words, if the superintendent indicates that the variations to change the works or for the addition or deletion of work may or may not proceed then that is an instruction under clause 36.2 of the Contract.

[7] Paragraph 109 of the Response

104) Furthermore, clause 36.2 of the Contract requires the Applicant to provide its assessment of the delays that may be suffered if the variation was instructed and the amount that the principal may be required to pay or that it will save.

105) The Applicant was given revised drawings that indicated they were for construction. I have not been provided any evidence that the Respondent indicated in any way that the drawings issued which superseded earlier revisions of those drawings were proposals in relation to which the Applicant was required to provide a detailed quotation and for which it could anticipate that it would be paid.

106) I have determined that the Respondent intended for the revised drawings to be used for construction.

107) Furthermore, the revised drawings could not be inferred to be proposed variations issued under clause 36.2 because the notes on the drawings indicated that they were for construction.

108) The revised drawings, therefore, were instructions given under clause 36.1.

109) Accordingly, the Applicant was not required to do any of the things required under clause 36.2 because no instruction under clause 36.2 was given, which was the condition precedent obliging the Applicant to respond pursuant to clause 36.2 of the Contract.

110) I do not, therefore, accept the Respondent's assertion that the Applicant is not entitled to variation due to the operation of clause 36.2 in relation to claims variations that are in dispute in this adjudication.

Was the payment claim made with a period permitted under the contract?

111) The Respondent asserts that the claims for variations were made out of time.

112) Clause 41.1 sets out the period within which the Applicant was required to notify its claim for a variation as follows:

> *"Communication of claims*
>
> *The prescribed notice is a written notice of the general basis and quantum of the claim.*
>
> *As soon as practicable after a party becomes aware of any claim in connection with the subject matter of the Contract, that party shall give to the other party and to the Superintendent the prescribed notice or a notice of dispute under subclause 42.1.*
>
> *This subclause and subclause 41.3 shall not apply to any claim, including a claim for payment (except for claims which would, other than for this subclause, have been included in the final payment claim), the communication of which is required by another provision of the Contract."*

113) There is no other clause in the Contract that sets out the time within which the Applicant must notify its claim for a variation arising under a direction given under clause 36.1. Accordingly, the Applicant was entitled to submit its claim as soon as practicable after it became aware of the claim.

114) In the circumstances, I do not consider the submission of this claim to be made within a time not envisaged under clause 41.1.

How is this variation to be valued?

115) The Applicant asserts that variations including V002 are to be valued pursuant to clause 36.4(d), because the clause 36.4(a), (b) and (c) are irrelevant.

116) The Respondent asserts that clause 36.4(b), (c) and (d) should be used for the purposes of valuing of variations.

117) The Applicant further claims that 43.5% should be added to its actual costs for overheads and profit[8].

118) The Respondent says that the Contract does not specify the amount to be used for overhead and profit but asserts that 43.5% is not fairly representative of the overhead and profit percentage on variations that is being applied in the industry and suggests that 15% is about the industry standard[9].

119) In certain situations, the Contract permits the Applicant;

a) to claim delay damages pursuant to clause 34.9 if it has been granted an extension of time for a compensable cause under clause 34.5; and or

b) to claim for a reasonable amount for overheads pursuant to clause 36.4(d) and profit on variations arising from a direction given under clause 36.1.

120) I will determine below the delay damages after I determine the extension of time to which the Applicant may be entitled. I have also determined below the reasonable amount referred to in clause 36.4(d) of the Contract.

Does the Tender Schedule form a part of the contract?

121) The Respondent identifies a bill of quantities (the **Tender Schedule**) completed by the Applicant during the tender period and asserts that it can be used for the purposed of clause 36.4(c). I do not accept that assertion for the following reasons;

a) Clause 2.2 of the Contract states:

"Bill of quantities

The Alternative in Item 10(a) applies.

Alternative 1

[8] Paragraph 26 in the Statement of [TC]
[9] Paragraphs 29 to 36 in the Statement of [GA].

A bill of quantities forms part of the Contract and shall be priced in accordance with subclause 2.3.

Alternative 2

A bill of quantities does not form part of the Contract and shall not be priced in accordance with subclause 2.3 unless so stated in Item 10(b).

b) Item 10(a) of Part A of the Annexure indicates that "Alternative 2" applies to this contract.

c) Item 10(b) of Part A of the Annexure indicates that a bill of quantities is not to be priced.

122) It is clear, therefore that the parties did not intend for there to be a bill of quantities that formed a part of the Contract or that any bill of quantities was to be priced and used in the administration of the contract.

123) For the avoidance of doubt, clause 36.4 states;

The Superintendent shall, as soon as possible, price each variation using the following order of precedence:

a) prior agreement;

b) applicable rates or prices in the Contract;

c) rates or prices in a priced bill of quantities, schedule of rates or schedule of prices, even though not Contract documents, to the extent that it is reasonable to use them; and

d) reasonable rates or prices, which shall include a reasonable amount for profit and overheads,

and any deductions shall include a reasonable amount for profit but not overheads.

That price shall be added to or deducted from the contract sum.

124) Clause 36.4 sets out how variations must be valued under the Contract. Specifically;

a) The parties may agree the value of a variation under clause 36.4(a) and that valuation must be used even though the Contract provides an method of valuation;

b) If there is no prior agreement, the variation must be valued using relevant rates set out in the Contract such as those set out in Schedule C to the Contract.

c) There is no priced bill that is relevant to this Contract. For the avoidance of doubt, the rates in the Tender Schedule cannot be used for the reasons set out above in paragraphs 121) and 122) unless the parties consent for each claim for a variation that the rates set out in the Tender Schedule can be used to value a particular variation. This conclusion is supported by the term drafted into Schedule A (that is a type of bill of quantities), which states; "*Pricing supplied is for all the works. It is not individual take out pricing*".

d) If none of the above apply, the parties may use reasonable rates. I construe this to mean similar industry rates.

Reasonable overhead and profit on variations (excluding delay damages)

125) In the adjudication application, I was informed that the 43.5% margin it claimed by the Applicant includes a percentage for delay damages. The Applicant has not provided a detailed breakdown of how it arrived at 43.5% but does admit that if I accept its delay damages claim, then the 43.5% should be reduced but does not make clear the overhead and profit component exclusive of a delay damages component.

126) As mentioned above, I will consider the Applicant's claims for extensions of time and any entitlement to delay damages separately.

127) The Respondent's cost assessor asserts that in its experience, 15% is about the industry standard for this type of mark-up on variations.

128) I accept the Respondent's cost assessor assertion that 15% is a reasonable allowance for overhead and profit on a variation.

Determination of claim for variation V002

129) I do not accept the Respondent's (the superintendent's assessment of 15 August 2017) for the reasons set out below.

130) The Respondent's cost assessor has assessed the invoices that were provided in support of claim for variation V002 as follows;

a) [*surveyor 1 name redacted*] invoice numbers: 101728, 97490, 97487, 97471, 97465, 97454, 97447, 95054, 94141;

b) [*surveyor 2 name redacted*] invoice number; 7662;

and rejects invoices "17471" (There is no such invoice. This is incorrectly stated and should be "197471"), "197465", "197454", "195054".

131) The Respondent says invoice 197471 was "re-works" and invoices 197465, 197454 and 195054 relate to works under the contract.

132) I have read the narrative drafted by the surveyor. I do not accept that invoices 197465 and 197454 relate to work under the contract. The narrative indicates that this was work carried out due to the issue of revised drawings.

133) I accept that invoices 197471 and 195054 most likely relate to work that was required to be performed under the Contract because it involved setting up the surface model for the first time.

134) Set out below is a table summarising my determination of V001:

Variation V001

Invoice	Applicant	Respondent	Determination
197490	$910.00	$910.00	$910.00
197488	$585.00	$585.00	$585.00
197487	$585.00	$585.00	$585.00
197471	$520.00	$-	$520.00
197465	$325.00	$-	$325.00
197454	$390.00	$-	$390.00
197447	$910.00	$910.00	$910.00
195054	$520.00	$-	$-
194141	$780.00	$780.00	$780.00
101728	$1,063.64	$1,063.64	$1,063.64
7662	$2,536.00	$2,536.00	$2,536.00
	$9,124.64	$7,369.64	$8,604.64
Margin	$3,969.22	$1,105.45	$1,290.70
TOTAL	**$13,093.86**	**$8,475.09**	**$9,895.34**

Note amounts claimed are as per invoices excluding GST.
Amounts assessed are exclusive of GST.
Amounts determined are exclusive of GST.

135) I have determined that the Applicant is entitled to be paid $9,895.34 excl. GST in relation to V002.

VARIATION V004 CHANGES TO SCOPE OF ROAD BASE COVERAGE. MATERIAL PLACED UNDER CHANGED CIRCUMSTANCES.

136) The Applicant has claimed $330,802.00 excl. GST to carry out V004 and the Respondent has certified $10,140.00 excl. GST.

137) The Applicant asserts that Drawing C1217-05-CEW-901 Rev C was superseded by Rev 0 then again superseded by Rev 1, then again superseded by Rev 2 then again superseded by Rev 3.

138) The Applicant asserts that the issue of drawings were instructions to vary the Contract pursuant to clause 36.1 of the Contract and/or a direction to re-sequence the works pursuant to clause 32 of the contract.

139) The work actually performed by the Applicant's surveyors is particularised in the statement of [*name redacted*] and says the variation was instructed due to changes shown in revisions to drawing C1217-05-CEW-901 and other drawings and instructions as follows;

a) Rev 0 issued on 3 August 2016, amended the layout of the perimeter (which had no consequence) and also required the removal of a bund wall, which caused delay because it had to be completed before the sub-grade works could progress;

b) Rev 1 issued on 29 September 2016, changed the dimensions of the road and required the construction of an area west of the [*redacted*] slabs to be constructed. Confirmed the location of Pits 1, 2 and 3, which had to be installed before the sub-base work could proceed.

c) Rev 2 issued on 7 October 2016, corrected the datum and set out points that resulted in an increased depth of road base.

d) Rev 3, issued 15 March 2017, was an as built drawing and had no effect on the construction.

e) On 10 August 2016, the Respondent sent the Applicant a revised drawing containing a note instructing the Applicant to change the construction sequence. Specifically, the instruction required the Applicant to reverse the its planned construction sequence by installing new [*connections*] before commencing the demolition of the old [*connections*].

f) The Respondent scheduled the delivery of the [*plant details redacted*] for mid-November 2016, which caused the Applicant to delay the construction of the road-base and apply its resources to the construction of the *[plant]* support slabs so that the Applicant would not be required to "double-handle" the [*plant*].

g) The Respondent instructed the addition of additional [*redacted*] main and sewer lines, which was claimed in variation V018;

h) The Respondent issued its underground [*redacted*] conduit design to the [*redacted*] area on 18 November 2017;

i) The Respondent instructed that an installed stormwater line was to be relocated due to a design error resulting in a clash between the stormwater line and a canopy footing;

j) The Respondent issued its revised [*redacted*] design in January 2017 that is the subject of variation V023; and

k) On 6 January 2017, the Applicant sought the Respondent's permission to use "blinding" to mitigate the effects of the wet season rains, which it claims is a variation directed by the Respondent.

140) The Applicant's claim was comprised of the following:

a) Supply and place road base in varying thicknesses from 100 to 175 mm for $177,374.00 plus 43.5% for overheads and margin;

b) Supply and place blinding for $88,326 plus 43.5% for overheads and margin;

c) Less a deduction for deleted work of -$33,376;

d) Set up of the blinding layer $1,200.00 plus 43.5% for overheads and margin.

141) The Respondent rejected claim the majority of V004 on the bases that;

a) The Applicant did not comply with the requirements of clause 36.2 of the Contract and is, therefore not entitled to claim for the variation;

b) The changes were minor and caused insignificant delay. The delay suffered by the Applicant was caused by the Applicant inability to resource and plan the works;

c) The "blinding" was placed by the Applicant for its convenience but did not form a part of the WUC.

d) The net effect of the changes referred to in the abovementioned drawings was that the Applicant was required to place road base over an additional 576m2, which required an additional 86m3 of material.

e) The rates provided during the tender are relevant for the purposes of valuing this variation.

142) The Respondent accepted that the net effect of the changes referred to in the abovementioned drawings was that the Applicant was required to place road base over an additional 576m2, which required an additional 86m3 of material and assessed the value of that work as $10,140.00 excl. GST.

143) Clause 4 of the Instrument of Agreement states:

> "*The following documents constitute the "Contract" and (save where otherwise expressly stated) are in the <u>following descending order of priority</u>.*
>
> *(a)* *This Instrument of Agreement*
>
> *(b)* *Part B - Annexure to AS4000-1997*
>
> *(c)* *Part A - Annexure to AS4000-1997*
>
> *(d)* *<u>General conditions of Contract AS4000-1997</u> (not attached)***(** the **General Conditions)**
>
> *(e)* *Schedules A to F as contained in document titled– C1217–06 – CON–002 Schedules*
>
> *(f)* *Technical specification– C1217–04 – CRP – 001 rev 0 Geotechnical Report*
>
> *(g)* *<u>Drawings as per drawing list</u>* (the **<u>Drawing List</u>**)
>
> (h) *Technical specification– C1 217–04–GSP– 001 rev B General design specification*"

Is the Applicant disentitled to make this claim by the operation of clause 36.2?

144) I have considered above at paragraphs 93) to 110) whether a revised approved for construction drawing (**AFC drawing**) was a direction under clause 36.1 or a direction under clause 36.2.

145) The Respondent asserted that in relation to the issue of any revised AFC drawings the Applicant's failure to comply with clause 36.2 entitled it to reject many of the claims made by the Applicant in the payment claim.

146) I determined that to the extent that the revised drawings showed more or less or different work, the revised drawings issued during the course of the works were in fact instructions given by the Respondent under clause 36.1 of the Contract for the following reasons:

a) the Respondent never indicated that the drawings were issued for the purposes of considering a particular variation;

b) The revised drawings were issued on the basis that they were "*approved for construction*" (**AFC**).

Was the payment claim made with a period permitted under the contract?

147) I have considered above at paragraphs 111)to 0 the issue as to whether the Applicant was entitled to submit its claim for payment given the period between commencement of the work under a variation and the time that a claim for payment for that work was made.

148) Furthermore, clause 41.1 sets out the period within which the Applicant was required to notify its claim.

149) There is no other clause in the Contract that sets out the time within which the Applicant must notify its claim for a variation arising under a direction given under clause 36.1. Accordingly, the Applicant was entitled to submit its claim as soon as practicable after it became aware of the claim.

150) In the circumstances, I do not consider the submission of this claim to be made within a time not permitted under clause 41.1.

How is this variation to be valued?

151) The Applicant asserts that variations including V004 are to be valued pursuant to clause 36.4(d), because the clause 36.4(a), (b) and (c) are irrelevant.

152) The Respondent asserts that Clause 36.4(b), (c) and (d) should be used for the purposes of valuing of variations.

153) The Applicant claims that 43.5% should be added to its actual costs for overheads and profit[10].

[10] Paragraph 26 in the Statement of [TC]

154) The Respondent says that 43.5% does not reflect the overhead and profit percentage on variations that is being applied in the industry and suggests that 15% is about the industry standard[11].

155) The Contract permits, in certain situations, the Applicant;

a) pursuant to clause 34.9, to claim delay damages it has been granted an extension of time for a compensable cause under clause 34.5; and

b) pursuant to clause 36.4(d), claim for a reasonable amount for overheads and profit on variations arising from a direction given under clause 36.1.

156) The Respondent identifies a bill of quantities completed by the Applicant during the tender period and asserts that it can be used for the purposed of clause 36.4(c). I do not accept that assertion for the following reasons;

a) Clause 2.2 of the Contract states:

"Bill of quantities

The Alternative in Item 10(a) applies.

Alternative 1

A bill of quantities forms part of the Contract and shall be priced in accordance with subclause 2.3.

Alternative 2

A bill of quantities does not form part of the Contract and shall not be priced in accordance with subclause 2.3 unless so stated in Item 10(b).

b) Item 10(a) of Part A of the Annexure indicates that "Alternative 2" applies to this contract.

c) Item 10(b) of Part A of the Annexure indicates that a bill of quantities is not to be priced.

d) It is clear, therefore that the parties did not intend for there to be a bill of quantities that formed a part of the Contract or that any bill of quantities was to be priced and used in the administration of the contract.

e) My conclusion in the above sub-paragraph is supported by the term drafted into Schedule A (that is a type of bill of quantities), which states; "*Pricing supplied is for all the works. It is not individual take out pricing*".

[11] Paragraphs 29 to 36 in the Statement of [GA].

Reasonable margin for overhead and profit

157) I have considered this question above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit.

Determination of variation claim V004

158) The Applicant asserts that;

a) The additional road base was required under the revised drawing C1217-05-CEW-901; and

b) the need to provide a blinding arose from the Respondent instructions to:

i) reverse the order of installation and demolition of the [*redacted*] lines;

ii) install the *[plant]* in mid-November 2016;

iii) install or re-work underground services referred to in above paragraph 139)

159) The Applicant asserts that it had planned to:

a) Demolish pipework during the period 3 to 5 September 2016; then

b) Supply and install [*redacted*] lines during the period 5 to 10 September 2016;

c) Cut to fill earthworks during the period 11 to 13 September 2016;

160) The Applicant then states;

> "*as would be expected given [the Respondent's] revised demolition sequence, this change to the order of the works delayed all preliminary earthworks on-site until the new [redacted] lines were installed (represented by activity 23)*."[12]
>
> "*This was largely because once [the* Applicant*] had installed the new [redacted] line (Activity 23) and removed the old [redacted] lines (activity 10) out of order with its original sequencing, a number of other trades have commenced on site, such as electricians and plumbers. This meant that [the Applicant] had to urgently reallocate its resources to begin excavations so that these trades could commence their works which in turn, prevented [the Applicant] from undertaking is other scheduled work on-site.*" [13]

[12] Paragraph 157 of the Statement of Zane Thiele
[13] Paragraph 157 of the Statement of Zane Thiele

161) I do not accept the Applicant's assertion as it makes no sense. The Applicant has not demonstrated that an instruction given on 10 August 2016 (which is prior to the Applicant mobilising to the site) that reversed the order of the demolition and installation of the [*connections*] (which were performed sequentially) had the type of delaying effect that it asserts. As a matter of logic, the revised sequence would have been:

a) Supply and install [*redacted*] lines during the period 3 to 8 September 2016;

b) Demolish pipework during the period 8 to 10 September 2016; then

c) Cut to fill earthworks during the period 11 to 13 September 2016;

162) It makes no sense to say that reversing demolition and installation activities, which were to be performed sequentially, would cause the Applicant to "be in the way of" other trades because the Applicant was required to perform the same work in the same area for the same overall period in the same way as it had originally planned.

163) The Applicant further asserts that it was instructed in mid-November 2016 to suspend its installation of the road base in order to install the [*plant*] set so as to avoid double handling the [*plant*].

164) The Applicant has not provided me with a copy of that instruction nor has it provided me a copy of its advice to the Respondent advising the significant delays that would flow from interrupting the construction sequence.

165) I accept that any additional work required by way of revised drawings is a variation, but based on the Respondent's explanation and evidence provided, I do not accept that those variations and the instruction to install the [*plant*] resulted in such delay that it was necessary to provide blinding to mitigate the effects of the wet season.

166) The Applicant seems to have caused its own delay and, in order to avoid further delays, requested the Respondent to approve the use of blinding.

167) I have not been provided with any drawing, specification, emails or letters or details of conversation showing that the blinding was requested by Respondent, or even that the Respondent offered to pay for the supply and installation of the blinding.

168) Accordingly, I determine that the Applicant is not entitled to payment for the blinding because it was not required under the contract, it was not instructed by the Respondent and it was provided for the convenience of the Applicant.

Applicant *double dipping on claim for overhead and profit*

169) The method of valuation applied by the Applicant for this claim was incorrect.

170) Clause 36.1 makes it clear that the Applicant must not vary the WUC except as directed in writing. I determined above, that revised approved for construction drawings requiring more or less work are directions issued under clause 36.1 of the Contract.

171) Under clause 37.1, the Applicant is only entitled to claim payment of the completed WUC, which includes any completed variations.

172) Clause 36.4 indicates how each variation must be priced. In the context that clause 1 defines variation as;

> *"The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract:*
>
> *a) increase, decrease or omit any part;*
>
> *b) change the character or quality;*
>
> *c) change the levels, lines, positions or dimensions;*
>
> *d) carry out additional work;*
>
> *e) demolish or remove material or work no longer required by the Principal.*

then, unless the revised design was completely different to that shown on the Contract drawings and the new work is not referable to the original work, then the Applicant only value the additional work.

173) For the purposes of this claim, I do not consider that the design was so materially changed that the original work was entirely deleted and a new package of work was added.

174) The Applicant has retained 43.5% for overhead and profit and allowed a deduction for the direct cost of the original works. The Applicant then claimed 43.5% for overhead and profit on the original work (that was not the subject of a variation) plus 43.5% overhead and profit on the additional work (which is the variation).

175) In effect, the Applicant's method of valuation means that it claims an additional 43.5% on the original work and 43.5% on the variation, which is not permitted for the above reasons.

176) The Applicant;

a) is entitled to claim overheads and profit on the works the subject of the variation; and

b) is only entitled to retain the overhead component of any deduction but not the profit.

Determination of V004

177) The Respondent's cost assessor states that he measured that 137 m3[14] of material was required due to the variations to cover 796 m2 that was not required under the original contract. Furthermore, he has allowed a 15% wastage factor and valued that material at $90.00/m3.

178) As mentioned above, the parties decided that the Tender Schedule will not be used for the purposes of clause 36.4.

179) The Respondent has used the price set out in the Tender Schedule for the purpose of valuing the variation, which I do not accept.

180) I do not accept the quantities calculated by the Respondent because it does not correlate with the information of the drawings used to perform Variation V004.

181) I have considered the Respondent's assessment and it appears less than the amount indicated on the drawings. Accordingly, I prefer the calculation of quantities provided by the Respondent's cost assessor, which are an area of &96m2 and 135 m3 of material (allowing for 15% wastage).

182) I accept the Applicant's claimed rates for supply of additional material at the rate of $81.51/m3. I also accept $57.46/m3 to place and compact the material and a further $59.65/m2 to trim the material. Furthermore, as determined above, the Applicant is entitled to 15% margin.

183) Accordingly, I determine the Applicant is entitled to payment of $76,498.33 excl. GST for V004.

VARIATION V005 CHANGES TO SCOPE OF BLUE METAL COVERAGE. MATERIAL PLACED UNDER CHANGED CIRCUMSTANCES.

184) The Applicant has claimed $27,682.00 excl. GST to carry out the work the subject of variation V005 and the Respondent has certified $11,286 excl. GST.

185) The Applicant asserts that;

a) the volume of blue metal that it was required to supply and install was increased from 1,134m2 to 2,130m2. Specifically, the revised drawings required the Applicant to provide 2,130 m2 of blue metal, which was an increase of 996m2 to that indicated by the original Contract drawings;

b) the effort to undertake the original installation increased due to certain delays (for which the Respondent is liable) that required it to re-sequence the installation. Specifically, the re-sequenced installation of blue metal required 25% more effort on a per m2 basis and that was due to the Respondent's delays;

[14] Assessment of variation 04 set out in the Statement of [GA]

c) there are no relevant rates in the Contract to value the variation. The Applicant proposes that the Tender Schedule rate plus 25% is a reasonable rate; and

d) the revised drawings were an instruction to vary the Contract pursuant to clause 36.1 of the Contract and/or a direction to re-sequence the works pursuant to clause 32 of the contract.

186) The Respondent rejected part of claim for V0005 for the following reasons;

a) The Applicant has over claimed the area of blue metal, which is 653 m2 (and not 987m2);

b) The Respondent has used the rate in the Tender Schedule, which is $18.10/m2 to value the variation; and

c) There was no delay, or change of sequence caused by the Respondent.

187) The work actually performed is particularised in the statement of [*name redacted*]. The variation was due to revisions to drawing C1217-05-CFD-901 Rev 0 and further revisions to drawings C1217-05-CEW-901 Rev 1 and Rev 2;

188) The Applicant says that C1217-05-CFD-901 Rev 1 had a significant number of small plinths "*which impacted the methodology of the installation of the blue metal*."

189) I have reviewed the drawing C1217-05-CFD-901 Rev 0 (the earlier revision) (which was available to the Applicant prior to entering into the contract) and it showed even more small plinths than the drawing which the Respondent asserts "*impacted the methodology of the installation of the blue metal.*"

190) The Applicant also asserts that

a) Drawing C1217-05-CEW-901 Rev 1 issued on 29 September 2016, changed the dimensions of the road and required the construction of an area west of the [*redacted*] slabs to be constructed. Confirmed the location of Pits 1, 2 and 3, which had to be installed before the sub-base work could proceed.

b) Drawing C1217-05-CEW-901 Rev 2 issued on 7 October 2016, corrected the datum and set out points that resulted in an increased depth of road base.

c) Drawing C1217-05-CEW-901Rev 3, issued 15 March 2017, was an as built drawing and had no effect on the construction.

d) On 10 August 2016, the Respondent sent the Applicant a revised drawing instructing that the construction sequence planned of the [*redacted*] lines and demolition of old [*redacted*] lines had to be reversed by installing new [*redacted*] lines prior to the demolition of the old [*redacted*] lines. This delayed the works and made the subsequent installation of the blue metal more difficult.

e) The Respondent scheduled the delivery of the *[plant]* for mid-November, which caused the Applicant to delay the construction of the road-base and apply its resources to the construction of the [*plant*] support slabs so that the Applicant would not be required to "double-handle" the [*plant*].

f) The Respondent instructed the addition of additional [*redacted*] main and sewer lines, which was claimed in variation V018;

g) The Respondent issued its underground [*redacted*] conduit design to the [*plant*] area on 18 November 2017;

h) The Respondent instructed that an installed stormwater line was to be relocated due to a design error resulting in a clash between the stormwater line and a canopy footing;

i) The Respondent issued its revised [*redacted*] design in January 2017 that is the subject of variation V023; and

j) On 6 January 2017, the Applicant sought the Respondent's permission to use "blinding" to mitigate the effects of the wet season rains, which it claims is a variation directed by the Respondent.

k) The Respondent asserts that none of the variations and or revised drawings caused any delay to the installation of the blue metal.

l) I have reviewed each item that the Applicant asserts caused it delay but I do not accept that any of those items caused the installation of the blue metal to be any more labour intensive, because the layout design was substantially the same as that indicated in the original Contract drawings.

191) The Respondent argues that the Applicant failed to follow the provisions of clause 36.2 of the Contract and, accordingly, the Applicant lost its entitlement to claim payment for the variation.

192) I have considered above at paragraphs 93) to 110) the Respondent's reliance on clause 36.2 as a basis for rejecting many of the claims made by the Applicant in the payment claim. I have determined that the revised drawings issued during the course of the works are in fact an instruction given under the Applicant was directed under clause 36.1 that may require the Applicant to perform more or less work.

Was the payment claim made with a period permitted under the contract?

193) I have considered above at paragraphs 111)to 0 the issue as to whether the Applicant was entitled to submit its claim for payment given the period between commencement of the work under a variation and the time that a claim for payment for that work was made.

194) Furthermore, clause 41.1 sets out the period within which the Applicant was required to notify its claim.

195) There is no other clause in the Contract that sets out the time within which the Applicant must notify its claim for a variation arising under a direction given under clause 36.1. Accordingly, the Applicant was entitled to submit its claim as soon as practicable after it became aware of the claim.

196) In the circumstances, I consider the submission of this claim to be made within a time permitted under clause 41.1.

Applicant *"double dipping" on claim for overhead and profit*

197) The method of valuation applied by the Applicant for this claim was incorrect.

198) Clause 36.1 makes it clear that the Applicant must not vary the WUC except as directed in writing. I determined above, that revised approved for construction drawings requiring more or less work are directions issued under clause 36.1 of the Contract.

199) Under clause 37.1, the Applicant is only entitled to claim payment of the completed WUC, which includes any completed variations.

200) Clause 36.4 indicates how each variation must be priced. In the context that clause 1 defines variation as;

> *"The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract:*
>
> *a) increase, decrease or omit any part;*
>
> *b) change the character or quality;*
>
> *c) change the levels, lines, positions or dimensions;*
>
> *d) carry out additional work;*
>
> *e) demolish or remove material or work no longer required by the Principal.*

then, unless the revised design was completely different to that shown on the Contract drawings and the new work is not referable to the original work, then the Applicant only value the additional work.

201) For the purposes of this claim, I do not consider that the design was so materially changed that the original work was entirely deleted and a new package of work was added.

202) The Applicant has retained 43.5% for overhead and profit and allowed a deduction for the direct cost of the original works. The Applicant then claimed 43.5% for overhead and profit on the original work (that was not the subject of a variation) plus 43.5% overhead and profit on the additional work (which is the variation).

203) In effect, the Applicant's method of valuation means that it claims an additional 43.5% on the original work and 43.5% on the variation, which is not permitted for the above reasons.

204) The Applicant;

a) is entitled to claim overheads and profit on the works the subject of the variation; and

b) is only entitled to retain the overhead component of any deduction but not the profit.

The determination this variation V005

205) I do not accept the Applicant's assertion that the Respondent's changes made the installation of the blue metal more difficult.

206) The Applicant claims that a reasonable rate for the valuation of this work (supply and installation of 996 m2) is the rate in its Tender Schedule for this work plus 25% for the extra difficulty of installation plus 25% on the original area due to the extra difficulty of installation.

207) The Respondent asserts that a reasonable rate for the valuation of this work (supply and installation of 653m2) is the rate in its Tender Schedule for this work.

208) As there was no additional difficulty associated with the installation, I determine that the rate ($18.10/m2) in the Tender Schedule is a reasonable rate for the purposes of valuing V005.

209) The Applicant asserts that an additional 996 m2 of blue metal was supplied and installed. The Respondent asserts that an additional 653m2 was supplied and installed. The Respondent's cost assessor measurements contain several errors. For example, 2,130 less 1,134 does not equal 830. 1,134 plus 41 does not equal 1,347. The difference between the cost assessors amended area and the Respondent's is 228m2. On balance, I prefer the measure of the Applicant which is 996 m2.

210) Accordingly, I determine the Applicant is entitled to payment of $18,027.60 excl. GST for V0005.

VARIATION V007 CHANGES TO SCOPE OF KERBING. MATERIAL KERBING PLACED UNDER CHANGED CIRCUMSTANCES.

211) The Applicant claims that a reasonable deduction for changes to the kerbing instructed by way of revised drawings is $11,688.00 excl. GST. The Respondent has certified a deduction of $17,812 excl. GST.

212) The Applicant presses its valuation as follows;

a) It has allowed a deduction equivalent to that stated in the Tender Schedule for 70 lm of concrete V drains and for 260 lineal metres (**lm**) of kerbing in the amount of negative $67,960.00 excl. GST;

b) It has claimed for the construction of 272 lm of kerbing at $172.00/lm (the rate in the Tender Schedule);

c) It has claimed a premium of $40/lm for hand placement plus 43.5% for overheads and profit in the amount of $4,362.00;

d) It has claimed sub-contractor's mobilisation costs that were amortised over a greater quantity of kerbing in the original Contract in the amount of $2,522.00;

e) It has claimed accommodation costs in the amount of $ 2,604.00 due to the longer period required for the hand placement of the kerbing;

213) The Respondent assessed V007 as follows;

a) It deducted 126 lm kerbing (deleted from scope of work) by the rate in the Tender Schedule;

b) It deducted 70 lm spoon drain (deleted from the scope of work) by the rate in the Tender Schedule, which was $322.00/lm;

c) It added 12m2 concrete slab (added to scope of work) by the rate in the Tender Schedule $329.00/m2;

d) It added 2 hours of preparation and backhoe in the amount of $640.00.

The determination this variation

214) I have also considered the Respondent's cost assessor's valuation, which is that the deduction is only $3,817.09.

215) The cost assessor's measure and the Applicant's measure of kerbing (of all types) are 276 lm and 272 lm respectively. The Respondent's measure is 263 lm.

216) The cost assessor and the Applicant agree that hand placement took longer with the subcontractors and incurred a premium for hand placement and accommodation costs. The Respondent was silent on that issue.

217) The Respondent's cost assessor has provided the most credible account of the additional work and its cost and, on balance, I prefer his account.

218) Accordingly, I determine the Respondent is entitled to deduct $3,817.09 excl. GST for the reduction in scope of work and for the new work that was performed under V007.

VARIATION V008 NEW ITEM – UPSTAND WALLS AT CLEAN [REDACTED] SLAB AND SURROUNDS

219) The Applicant has claimed $29,693.00 excl. GST to carry out V008 and the Respondent has certified $Nil.

220) In the payment claim, the Applicant asserts;

> *"This variation captures the extra costs associated with the new upstand walls described at drawing C1217-05-CEW-907 Rev 0 dated 10/03017 and the new kerb detail (K.O = kerb only) at drawing C1217-05-CEW-904 Rev 1.*
>
> *Elsewhere, the amended concrete works in the vicinity of the [redacted], rainwater and adjacent areas are considered at [Applicant's] Variation 047. The valuation at the Variation 047 excludes the retaining walls and kerbs that are the subject of this Variation 008 only.*

221) In the Respondent's payment certificate (Notice of Dispute), the Respondent said;

> *"8. The Contract that has not identified the variation but rather*
>
> - *Stated a number of drawing numbers and revisions without showing where variation is*
> - *Stated that V047 excludes the works associated with this variation 008 but again not showing what works this variation is for?*
>
> *[The Respondent] cannot assess this variation without understanding what it is that [the Applicant is] claiming for–[the Respondent] suggest[s] that [the Applicant] highlight the differences on the drawing*
>
> *9. [The Respondent] notes*
>
> - *VO47 includes the new upstand walls and missing blockwork as per PO 26293 issued on 23/03/2017*
> - *Please also refer to the quote supplied by [the Applicant] which refers to PO 26293 detailing the works involved– email sent from [the Applicant's representative] to [the Respondent's representative] on 12/03/2017 10.31 PM"*

222) In the adjudication application, at paragraphs 240 to 265 of the statement of [*the Applicant's representative*], [*he*] particularises the work associated with V008, making it clear that the construction of the upstand walls at the [*redacted*] slab and surrounds was a variation.

223) The Respondent provides no response to the Applicant's claim for payment for the works under V008 nor does it provide PO 26293 which the Respondent asserts evidence that the work claimed under V008 is included in PO 26293 that was claimed (and certified) under V0047. Furthermore, the Respondent makes no comment regarding the quantum claimed relating to the construction of the upstand walls at the [*redacted*] slab and surrounds.

224) There does not appear to be any dispute that the construction of the upstand walls at the [*redacted*] slab and surrounds was a variation. The dispute is about whether this work was incorporated in work performed under PO 26293 that was claimed (and certified) under V0047.

225) The claimant has validly claimed payment by clearly identifying the work and the amount claimed and the Respondent has failed to explain why the amount claimed was included in V047.

Reasonable margin for overhead and profit

226) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit.

227) On balance, I prefer the Applicant's position and have determined that the Applicant is entitled to payment of its claimed direct costs of $20,692 plus 15%, which is $23,795.80 excl. GST.

VARIATION V010 NEW ITEM – SUPPLY AND INSTALL SUB-SOIL DRAINS BEHIND WALLS

228) The Applicant has claimed $16,550.00 excl. GST to carry out V010 and the Respondent has certified $Nil.

229) In the payment claim, the Applicant asserts;

> *"The design was later amended – refer new IFC Drawing C1217–CEW–907 Rev 0 dated 10 March 2017 – that as well as calling for demolition of the existing blockwork walls now required sub-soil drains to behind other retaining walls (varied from previous layouts) introduced into the modified design. This included the retaining wall surrounding the modified [redacted] and rainwater tank slabs as detailed at drawing C1217–CEW–907 Rev 0 dated 10 March 2017.*
>
> *Elsewhere, the amended concrete works in the vicinity of the [redacted, rainwater and adjacent areas are considered at [Applicant] Variation 047. The valuation at the Variation 047 excludes the sub-soil drains that are the subject of this Variation 010 only."*

230) In the Respondent's payment certificate (Notice of Dispute), the Respondent said;

- *VO 47 includes the subsoil drains that this variation (VO 10) refers to*

- *VO 47 that were completed under a separate purchase order to the Contract works and work works agreed to and improve as per quote supplied and subsequently PO 26293 issued*

- *[The Respondent has] confirmed with the Sub Contractor performing these works for [the Applicant] that this works (Supply and install of the subsoil drains) was allowed for in the quoted works and have also confirmed there were no variations to these words being performed under this PO 26293"*

231) In the adjudication application, at paragraphs 266 to 286 of the statement of [*the Applicant's representative*], [*he*] particularises the work associated with V010, making it clear that the construction of the sub-soil drains was a variation that was not included in the Respondent's direction referenced PO 26293. In particular, [*he*] states:

> "*… [the Applicant's] design regarding subsoil drainage to the retaining walls was not finalized prior to [the Applicant] issuing (and [the Respondent] accepting) [the Applicant's] tender for the works*."

232) The Respondent provides no response to the Applicant's claim for payment for the works under V010 (that is particularised in the application for adjudication) nor does it provide PO 26293 which the Respondent asserts evidence that the work claimed under V010 is included in PO 26293 that was claimed (and certified) under V0047.

233) The Respondent's cost assessor provides a theoretical assessment of V010. Specifically, the Respondent's cost assessor indicates that he has not been given a copy of claimant's quotation nor a copy of the Respondent's PO 26293 and states;

- "*…<u>[the Applicant] provided a quotation (I assume)</u> on the revised drawings which depicted the sub-soil drains.*

- *<u>In the absence of evidence suggesting otherwise</u> I expect the subsoil drains to be included in the variation as they are one of the features that required a variation to be pursued."*

234) The Respondent's cost assessor valuation of the work the subject of V010 is $4,480.48 based on the excavation of 33 lm of 0.5m wide trench at a rate of $135.77/lm. There appears to be no consideration given to other parts of the installation process such as supply, setout etc..

235) There does not appear to be any dispute that the construction of the installation of the sub-soil drains was a variation. The dispute is about whether this work was incorporated in work performed under PO 26293 that was claimed (and certified) under V047.

236) The claimant has validly claimed payment by clearly identifying the work and the amount claimed and the Respondent has failed to explain why the amount claimed was included in V047.

237) The claimant has also claimed a margin for overheads and profit of 43.5%.

Reasonable margin for overhead and profit

238) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit.

Determination of claim for variation V010

239) On balance, I prefer the Applicant's position and have determined that the Applicant is entitled to payment of its claimed direct costs of $11,533 plus 15%, which is $13,262.95 excl. GST.

VARIATION V011 RE-ALIGN EXISTING STORMWATER DRAINS

240) The Applicant claimed $17,010.00 excl. GST to carry out V011 and the Respondent has certified $11,846.00 excl. GST.

241) In the payment claim, the Applicant asserts;

> *"This variation is for additional work directed by superintendent be carried out due to the new requirement for two (2) existing stormwater lines (not previously shown) to be realigned as a consequence of the design changes directed by the superintendent."*

242) In the Respondent's payment certificate (Notice of Dispute), the Respondent said;

- *This revised submission by the Contractor has no new evidence that the previously submitted variation*
- *Please see previous correspondence C1217–01–GNO–150 for previous assessment of the works*

243) In the Respondent's correspondence C1217–01–GNO–150 incorporated by reference in the notice of dispute, *[the Respondent]* used the rates in Schedule C of the Contract to value the work the subject of variation claim V011.

244) In the submissions to the adjudication application, the Applicant asserts that the work performed was substantially different to that which it anticipated at the time of tender and, therefore, the rates set out in Schedule C cannot be used for the purposes of valuing additional work the subject of this variation. The Applicant also asserts that the appropriate method of valuation is to use reasonable rates and to apply a reasonable margin for overheads and profit (which it says is 43.5%).

How is this variation to be valued?

245) The Applicant asserts that V010 is to be valued pursuant to clause 36.4(d), because the methods set out in clause 36.4(a), (b) and (c) are irrelevant.

246) Clause 36.4 states:

> "*36.4 Pricing*
>
> *The Superintendent shall, as soon as possible, price each variation using the following order of precedence:*
>
> *a) prior agreement;*
>
> *b) applicable rates or prices in the Contract;*
>
> *c) rates or prices in a priced bill of quantities, schedule of rates or schedule of prices, even though not Contract documents, to the extent that it is reasonable to use them; and*
>
> *d) reasonable rates or prices, which shall include a reasonable amount for profit and overheads,*
>
> *and any deductions shall include a reasonable amount for profit but not overheads.*
>
> *That price shall be added to or deducted from the Contract sum.*"

247) There was no agreement in relation to V011, therefore 36.4(a) is not relevant.

248) There were applicable rates set out in Schedule C to the contract, which the Respondent used.

249) Schedule C to the Contract provides "*The rates shall be used for the purposes of variations and must be inclusive of the overhead, profit and site conditions*."

250) I accept the Respondent's method of valuation because that is what the Contract requires.

Determination of claim for variation V011

251) On balance, I prefer the Respondent's position and have determined that the Applicant is entitled to payment of its claimed direct costs of $11,846.00 excl. GST.

VARIATION V012 CHANGED STORMWATER PIT REQUIREMENTS

252) The Applicant claimed $10,041.00 excl. GST to carry out V012 and the Respondent has certified $4,573.00.

253) In the payment claim, the Applicant asserts;

"This variation is for additional work directed by superintendent be carried out due to modifications to the requirements for the stormwater pits and the addition of a new stormwater pit as a consequence of the design changes directed by the superintendent."

254) In the Respondent's payment certificate (Notice of Dispute), the Respondent said;

- *This revised submission by the Contractor has no new evidence that the previously submitted variation*
- *Please see previous correspondence C1217–01–GNO–159 for previous assessment of the works*

255) In the Respondent's correspondence C1217–01–GNO–159 incorporated by reference in the notice of dispute, the Respondent allowed;

a) $4,190.00 for materials, which is the same amount as that claimed by the Respondent; and

b) used the rates in Schedule C of the Contract to value the work the subject of variation claim V011. The Respondent assessed $2,950.00 excl GST for equipment and $2,160.00 excl. GST for labour.

c) Used the rates in the Tender Schedule to calculate the deletion amount of $4,727.00

256) In the submissions to the adjudication application, the Applicant asserts that the work performed was substantially different to that which it anticipated at the time of tender and, therefore, the rates set out in Schedule C cannot be used for the purposes of valuing additional work the subject of this variation. The Applicant also asserts that the appropriate method of valuation is to use reasonable rates and to apply a reasonable margin for overheads and profit (which it says is 43.5%).

How is this variation to be valued?

257) The Applicant asserts that V010 is to be valued pursuant to clause 36.4(d), because the methods set out in clause 36.4(a), (b) and (c) are irrelevant.

258) Clause 36.4 states:

"*36.4 Pricing*

The Superintendent shall, as soon as possible, price each variation using the <u>following order of precedence:</u>

a) prior agreement;

b) applicable rates or prices in the Contract;

c) rates or prices in a priced bill of quantities, schedule of rates or schedule of prices, even though not Contract documents, to the extent that it is reasonable to use them; and

d) reasonable rates or prices, which shall include a reasonable amount for profit and overheads,

and any deductions shall include a reasonable amount for profit but not overheads.

That price shall be added to or deducted from the Contract sum."

259) There was no agreement in relation to V012, therefore 36.4(a) is not relevant.

260) I determined above at paragraphs 121) to 123) that the Respondent is not entitled to rely on the Tender Schedule for the purposes of valuing variations other that with the consent of the Applicant.

261) There were applicable rates set out in Schedule C to the contract, which the Respondent used.

262) Schedule C to the Contract provides "*The rates shall be used for the purposes of variations and must be inclusive of the overhead, profit and site conditions.*"

263) I accept the Respondent's use of the rates set out in Schedule C because that is what the Contract requires. I do not accept that the Respondent was entitled to use the rates in the Tender Schedule for the purposes of valuing the deletion, because the Contract does not authorise the Respondent to do so.

Applicant *"double dipping" on claim for overhead and profit*

264) The method of valuation applied by the Applicant for this claim was incorrect.

265) Clause 36.1 makes it clear that the Applicant must not vary the WUC except as directed in writing. I determined above, that revised approved for construction drawings requiring more or less work are directions issued under clause 36.1 of the Contract.

266) Under clause 37.1, the Applicant is only entitled to claim payment of the completed WUC, which includes any completed variations.

267) Clause 36.4 indicates how each variation must be priced. In the context that clause 1 defines variation as;

"The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract:

a) increase, decrease or omit any part;

b) change the character or quality;

c) change the levels, lines, positions or dimensions;

d) carry out additional work;

e) demolish or remove material or work no longer required by the Principal.

then, unless the revised design was completely different to that shown on the Contract drawings and the new work is not referable to the original work, then the Applicant only value the additional work.

268) For the purposes of this claim, I do not consider that the design was so materially changed that the original work was entirely deleted and a new package of work was added.

269) The Applicant has retained 43.5% for overhead and profit and allowed a deduction for the direct cost of the original works. The Applicant then claimed 43.5% for overhead and profit on the original work (that was not the subject of a variation) plus 43.5% overhead and profit on the additional work (which is the variation).

270) In effect, the Applicant's method of valuation means that it claims an additional 43.5% on the original work and 43.5% on the variation, which is not permitted for the above reasons.

271) The Applicant;

a) is entitled to claim overheads and profit on the works the subject of the variation; and

b) is only entitled to retain the overhead component of any deduction but not the profit.

Determination of claim for variation V012

272) I have determined that Schedule C was correctly used by the Respondent to value the labour materials and equipment used to perform this variation in the amount of $9,300.00 excl. GST.

273) Even though the Applicant's payment claim indicates that the Applicant consented to use the Tender Schedule, the Respondent has not complied with cl.36.4 as follows; "*and any deductions shall include a reasonable amount for profit <u>but not overheads</u>.*"

Reasonable margin for overhead and profit

274) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit of which 5% is profit and 10% is profit as proffered by the Respondent's cost assessor.

275) Accordingly, I determine that the Applicant is entitled to payment of the following amount for the work the subject of V012;

- labour materials and equipment used to perform this variation in the amount of $9,300.00 excl. GST and
- Deduction of the $4,502.00 less 10% for overheads.
- The Applicant is entitled to payment of $5,248.20.

VARIATION V014 CHANGED STORMWATER PIT REQUIREMENTS

276) The Applicant claimed $6,985.00 excl. GST to carry out V014 and the Respondent has certified $6,985.00.

277) The Applicant is, therefore, entitled to payment of $6,985.00 excl. GST for V014.

VARIATION V015 [REDACTED] WATER SYSTEM AND PITS

278) The Applicant claimed $39,683.00 excl. GST to carry out V015 and the Respondent has certified $17,064.00.

279) In the payment claim, the Applicant asserts;

> *"This variation is for additional work directed by Superintendent to be carried out due to additional requirements for [connections] and changes in the order and timing of carrying out this work due to added constraints as a consequence of the design changes directed by the Superintendent."*

280) In the Respondent's payment certificate (Notice of Dispute), the Respondent said;

- *[The Respondent] has reviewed the drawings and found that the [redacted] location, and number of pits have not changed since the tender drawings*
- *… it is good practice to install all underground services prior to installing the concrete slab over the top of them…*
- *… the Contract has not identified how this note [ie. Note 1 on drawing C1217-05-CFD-907] has put a constraint/affected the works/costs or schedule…*
- *… the contractor's own programme shows that underground services are to be done prior to the construction of the slab*
- *The schedule of rates supplied with the tender/Contract show the Contractor has allowed to supply and install 80m of [redacted] line, 5 x pits and…*

- *[The Respondent] assess[es] that Blucher drains appear on IFC drawings but not on tender drawings and therefore agree this is an addition/variation to WUC, using the contractor's pricing for this assessment as per their "pricing sheet". Lines 159 to 179 = $13,262*

- *[The Respondent] assess[es] that the valve within the valve pit was not shown on tender drawings but is on IFC drawings– using the contractor line item 142 to 144 = $2,250*

- *Total of item 9 and 10 above equals $15,512 dollars +10% markup equals $17,064*

281) In the adjudication application, the Applicant asserts;

- That it was issued drawing C1217-05-CFD-907 on 10 August 16, but that drawing is not an original Contract drawing.

- drawing C1217-05-CFD-907 required the Applicant to;

  - Procure 5 additional 600m2 valve pits;

  - procure the covers for the pits;

  - procure additional gravel backfill for the pits;

  - provide additional labour to install the pits;

  - supply and install valves and mounting brackets into the pits; and

  - procure and install stainless steel Blucher drains and related materials.

282) The Applicant further claims that the additional scope of work significantly delayed the Applicant's works and delayed completion. Additionally, the Applicant asserts that it was required to change its installation sequence due to the above-mentioned changes and an instruction on drawing C1217-05-CFD-907, which caused further date for completion.

How is this variation to be valued?

283) The Respondent asserts that the length of the [*redacted*] lines has not changed and the Applicant's deduction for the original value is slightly more than the amount claimed for the [*redacted*] lines. Accordingly, I will use the Applicant's valuation for this item.

284) I have checked the drawing list contained in Schedule A of the Contract and drawing C1217-05-CFD-907 is not mentioned in that list. Accordingly, I am persuaded that the Applicant was required to;

a) Supply and install 5 additional 600m2 valve pits and galvanized covers;

b) procure and place additional gravel backfill for the pits;

c) supply and install valves and mounting brackets into the pits; and

d) procure and install stainless steel Blucher drains and related materials.

285) The parties agree that the supply and installation of the Blucher drains was an additional cost of $13,262.00 excl. GST.

286) The parties do not agree in relation to the value of the valve with the valve pit. The Applicant has claimed $7,397.00 and the Respondent has certified $2,250.00 excl GST.

287) The Respondent, however, has not accepted the Applicant's claim for labour to install the valves. I accept the Applicant's claim for $7,297.00 excl. GST for this item.

288) The Respondent has also not made any provision to supply and install the valve pits and covers. I accept the Applicant's claim for $7,800.00 excl. GST for this item.

289) The Applicant has then claimed 43.5% on its direct costs as reasonable overhead and margin.

Reasonable margin for overhead and profit

290) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit of which 5% is profit and 10% is profit as proffered by the Respondent's cost assessor.

Applicant *"double dipping" on claim for overhead and profit*

291) The method of valuation applied by the Applicant for this claim was incorrect.

292) Clause 36.1 makes it clear that the Applicant must not vary the WUC except as directed in writing. I determined above, that revised approved for construction drawings requiring more or less work are directions issued under clause 36.1 of the Contract.

293) Under clause 37.1, the Applicant is only entitled to claim payment of the completed WUC, which includes any completed variations.

294) Clause 36.4 indicates how each variation must be priced. In the context that clause 1 defines variation as;

> *"The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract:*
>
> *a) increase, decrease or omit any part;*
>
> *b) change the character or quality;*
>
> *c) change the levels, lines, positions or dimensions;*
>
> *d) carry out additional work;*
>
> *e) demolish or remove material or work no longer required by the Principal.*

then, unless the revised design was completely different to that shown on the Contract drawings and the new work is not referable to the original work, then the Applicant only value the additional work.

295) For the purposes of this claim, I do not consider that the design was so materially changed that the original work was entirely deleted and a new package of work was added.

296) The Applicant has retained 43.5% for overhead and profit and allowed a deduction for the direct cost of the original works. The Applicant then claimed 43.5% for overhead and profit on the original work (that was not the subject of a variation) plus 43.5% overhead and profit on the additional work (which is the variation).

297) In effect, the Applicant's method of valuation means that it claims an additional 43.5% on the original work and 43.5% on the variation, which is not permitted for the above reasons.

298) The Applicant;

a) is entitled to claim overheads and profit on the works the subject of the variation; and

b) is only entitled to retain the overhead component of any deduction but not the profit.

Determination of V015

299) Accordingly, I determine that the Applicant is entitled to payment of the following amount for the work the subject of V015;

- labour materials and equipment used to perform this variation in the amount of $27,654.00 excl. GST and
- 15% for overheads and profit.

300) The Applicant is entitled to payment of $31,802.10 excl. GST.

VARIATION V018 [REDACTED] WATER MAIN – CHANGED REQUIREMENTS

301) The Applicant claimed $34,935.00 excl. GST to carry out V018 and the Respondent has certified $Nil.

302) In the payment claim, the Applicant asserts;

> *"This variation is for additional work directed by Superintendent to be carried out in relation to the [redacted] main lines and changes in the order and timing of these works as a consequence of the design changes directed by the Superintendent."*

303) The Applicant asserts that the revised drawings issued by the Respondent required the Applicant to;

a) Re-route the [*redacted*] main and other services;

b) Increase the trenching widths;

c) provide additional length of [*redacted*] main;

d) provide anchor and thrust blocks for the [*redacted*] main;

e) provide sluice valves;

f) provide puddle flanges; and

g) re-sequence the works.

304) The Applicant asserts that the revised drawings caused it to incur an increase of direct costs in the amount of $24,345.00. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

305) In the Respondent's payment certificate (Notice of Dispute), the Respondent said;

- *… the Contractor is correct that the trench is wider at this point for a section of approximately 20m.*
- *… [the Respondent] note[s] that the holds on these drawings were lifted 12th of October and that the Contractor had not finished the [redacted] main excavations in any case at this time– in actual fact were still carrying out bulk earthworks in this area see photo below…*[refers to a photograph dated 11 October 2016 showing bulk earthworks being undertaken on the entire site]
- *… the Contract has not identified how this note [i.e. Note 1 on drawing C1217-05-CFD-907] has put a constraint/affected the works/costs or schedule…*

306) In the adjudication application, the Applicant asserts that the revisions required the following changes;

a) Increased trench widths;

b) Increased trench depths;

c) increased excavation required for the trenches given the changes in depths and widths;

d) increased pipe installation works; and

e) more materials such as pipe, sand and extra backfill.

307) The Applicant further claims that the additional scope of work significantly delayed the Applicant's works and delayed completion. Additionally, the Applicant asserts that it was required to change its installation sequence due to the above-mentioned changes which caused further date for completion.

308) The Respondent also claims that it instructed the deletion of certain work that gave rise to a negative variation referenced VO0B. I will consider this set-off below.

309) The Respondent's cost assessor concludes that the increase in direct costs incurred by the Applicant arising from the revised drawings is $31,696.06 less $1,688.00 for a reduction in 150 mm [*redacted*] main pipe.

How is this variation to be valued?

310) The Respondent's costs assessor says that the revised drawings required the Applicant to provide materials valued at $25,626.50. The Applicant clients that it was required to provide materials valued at $26,725.00.

311) The Respondent's cost assessor says that the value of the additional base slabs excavation and backfilling was $6,069.57.

312) I have reviewed the drawings referred to by the Applicant and the quantities used by the Respondent's cost assessor appear to correlate to the increased scope of work.

Applicant *"double dipping" on claim for overhead and profit*

313) The method of valuation applied by the Applicant for this claim was incorrect.

314) Clause 36.1 makes it clear that the Applicant must not vary the WUC except as directed in writing. I determined above, that revised approved for construction drawings requiring more or less work are directions issued under clause 36.1 of the Contract.

315) Under clause 37.1, the Applicant is only entitled to claim payment of the completed WUC, which includes any completed variations.

316) Clause 36.4 indicates how each variation must be priced. In the context that clause 1 defines variation as;

> *"The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract:*
>
> *a) increase, decrease or omit any part;*
>
> *b) change the character or quality;*
>
> *c) change the levels, lines, positions or dimensions;*
>
> *d) carry out additional work;*
>
> *e) demolish or remove material or work no longer required by the Principal.*

then, unless the revised design was completely different to that shown on the Contract drawings and the new work is not referable to the original work, then the Applicant only value the additional work.

317) For the purposes of this claim, I do not consider that the design was so materially changed that the original work was entirely deleted and a new package of work was added.

318) The Applicant has retained 43.5% for overhead and profit and allowed a deduction for the direct cost of the original works. The Applicant then claimed 43.5% for overhead and profit on the original work (that was not the subject of a variation) plus 43.5% overhead and profit on the additional work (which is the variation).

319) In effect, the Applicant's method of valuation means that it claims an additional 43.5% on the original work and 43.5% on the variation, which is not permitted for the above reasons.

320) The Applicant;

a) is entitled to claim overheads and profit on the works the subject of the variation; and

b) is only entitled to retain the overhead component of any deduction but not the profit.

Reasonable margin for overhead and profit

321) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit of which 5% is profit and 10% is profit as proffered by the Respondent's cost assessor.

Determination of V018

322) Accordingly, I determine that the Applicant is entitled to payment of the following amount for the work the subject of V018;

a) Labour, materials and equipment used to perform this variation less an amount for the reduction of length of the 150mm [*redacted*] water main) in the amount of $30,008.06 ($ 31,696.06 - $1,688.06) excl. GST and

b) 15% for overheads and profit.

323) The Applicant is entitled to payment of $34,509.27 excl. GST.

VARIATION V019 REMOVE AND REINSTATE BOLLARDS

324) The Applicant claimed $7,667.00 excl. GST to carry out V019 and the Respondent has certified $5,343.00 excl. GST.

325) In the payment claim, the Applicant asserts;

> *"This variation is for additional work required for the removal of 13 bollards and supply and installation of 11 bollards directed by to be carried out."*

326) The Applicant asserts that the Superintendent's direction caused it to incur an increase of direct costs in the amount of $5,343.00. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

327) In the Respondent's payment certificate (Notice of Dispute), the Respondent said;

- *[The Respondent] approve the costs associated with the removal and reinstallation as per the Contractor's pricing for $5,343*
- *[The Respondent] do[es] not approve the 43.5% markup – please refer to the Contract and specifically schedule C*

How is this variation to be valued?

328) There is no dispute as to the direct costs, the dispute is in relation to what is a reasonable margin for overheads and profit to be applied to actual costs referred to in cl. 36.4(d) of the contract.

Reasonable margin for overhead and profit

329) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit of which 5% is profit and 10% is profit as proffered by the Respondent's cost assessor.

330) Accordingly, I determine that the Applicant is entitled to payment of the following amount for the work the subject of V020;

a) Labour, materials and equipment used to perform this variation in the amount of $5,343.00 excl. GST and

b) 15% for overheads and profit.

331) The Applicant is entitled to payment of $6,144.45 excl. GST for V020.

VARIATION V020 OFF-SITE DISPOSAL OF EXCESS CUT MATERIAL

332) The Applicant claimed $87,591.00 excl. GST to carry out V020 and the Respondent has certified $3,960.00.

333) In the payment claim, the Applicant asserts;

> *"This variation is for additional work to be carried out for the carting and disposal of material off-site as a consequence of the design changes directed by the Superintendent.*
>
> *…*
>
> *[The* Respondent*] and [the head contractor] required all surplus material to be disposed offsite in and adjacent waste facility.*
>
> *The variation claim covers the costs of transport and disposal of surplus material not previously contemplated or required under the original design."*

334) The Applicant asserts that the direction caused it to incur an increase of direct costs in the amount of $61,039.00. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

335) In the Respondent's payment certificate (Notice of Dispute), the Respondent referred to Note 11 on drawing CEW-000 Rev B that said;

> *… "Excess cut material is to be either disposed of site or placed as mounding on the southern side of the pad as detailed on these drawings. Additional cut material may be used to provide further flood mitigation works to the east & west of the site subject discussions and approval on site*

336) The Respondent asserts that the tender instructions and drawing WAD151238-CEW-000 Rev B, which forms a part of the Contract requires the Applicant to dispose of the cut material off site and the Applicant is not entitled to make this claim.

337) The Applicant asserts that it entered into this Contract on the basis that the surplus material left over after the bulk earthworks were completed were to be used in the construction of the bund wall shown on Section D-D of drawings C1217-05-CEW-901 Rev C and C1217-05-CEW-901 Rev C. The Applicant further asserts that it would not have incurred any costs for the transport and disposal of the surplus material.

338) The Applicant further asserts that the Contract was varied by the issue of C1217-05-CEW-901 Rev D and C1217-05-CEW-901 Rev D that required the construction of a much smaller retaining wall and, therefore, the Applicant was required to transport and dispose of the surplus fill off site.

339) I do not accept the Respondent's argument, which is that note 11 of drawing WAD151238-CEW-000 Rev B means that the Applicant was required to transport any surplus material off-site resulting from design changes made by the Respondent after entering into the contract. Clearly the Applicant could not predict the cost of transport and disposal of surplus resulting from unspecified future design changes.

340) In principle, I accept the Applicant's basis of claim, however, I do not accept the Applicant's assessment of costs relating to the surplus material that had to be removed from the site. The Applicant has provided an assessment based on the time it says it took to load and transport and dispose of the surplus fill, which seems excessive.

341) I accept the Applicant's argument that the Applicant entered into the Contract on the basis that it would construct the bund wall by using surplus fill from the preceding bulk earthworks activity.

342) Accordingly, if the design of the bund wall was changed and a lesser amount of surplus fill was required for the construction of a smaller bund wall, then the surplus material that the Applicant was going to use in the construction of the bund wall would have to be removed from the site and the Applicant would incur some transport and disposal costs for which the Respondent is liable. That, however, does not mean the Respondent is liable for all costs of transport and disposal. The Respondent is liable only for the additional costs incurred by the Applicant due to the change of the bund wall design.

343) The Respondent's cost assessor has provided a measure of the surplus fill that had to be removed from the site as 264.2 m3 due to the revised design of a smaller bund wall.

344) The Respondent's cost assessor has assumed that it takes about 1 hour round trip for tipper to be loaded, deliver surplus to a tip and return to site. The Respondent also points out that the side tipper used by the Applicant carried 12.5 m3.

345) The Applicant says it used the side tipper (and rear tipper for a short time) for a total of 109 hours. Based on a return trip of 1 hour and a 12.5 m3 payload, that means each tipper (based on a utilisation of the tipper of say 1 out of 2 hours (50%)) carried 4.8 m3, which is still less than half of a full tipper. Accordingly, the hours claimed by the Applicant seem excessive and I prefer the method of calculation of the claimant's cost assessor.

346) The Respondent has only claimed for a deduction relating to VO0B, which I will consider separately below.

347) I accept that the Respondent's cost assessor's estimate of additional costs in the amount of $10,559.70 excl. GST.

Reasonable margin for overhead and profit

348) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit of which 5% is profit and 10% is profit as proffered by the Respondent's cost assessor.

349) Accordingly, I determine that the Applicant is entitled to payment of the following amount for the work the subject of V020;

a) $10,599.70 excl. GST for the transport and disposal of the surplus excl. GST and

b) 15% for overheads and profit.

350) The Applicant is entitled to payment of $12,143.66 excl. GST.

VARIATION V021 [REDCACTED] – CHANGED REQUIREMENTS

351) The Applicant claimed $27,581 excl. GST to carry out V021 and the Respondent has certified $2,239.00.

352) In the payment claim, the Applicant asserts;

> *"This variation is for additional work to be carried out to the [redacted] due to design changes directed by Superintendent and the addition of a significant additional constraint on the order of the works that was not specified in the baseline Contract drawings.*
>
> *…*
>
> *During the course of the works, the design of [reacted] reticulation was varied by way of a number of changes including termination point detail, additional valves, flanges and associated welds, isolation flanges and changes to testing requirements and surface treatment as described at later issued approved for construction (AFC) drawings as follows…"*

353) The Applicant asserts that the revised drawings caused it to incur an increase of direct costs in the amount of $19,220.00. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

354) In the Respondent's payment certificate (Notice of Dispute), the Respondent;

a) Rejects the Applicant's claim that the note on drawing C1217-05-CEW-906 issued 10 August 2016 that states; "*Demolition sequence to be coordinated with site construction programme to ensure minimal downtime. New [redacted] lines to be installed to interface points prior to removal of existing*.." caused any delay to the works and notes that the Applicant has not explained how that note caused any delay.

b) Referred to its earlier assessment of this claim in its correspondence C1217-01-GNO-172 dated 24 May 2017 in the amount of $2,239.00.

How is this variation to be valued?

355) The Respondent's cost assessor has measured each additional valve, flange etc.. and effort associated with the items and concludes that the increase in direct costs incurred by the Applicant arising from the revised drawings is $21,498.80 less $2,088.89.00 for a reduction in the length of the [*redacted*] pipe.

356) I have reviewed the drawings referred to by the Applicant and the quantities used by the Respondent's cost assessor appear to correlate to the increased scope of work.

357) The Applicant has valued the extra work on the basis of valuing the entire latest issue design and then subtracting the value of the work set out in the Contract drawings less 43.5% for overhead and profit, which it asserts it is entitled to retain under cl. 36.4.

358) The Applicant has used the rates in the Tender Schedule for the purposes of valuing the deletion.

359) Accordingly, I construe that as implicit consent to value this variation by the use of the rates in the Tender Schedule.

360) I prefer the Respondent's cost assessor's method of measurement and valuation which correlates with the changes on the drawings referred to in the payment claim.

Applicant *double dipping on claim for overhead and profit*

361) That method of valuation is incorrect save for the circumstance where the revised design was completely different to that shown on the Contract drawings.

362) The Applicant's valuation methodology means that it retains the overhead and profit but allows a deduction for the direct cost of the original works and then claims a new amount for overhead and profit on the original work (that was not the subject of a variation).

363) The Applicant;

a) is entitled to claim overheads and profit on the works the subject of the variation and not on the works (that were not revised) plus the new related work the subject of the variation; and

b) is only entitled to retain the overhead component of any deduction but not the profit.

Reasonable margin for overhead and profit

364) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit of which 5% is profit and 10% is overhead as proffered by the Respondent's cost assessor.

365) Accordingly, I determine that the Applicant is entitled to payment of the following amount for the work the subject of V021;

a) Labour, materials and equipment used to perform this variation less an amount for the reduction of length of the [*redacted*] lines (exclusive of 10% for overheads pursuant to cl. 36.4) in the amount of $19,618.80 ($ 21,498.80 – ($2,088.89 x).90)) excl. GST and

b) 15% for overheads and profit.

366) The Applicant is entitled to payment of $22,561.62 excl. GST.

VARIATION V023 CHANGED ELECTRICAL DESIGN – [REDACTED]

367) The Applicant claimed $100,239.00 excl. GST to carry out V023 and the Respondent has certified $Nil.

368) In the payment claim, the Applicant asserts;

> *"This variation V023 captures the extra costs associated with changes to [redacted] as described at late issued AFC drawings C1217–05–EGA–100 / 105 / 106 / 107 / 108 / 109 / 110 / 111 / 130 / 131 Rev 0 and later issued had marked up-dates to C1217-05-EGA-105 / 106 / 107 and 108."*

369) The Applicant asserts that the revised drawings caused it to incur an increase of direct costs in the amount of $69,853.00. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

370) In the Respondent's payment certificate (Notice of Dispute), the Respondent;

a) Rejects the Applicant's claim that any change of design delayed the works and asserts that if there was any delay it was due to the Applicant's failure to plan and manage this work;

b) Refers to its assessment of this work in its letter of 9 May 2017 referenced C1217-01-GNO-143 assessing the work in the amount of $3,060.00;

c) Asserts that this work was the subject of the Applicant claim for variation V040.

How is this variation to be valued?

371) The Applicant claims that it installed an additional 953 m of [*redacted*] and provides its breakdown to install the [*redacted*]. There are no quantities shown in that breakdown and there is no indication of the additional work to be performed compared to the Contract quantities. I am not persuaded by the Applicant's valuation of additional work performed.

372) The Respondent also provided an assessment of the additional works that indicated 190m less [*redacted*] and 65 additional weld lugs. I am not persuaded by the Respondent's valuation of the additional work performed.

373) The Respondent's cost assessor has provided a detailed breakdown and calculated 301 m of additional [*redacted*] was installed. I am persuaded by the cost assessor's measurement of additional [*redacted*] supplied and installed and will use that for the valuation below.

374) The Respondent and the Applicant agree that the value of metre of [*redacted*] is that stated in the Tender Schedule, which is $105.00 per metre excl. GST.

375) Furthermore, the Respondent and the Applicant agree that the value of trenching, bedding and backfilling each metre of [*redacted*] is that stated in the Tender Schedule, which is $14.00 per metre excl. GST.

376) The Applicant does not indicate how many additional weld lugs it installed.

377) The Respondent certifies that the Applicant installed 65 additional weld lugs.

378) Both the Respondent and the Applicant agree that the value of each weld lug is that stated in the Tender Schedule, which is $394.00 each excl. GST.

379) The Applicant has valued the extra work on the basis of valuing the entire latest issue design and then subtracting the value of the work set out in the Contract drawings less 43.5% for overhead and profit, which it asserts it is entitled to retain under cl. 36.4.

380) The Applicant has used the rates in the Tender Schedule for the purposes of valuing the deletion.

381) Accordingly, I construe that as implicit consent to value this variation by the use of the rates in the Tender Schedule.

Applicant *"double dipping" on claim for overhead and profit*

382) The method of valuation applied by the Applicant for this claim was incorrect.

383) Clause 36.1 makes it clear that the Applicant must not vary the WUC except as directed in writing. I determined above, that revised approved for construction drawings requiring more or less work are directions issued under clause 36.1 of the Contract.

384) Under clause 37.1, the Applicant is only entitled to claim payment of the completed WUC, which includes any completed variations.

385) Clause 36.4 indicates how each variation must be priced. In the context that clause 1 defines variation as;

> *"The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract:*
>
> *a) increase, decrease or omit any part;*
>
> *b) change the character or quality;*
>
> *c) change the levels, lines, positions or dimensions;*
>
> *d) carry out additional work;*
>
> *e) demolish or remove material or work no longer required by the Principal.*

then, unless the revised design was completely different to that shown on the Contract drawings and the new work is not referable to the original work, then the Applicant only value the additional work.

386) For the purposes of this claim, I do not consider that the design was so materially changed that the original work was entirely deleted and a new package of work was added.

387) The Applicant has retained 43.5% for overhead and profit and allowed a deduction for the direct cost of the original works. The Applicant then claimed 43.5% for overhead and profit on the original work (that was not the subject of a variation) plus 43.5% overhead and profit on the additional work (which is the variation).

388) In effect, the Applicant's method of valuation means that it claims an additional 43.5% on the original work and 43.5% on the variation, which is not permitted for the above reasons.

389) The Applicant;

a) is entitled to claim overheads and profit on the works the subject of the variation; and

b) is only entitled to retain the overhead component of any deduction but not the profit.

Reasonable margin for overhead and profit

390) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit of which 5% is profit and 10% is overhead as proffered by the Respondent's cost assessor.

Valuation of V023

391) Accordingly, I determine that the Applicant is entitled to payment of the following amount for the work the subject of V023;

a) Supply and install additional [*redacted*] 301 m at $105.00/m is $31,605.00 excl. GST;

b) Excavate, lay and backfill conduit 301 m at $14.00/m is $4,214.00 excl. GST;

c) Supply and install additional weld lugs 65 at $394.00 is $25,610.00 excl. GST; and

d) 15% for overheads and profit.

392) The Applicant is entitled to payment of $72,143.35 excl. GST.

VARIATION V025 CHANGED ELECTRICAL DESIGN – CONDUITS

393) The Applicant claimed $142,124.00 excl. GST to carry out V025 and the Respondent has certified $30,368 excl. GST.

394) In the payment claim, the Applicant asserts;

> *"The changes at the AFC drawings detailed above including changes to conduit types and lengths together with extra trenching are extra and varied scope.*
>
> *…*
>
> *This variation V025 captures the extra cost associated with changes to the conduit layout as described at late issued AFC drawings C1217–05–EGA–132–136 and later revisions and extra drawing C1217–05–EGA–137 Rev 0 dated 24/02/17. It also includes extra cost associated with late issued design for conduits to concrete footings as detailed at C1217–05–CFD–910 / 911 Rev 0 and later revisions"*

395) The Applicant asserts that the revised drawings caused it to incur an increase of direct costs in the amount of $99,041.00. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

396) In the Respondent's payment certificate (Notice of Dispute), the Respondent;

a) Acknowledges that the revisions to the Contract drawings required the Applicant to supply and install additional conduits and incidental work;

b) Values the supply and installation of the additional conduit and additional work as $30,368.00 excl. GST.

How is this variation to be valued?

397) The Applicant claims that it installed an additional 297 m of various sized conduits and provides a breakdown to supply and install all conduits. There are no quantities shown in that breakdown and there is no indication of the additional work to be performed compared to the Contract quantities. I am not persuaded by the Applicant's valuation of additional work performed.

398) The Respondent provided an assessment of the additional works that indicated 778m additional conduits and 95.089 m3 of additional excavation and backfill and 48 additional fittings were supplied and installed.

399) The Respondent's cost assessor also provided an assessment of the additional works that indicated 909m additional conduits and 137.48 m3 of additional excavation and backfill and 38 additional fittings were supplied and installed. I am persuaded by the cost assessor's measurement of additional conduit, fittings supplied and installed and excavation and backfilling because the cost assessor has provided a detailed measure and analysis of changes to drawings. I will use the cost assessor's valuation below.

400) The Applicant has valued the extra work on the basis of valuing the entire latest issue design and then subtracting the value of the work set out in the Contract drawings less 43.5% for overhead and profit, which it asserts it is entitled to retain under cl. 36.4.

Applicant *"double dipping" on claim for overhead and profit*

401) The method of valuation applied by the Applicant for this claim was incorrect.

402) Clause 36.1 makes it clear that the Applicant must not vary the WUC except as directed in writing. I determined above, that revised approved for construction drawings requiring more or less work are directions issued under clause 36.1 of the Contract.

403) Under clause 37.1, the Applicant is only entitled to claim payment of the completed WUC, which includes any completed variations.

404) Clause 36.4 indicates how each variation must be priced. In the context that clause 1 defines variation as;

> *"The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract:*
>
> *a) increase, decrease or omit any part;*

b) change the character or quality;

c) change the levels, lines, positions or dimensions;

d) carry out additional work;

e) demolish or remove material or work no longer required by the Principal.

then, unless the revised design was completely different to that shown on the Contract drawings and the new work is not referable to the original work, then the Applicant only value the additional work.

405) For the purposes of this claim, I do not consider that the design was so materially changed that the original work was entirely deleted and a new package of work was added.

406) The Applicant has retained 43.5% for overhead and profit and allowed a deduction for the direct cost of the original works. The Applicant then claimed 43.5% for overhead and profit on the original work (that was not the subject of a variation) plus 43.5% overhead and profit on the additional work (which is the variation).

407) In effect, the Applicant's method of valuation means that it claims an additional 43.5% on the original work and 43.5% on the variation, which is not permitted for the above reasons.

408) The Applicant;

a) is entitled to claim overheads and profit on the works the subject of the variation; and

b) is only entitled to retain the overhead component of any deduction but not the profit.

Reasonable margin for overhead and profit

409) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit of which 5% is profit and 10% is overhead as proffered by the Respondent's cost assessor.

Valuation of V025

410) Accordingly, I determine that the Applicant is entitled to payment of the following amount for the work the subject of V023;

a) Supply and install additional conduits bends and additional excavation; and

b) 15% for overheads and profit.

411) The Applicant is entitled to payment of $92,523.32 excl. GST.

VARIATION V028 CHANGED CONCRETE DESIGN – APRON SLAB

412) The Applicant claimed $149,833.00 excl. GST to carry out V025 and the Respondent has certified $31,862.00 excl. GST.

413) In the payment claim, the Applicant asserts;

> *"This Variation V028 addresses multiple changes to the apron slabs.*
>
> *This variation is for the significant additional work and the significant changes in the character of the work as a consequence of the major and constant changes to the apron slab design and other design changes directed by the superintendent in piecemeal fashion.*
>
> *…*
>
> *During the course of the works, the design of apron slabs has been varied and the overall dimensions increased as described at later issued approved for construction (AFC) drawings as follows:*
>
> - *Drawing C 1217–CFD–902 Rev 0, 1, 2 and 3 dated 10–08–16, 27–09–16, 18–11–16 and 12–12–16 respectively that amongst other matters amended the location and increased the length of sawn joints and dowel joints, amended the reinforcement design around pits, added reinforcement around the canopy for things (increased number of), introduced additional upstands and footings, introduced pits adjacent to [plant] slabs, removed cast in sleeves and amended overall dimensions*
> - *Drawing C1217–CFD–906 Rev 0 and 1 dated 10–08–16 and 28–09–16 respectively providing amended design details of slabs, up stands and footings"*

414) In the payment claim, the Applicant asserts that the revised drawings caused it to incur an increase of direct costs in constructing the apron slabs in the amount of $104,413.00 and delayed the date for completion. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

415) In the Respondent's payment certificate (**Notice of Dispute**) referenced C1217-01-GNO-231 dated 16 August 2017, the Respondent;

a) Acknowledges that the revisions to the Contract drawings required the Applicant to make "*Changes to scope of apron slabs*";

b) Rejects that the changes caused the Applicant any delay;

c) At item 11 of the Notice of Dispute, the Respondent confirms that its assessment is; "*in relation to the apron slabs*"; and

d) Values the amendments to the apron slabs as $31,862.00 excl. GST.

How is this variation to be valued?

416) The Applicant claims that it supplied and installed apron slabs to a revised design and has set out its costs for the construction of the apron slab. It is not possible, however, to ascertain which costs were for the variation and which costs were for the original works. The Applicant also claims 43.5% for overhead and profit, which it asserts it is entitled to claim under cl. 36.4.

417) The parties agree that additional work was performed which was a variation.

418) I am not, however, persuaded by the Applicant's valuation of the additional work because it is not possible to distinguish which part of the valuation is for the original Contract works and which part is for performing the variation.

419) The Applicant alludes to delays caused by the Respondent for various reasons including late issue, increased complexity in the new design but then conflates delay damages and cost of additional work to perform a variation.

420) Under clause 34.2 of the contract, the Applicant must notify the Respondent of delay for which the Respondent is liable. If those delays were caused by the Respondent and the Applicant is entitled to an extension of time pursuant to clauses 34.3 and 34.4, then the claimant may make a claim for delay damages under clause 34.9.

421) The Contract does not permit a global claim of the type made by the Applicant where delay damages and a claim for variation and a claim for performing original Contract work are all blended together under one claim including a deduction for the original work less 43.5% for overheads and profit.

422) The Respondent's assessment in relation to the changes to the apron slabs in response to the claim for variation V028 is $31,862.00 excl. GST.

423) The Respondent's cost assessor has provided an assessment of the additional works that indicated 33m2 to increase to increase to the slab size, 28 lineal metre of sawn joints, 22 lineal metre of dowel joints and identified multiple additional footings and plinths.

424) The Respondent has made an assessment of the changes to the apron slab that appears to correlate with the Respondent's cost assessor's assessment.

Applicant *"double dipping" on claim for overhead and profit*

425) The method of valuation applied by the Applicant for this claim was incorrect.

426) Clause 36.1 makes it clear that the Applicant must not vary the WUC except as directed in writing. I determined above, that revised approved for construction drawings requiring more or less work are directions issued under clause 36.1 of the Contract.

427) Under clause 37.1, the Applicant is only entitled to claim payment of the completed WUC, which includes any completed variations.

428) Clause 36.4 indicates how each variation must be priced. In the context that clause 1 defines variation as;

> *"The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract:*
>
> *a) increase, decrease or omit any part;*
>
> *b) change the character or quality;*
>
> *c) change the levels, lines, positions or dimensions;*
>
> *d) carry out additional work;*
>
> *e) demolish or remove material or work no longer required by the Principal.*

then, unless the revised design was completely different to that shown on the Contract drawings and the new work is not referable to the original work, then the Applicant only value the additional work.

429) For the purposes of this claim, I do not consider that the design was so materially changed that the original work was entirely deleted and a new package of work was added.

430) The Applicant has retained 43.5% for overhead and profit and allowed a deduction for the direct cost of the original works. The Applicant then claimed 43.5% for overhead and profit on the original work (that was not the subject of a variation) plus 43.5% overhead and profit on the additional work (which is the variation).

431) In effect, the Applicant's method of valuation means that it claims an additional 43.5% on the original work and 43.5% on the variation, which is not permitted for the above reasons.

432) The Applicant;

a) is entitled to claim overheads and profit on the works the subject of the variation; and

b) is only entitled to retain the overhead component of any deduction but not the profit.

Reasonable margin for overhead and profit

433) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit of which 5% is profit and 10% is overhead as proffered by the Respondent's cost assessor.

Valuation of V028

434) Accordingly, I determine that the Applicant is entitled to payment of the following amount for the work the subject of V028 being;

a) The supply and installation of concrete and incidental items for the construction of changes to the apron slab in the amount of $31,862.00; and

b) 15% for overheads and profit.

435) The Applicant is entitled to payment of $116,297.83 excl. GST for V028.

VARIATION V030 CHANGED CONCRETE DESIGN – FOOTINGS TO [REDACTED]

436) The Applicant claimed $141,864.00 excl. GST to carry out V030 and the Respondent has certified $94,330.00 excl. GST.

437) In the payment claim, the Applicant asserts;

> *"This VariationV030 addresses multiple changes to slabs and footings (concrete works).*
>
> *This variation is for the significant additional work and the significant changes in the character of the work as a consequence of the major and constant changes to design of footings and [redacted] slabs and other design changes directed by the superintendent in piecemeal fashion.*
>
> *…*
>
> *This variation V030 covers the extra footings to [redacted] and the new [redacted] slab which replaced three [redacted] slabs."*

438) The Applicant asserts that the revised drawings caused it to incur an increase of direct costs in the amount of $98,860.00 and delayed the date for completion. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

439) In the Respondent's payment certificate (Notice of Dispute) referenced C1217-01-GNO-232 dated 16 August 2017, the Respondent;

a) Acknowledges that the revisions to the Contract drawings required the Applicant to supply and install extra footings to [*redacted*] and the new [*redacted*] slab which replaced 3 [*redacted*] slabs;

b) Accepts the hours recorded and claimed in V030 by the Applicant for the performance of the work under V030;

c) Rejects the Applicant's valuation because the Applicant used its reasonable rates where the Respondent asserts the Applicant should have used the rates in Schedule C to the contract;

d) Rejects that the changes caused the Applicant any delay;

e) Values the amendments to the slabs as $94,330.00 excl. GST.

How is this variation to be valued?

440) The only disagreement by the Respondent to the Applicant's claim is that the Respondent rejects part of the amount claimed for labour ($4,530.00) because the Applicant did not use the rates set out in Schedule C to the Contract and it rejects the 43.5% claimed by the Applicant for overheads and profit because overheads and profit is included within the rates in Schedule C.

441) I also do not accept that the Applicant is entitled to 43.5% margin for overhead and profit because in the absence of any agreement, clause 36.4(b) of the Contract operates and requires the variation to be valued using the rates set out in Schedule C. For the avoidance of doubt, Schedule C makes it clear that the overhead and profit applied to the cost of carrying out a variation is included in the rates stated in Schedule C.

Valuation of V030

442) For the reasons stated above at paragraphs 123) to 124), I accept the Respondent's valuation based on the rates set out in Schedule C.

443) Accordingly, I determine that the Applicant is entitled to payment of the following amounts for the work the subject of V030;

a) for the changes to slabs and footings, the amount of $94,330.00 (being $98,860 (claimed by the Applicant) less $4,530.00 (rejected by the Respondent); and

444) The Applicant is entitled to payment of $94,330.00 excl. GST for performing the variation work referred to in V030.

VARIATION V032 CHANGED CONCRETE DESIGN – SLAB, PLINTHS AND FOOTINGS (ALL AREAS)

445) The Applicant claimed $161,410.00 excl. GST to carry out V032 and the Respondent has certified (negative) -$1,939.00.00 excl. GST.

446) In the payment claim, the Applicant asserts;

> *"This Variation V032 addresses multiple changes to plinths and footings (concrete works).*
>
> *This variation is for the significant additional work and the significant changes in the character of the work as a consequence of the major and constant changes to design of slabs, plinths and footings directed by the superintendent.*
>
> *…*

This variation V032 covers changes to slabs (apron slabs specifically exclusive of upstands are considered in separate variation V028), plinths and footings in [plant] and external areas but excludes the new [redacted] slab which replaced three [redacted] which is considered in separate variation V030."

447) The Applicant asserts that the revised drawings caused it to incur an increase of direct costs in the amount of $130,915.00 and delayed the date for completion. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

448) In the Respondent's payment certificate (Notice of Dispute), the Respondent made the following assessments and comments;

a) the [*redacted*] plinths were previously assessed in variation 028;

b) the roof canopy footings were previously assessed in variation 028;

c) the workshop container plinths did not change from the tender drawings;

d) the radiator plinths did not change from the tender drawings;

e) the walkway and stair plinths did not cost any more to construct;

f) the [*redacted*] slab required an additional 1.5m2 concrete and using the Applicant's pricing schedule is valued at $494.79;

g) the [*redacted*] slab required an additional 9.5m2 concrete and using the Applicant's pricing schedule is valued at $3,438.00;

h) the [*redacted*] slab required an additional 30.0m2 concrete and using the Applicant's pricing schedule is valued at $7,984.00;

i) the [*redacted*] slab was no longer required and the Respondent deducted $6,103.00;

j) the [*redacted*] slab was no longer required and the Respondent deducted $6,318.00

k) the [*redacted*] slabs were no longer required and the Respondent deducted $1,434.00

449) In aggregate, the Respondent assessed that the Applicant owed the Respondent $1,939.00 in relation to V032.

450) The Respondent asserts that [*redacted*] plinths and the roof canopy footings were previously assessed in variation 028.

451) I have read claim for variation V028 which states;

"This Variation V028 addresses multiple changes to the apron slabs.

…

During the course of the works, the design of open slabs has been varied and the overall dimensions increased as described at later issued approved for construction (AFC) drawings as follows:

- *Drawing C 1217–CFD–902 Rev 0, 1, 2 and 3 dated 10–08–16, 27–09–16, 18–11–16 and 12–12–16 respectively that amongst other matters amended the location and increased the length of sawn joints and dowel joints, amended the reinforcement design around pits, added reinforcement around the canopy for things (increased number of), introduced additional upstands and footings, introduced pits adjacent to [plant] slabs, removed cast in sleeves and amended overall dimensions.*

- *Drawing C1217–CFD–906 Rev 0 and 1 dated 10–08–16 and 28–09–16 respectively providing amended design details of slabs, up stands and footings"*

452) The Applicant did not claim for the changes to slabs, plinths and footings in *[plant]* and external areas in V028 because it made it clear that V028 was only for "*multiple changes to apron slabs*".

453) The Respondent asserts that workshop container plinths and the radiator plinths did not change from the tender drawings and, therefore, there is no claim.

454) The Respondent's cost assessor has measured the footings and plinths the subject of V030 in its assessment of V028. Specifically, the measure at V028 indicates that the Applicant supplied 2 additional workshop container footings and no additional radiator plinth footings.

455) The Respondent's cost assessor has measured walkway and stair plinths as having been reduced by 3m², the [*redacted*] slab as increasing by 3m², the [*redacted*] slab as increasing by 9m², the [*redacted*] slab as increasing by 36.9m² and the [*redacted*] slab as a new item of 22m².

456) I determined above at paragraphs 121) to 123) that the Respondent is not entitled to rely on the pricing in the Tender Schedule for the purposes of valuing variations.

457) In relation to some claims for variations, the Applicant has priced its variations by reference to the Tender Schedule and the Respondent has implicitly accepted that proposal and valued the variation similarly. In that case the parties waived a right not to use the Tender Schedule. That is not the case for this claim for a variation. Therefore, the Respondent may not use the Tender Schedule to value this claim for variation V032.

458) In the assessment of V032, the Respondent has relied on the amounts set out in the Tender Schedule. The Applicant has similarly used the Tender Schedule. The Applicant however has retained 43.5% for overheads and profit and the Respondent has deducted the entire amount. Neither method is in accordance with the procedure set out in clause 36.4 of the contract. Clause 36.4 makes it clear that; "*any deductions shall include a reasonable amount for profit but not overheads*". Accordingly, I will use the rates in the Tender Schedule to value the deletion of the [*redacted*] slab, the [*redacted*] slab and the [*redacted*] slabs less 10%, which I determined above was a reasonable amount for overheads.

How is this variation to be valued?

459) The Applicant claims that it supplied and installed plinths and footings to a revised design and has set out its costs for the construction of the plinths and footings. It is not possible, however, to ascertain which costs were for the variation and which costs were for the original works. The Applicant also claims 43.5% for overhead and profit, which it asserts it is entitled to claim under cl. 36.4.

460) The parties agree that additional work was performed which was a variation.

461) I am not, however, persuaded by the Applicant's valuation of the additional work because it is not possible to distinguish which part of the valuation is for the original Contract works and which part is for performing the variation.

462) The Applicant alludes to delays caused by the Respondent for various reasons including late issue, increased complexity in the new design but then conflates delay damages and cost of additional work to perform a variation.

463) Under clause 34.2 of the contract, the Applicant must notify the Respondent of delay for which the Respondent is liable. If those delays were caused by the Respondent and the Applicant is entitled to an extension of time pursuant to clauses 34.3 and 34.4, then the claimant may make a claim for delay damages under clause 34.9.

464) The Contract does not permit a global claim of the type made by the Applicant where delay damages and a claim for variation and a claim for performing original Contract work are all blended together under one claim including a deduction for the original work less 43.5% for overheads and profit.

465) The Respondent's assessment in relation to the changes to the plinths and footings in response to the claim for variation V032 is negative $1,938.21 excl. GST.

466) The Respondent's cost assessor has provided an assessment of the additional works under V032 in its assessment of V0028 and V032.

467) The Respondent has made an assessment of the changes to the plinths and footings, that does not correlate with the Respondent's cost assessor's assessment or the Applicant's assessment of the extra work.

468) By reference to the drawings referred to me in the statement of [*applicant's representative*], the Applicant's measure, the Respondent's assessment and the Respondent's cost assessor's measure of the additional works claimed under V032, I have determined the additional work, which is set out in the table below.

Applicant *"double dipping" on claim for overhead and profit*

469) The method of valuation applied by the Applicant for this claim was incorrect.

470) Clause 36.1 makes it clear that the Applicant must not vary the WUC except as directed in writing. I determined above, that revised approved for construction drawings requiring more or less work are directions issued under clause 36.1 of the Contract.

471) Under clause 37.1, the Applicant is only entitled to claim payment of the completed WUC, which includes any completed variations.

472) Clause 36.4 indicates how each variation must be priced. In the context that clause 1 defines variation as;

> *"The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract:*
>
> *a) increase, decrease or omit any part;*
>
> *b) change the character or quality;*
>
> *c) change the levels, lines, positions or dimensions;*
>
> *d) carry out additional work;*
>
> *e) demolish or remove material or work no longer required by the Principal.*

then, unless the revised design was completely different to that shown on the Contract drawings and the new work is not referable to the original work, then the Applicant only value the additional work.

473) For the purposes of this claim, I do not consider that the design was so materially changed that the original work was entirely deleted and a new package of work was added.

474) The Applicant has retained 43.5% for overhead and profit and allowed a deduction for the direct cost of the original works. The Applicant then claimed 43.5% for overhead and profit on the original work (that was not the subject of a variation) plus 43.5% overhead and profit on the additional work (which is the variation).

475) In effect, the Applicant's method of valuation means that it claims an additional 43.5% on the original work and 43.5% on the variation, which is not permitted for the above reasons.

476) The Applicant;

a) is entitled to claim overheads and profit on the works the subject of the variation; and

b) is only entitled to retain the overhead component of any deduction but not the profit.

Reasonable margin for overhead and profit

477) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit of which 5% is profit and 10% is overhead as proffered by the Respondent's cost assessor.

Valuation of V032

478) Accordingly, I determine that the Applicant is entitled to payment of the following amount for the work the subject of V032 being;

Item	Change	Applicant	Respondent	Respondent's cost assessor	Determination
[*Redacted*] plinths	2 off	Incl.	$-	$516.46	$593.93
[*Redacted*] strip footings	2 off	$4,771.00	$-	$16,852.44	$19,380.31
Workshop container plinths	0 off	$1,308.00	$-	$-	$-
Radiator plinths	0 off	$11,584.00	$-	$-	$-
Roof canopy footings	10 off	$51,211.00	$-	$10,647.00	$12,244.05
Walkway and stair plinths		$9,646.00	$-	$(1,324.01)	$-
[*Redacted*] slab	3.0m2	$3,181.00	$494.79	$546.00	$627.90
[*Redacted*] slab	9.5 m2	$7,794.00	$3,438.00	$3,257.91	$3,746.60
[*Redacted*] slab	36.9m2	$11,390.00	$7,984.00	$9,820.57	$11,293.66
[*Redacted*] slab	Tender Schedule	$(4,253.00)	$(6,103.00)	$(6,103.00)	$(5,492.75)
[*Redacted*] slabs	Tender Schedule	$(4,403.00)	$(6,318.00)	$(6,318.00)	$(5,686.47)
[*Redacted*] slabs	Tender Schedule	$(999.00)	$(1,434.00)	$(1,434.00)	$(1,290.21)
TOTAL		**$91,230.00**	**$(1,938.21)**	**$26,461.37**	**$35,417.00**

479) The Applicant did not particularise the effort to construct 2 [*redacted*] plinths. Accordingly, I have used the Respondent's cost assessor's valuation but I have added 15% for overheads and margin for the reasons set out above.

480) The Respondent did not assess the [*redacted*] strip footings. Accordingly, I have used the Respondent's cost assessor's valuation but I have added 15% for overheads and margin for the reasons set out above.

481) I am not persuaded there were any additional workshop container plinths or radiator plinths. Accordingly, I have used the Respondent's valuation. Accordingly, I have used the Respondent's cost assessor's valuation but I have added 15% for overheads and margin for the reasons set out above.

482) A significant portion of the Applicant's claim relates to delay damages relating to the construction of the roof canopy footings. It is not possible separate the delay damages claim from the additional costs performed to construct 10 additional footings. Accordingly, I have used the Respondent's cost assessor's valuation but I have added 15% for overheads and margin for the reasons set out above.

483) I am not persuaded there were any additional walkway and stairway plinths. Accordingly, I have used the Respondent's valuation.

484) A significant portion of the Applicant's claim relates to delay damages relating to the construction of [*redacted*] slab, the [*redacted*] slab and the [*redacted*] slab. It is not possible separate the delay damages claim from the additional costs performed to construct additional areas of the abovementioned slabs. Accordingly, I have used the Respondent's cost assessor's valuation but I have added 15% for overheads and margin for the reasons set out above.

485) The Respondent has applied the entire value of the [*redacted*] slab, the [*redacted*] slab and the [*redacted*] slabs stated in the Tender Schedule. The Applicant has also used the Tender Schedule for that purpose. Neither deduction is made in accordance with clause 36.2. Accordingly I have made a deduction of the respective amounts set out in the Tender Schedule less 10% for overheads pursuant to clause 36.4 of the contract.

486) The Applicant is entitled to payment of $35,417 excl. GST.

VARIATION V033 DESIGN AND SUPPLY OF [REDACTED] PROTECTION

487) The Applicant claimed $43,294.00 excl. GST to carry out V033 and the Respondent has certified $12,951.00 excl. GST.

488) In the payment claim, the Applicant asserts;

> *"This variation V033 addresses the design and supply of [redacted] protection for the [redacted].*
>
> *… the Contractor was directed to design and provide [redacted] protection for the [redacted] . This was not part of the baseline Contract works).*

On 17 August 2016, email from [the Respondent] to [the Applicant/Contractor] instructing the Contractor to proceed with the design, supply, install and commission of the [redacted] protection system of the [redacted]."

489) The Applicant asserts that the Respondent's instruction caused it to incur an increase of direct costs in the amount of $30,170.00 and delayed the date for completion. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

490) In the Respondent's payment certificate (Notice of Dispute) referenced C1217-01-GNO-234 dated 16 August 2017, the Respondent;

a) Acknowledges that the instruction to the Applicant to supply and install [*redacted*] protection to the [*redacted*];

b) Refers to the quotation supplied by the contractor referenced Q4472R2 that was produced by its subcontractor [*name redacted*] for the design, supply and provide commissioning for a cost of $10,700 excluding GST;

c) Rejects the Applicant's claim for work to excavate, deliver materials and backfill in addition to the work carried out by the subcontractor and assesses the claim in the amount of $2,251.00 excluding GST;

d) Rejects that the instruction caused the Applicant any delay;

e) Values the design, supply, installation and commissioning of the [*redacted*] protection system in the amount of $12,951.00 excl. GST.

How is this variation to be valued?

491) The only disagreement by the Respondent to the Applicant's claim is that the Respondent rejects part of the amount claimed for subcontractor because;

a) The Applicant claimed for an amount more than its proven cost in relation to the subcontractor;

b) the incidental work claimed by the contractor is excessive and assesses that work in the amount of $2,251.00 but provides no breakdown or reasoning as to how it made that assessment; and

c) rejects the 43.5% claimed by the Applicant for overheads and profit but does not provide any reasons.

492) I also do not accept that the Applicant is entitled to 43.5% margin for overhead and profit because in the absence of any agreement, clause 36.4(b) of the Contract operates and requires the variation to be valued using the rates set out in Schedule C and when there are no applicable rates, then pursuant to clause 36.4(d) it must use reasonable rates and is entitled to add a reasonable amount for overheads and profit.

493) For the avoidance of doubt, Schedule C makes it clear that the overhead and profit applied to the cost of carrying out a variation is included in the rates stated in Schedule C.

Valuation of V033

494) For the reasons stated above at paragraphs 123) to 124), I accept the Respondent's valuation based on the rates set out in Schedule C.

495) Furthermore, the Applicant is only entitled to claim a margin on its reasonable costs. The quotation the Applicant provided sets out the cost of its subcontractor as $10,700.00.

496) The Respondent's cost assessor has provided a breakdown of the incidental work carried out by the Applicant that appears reasonable to me. Excluding the cost of the subcontractor, that assessment is $13,440.00 excl. GST and includes 15% for overhead and margin.

497) The Applicant's assessment of its costs excluding the cost of the subcontractor is $12,570.00, which is determined on the basis of reasonable rates as $12,570.00. I note that some of the items claimed are items that should have been valued pursuant to Schedule C and others are the Applicant's reasonable rates.

498) I prefer the Respondent's cost assessor's assessment but note that the Applicant is entitled to payment of 15% for overhead and margin.

499) Accordingly, I determine that the Applicant is entitled to payment of the following amounts for the work the subject of V033;

a) for the design supply and installation of the [*redacted*] protection system, $10,500 plus 15%, which is; $12,305.00 excl. GST; and

b) the incidental work carried out by the Applicant in the amount of $13,440.00 excl. GST

500) The Applicant is entitled to payment of $25,745.00 excl. GST for performing the variation work referred to in V033.

VARIATION V034 SEWER LINES – CHANGED REQUIREMENTS

501) The Applicant claimed $22,982.00 excl. GST to carry out V034 and the Respondent has certified $1,950.00 excl. GST.

502) In the payment claim, the Applicant asserts;

> *"This variation V033 addresses changes to the sewer reticulation.*
>
> *This variation is for additional work to be carried out due to changed requirements for the sewer as a consequence of design changes directed by the Superintendent.*

503) The Applicant asserts that the Respondent's instruction caused it to incur an increase of direct costs in the amount of $16,015.00 and delayed the date for completion. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

504) In the Respondent's payment certificate (Notice of Dispute) referenced C1217-01-GNO-235 dated 16 August 2017, the Respondent;

a) Acknowledges that the revised drawings required the change of pipe size from 50mm to 63mm but noted the route and length of pipe were almost identical to the route and length indicated on the contact drawings;

b) Accepts the Applicant's stated costs for additional pipe in the amount of $1,200.00 excl. GST and for "ACO cable mate [sic] type 95" in the amount of $750.00 excl. GST;

c) Values the change to the sewer design in the amount of $1,950.00 excl. GST.

How is this variation to be valued?

505) The Applicant claims that it constructed the sewer lines to a revised design and has set out its costs for the construction of the sewer lines. It is not possible, however, to ascertain which costs were for the variation and which costs were for the original works. The Applicant also claims 43.5% for overhead and profit, which it asserts it is entitled to claim under cl. 36.4.

506) The parties agree that additional work was performed which was a variation.

507) I am not, however, persuaded by the Applicant's valuation of the additional work because it is not possible to distinguish which part of the valuation is for the original Contract works and which part is for performing the variation.

508) The Applicant alludes to delays caused by the Respondent for various reasons including late issue, increased complexity in the new design but then conflates delay damages and cost of additional work to perform a variation.

509) Under clause 34.2 of the contract, the Applicant must notify the Respondent of delay for which the Respondent is liable. If those delays were caused by the Respondent and the Applicant is entitled to an extension of time pursuant to clauses 34.3 and 34.4, then the claimant may make a claim for delay damages under clause 34.9.

510) The Contract does not permit a global claim of the type made by the Applicant where delay damages and a claim for variation and a claim for performing original Contract work are all blended together under one claim including a deduction for the original work less 43.5% for overheads and profit.

511) The Respondent's assessment in relation to the changes to the sewer lines in response to the claim for variation V034 is $1,950.00 excl. GST.

512) The Applicant's claim and the Respondent's assessment of materials is about the same.

513) The Respondent's cost assessor has provided an assessment of the additional works. The cost assessor, however, indicates the Applicant was required to install the ACO cable pit and carry out additional excavation and backfilling, which explains some of the additional cost claimed by the Applicant for the construction of the work under this variation.

Applicant *"double dipping" on claim for overhead and profit*

514) The method of valuation applied by the Applicant for this claim was incorrect.

515) Clause 36.1 makes it clear that the Applicant must not vary the WUC except as directed in writing. I determined above, that revised approved for construction drawings requiring more or less work are directions issued under clause 36.1 of the Contract.

516) Under clause 37.1, the Applicant is only entitled to claim payment of the completed WUC, which includes any completed variations.

517) Clause 36.4 indicates how each variation must be priced. In the context that clause 1 defines variation as;

> *"The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract:*
>
> *a) increase, decrease or omit any part;*
>
> *b) change the character or quality;*
>
> *c) change the levels, lines, positions or dimensions;*
>
> *d) carry out additional work;*
>
> *e) demolish or remove material or work no longer required by the Principal.*

then, unless the revised design was completely different to that shown on the Contract drawings and the new work is not referable to the original work, then the Applicant only value the additional work.

518) For the purposes of this claim, I do not consider that the design was so materially changed that the original work was entirely deleted and a new package of work was added.

519) The Applicant has retained 43.5% for overhead and profit and allowed a deduction for the direct cost of the original works. The Applicant then claimed 43.5% for overhead and profit on the original work (that was not the subject of a variation) plus 43.5% overhead and profit on the additional work (which is the variation).

520) In effect, the Applicant's method of valuation means that it claims an additional 43.5% on the original work and 43.5% on the variation, which is not permitted for the above reasons.

521) The Applicant;

a) is entitled to claim overheads and profit on the works the subject of the variation; and

b) is only entitled to retain the overhead component of any deduction but not the profit.

Reasonable margin for overhead and profit

522) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit of which 5% is profit and 10% is overhead as proffered by the Respondent's cost assessor.

Valuation of V034

523) I determine that the Applicant is entitled to payment of the following amount for the work the subject of V034 being;

a) The supply and installation of sewer pipe, fittings and an ACO pit type 95 in the amount of $1,950.00;

b) The installation of the ACO cable pit and to carry out additional excavation and backfilling in the amount of $2,099.89 and

c) 15% for overheads and profit.

524) The Applicant is entitled to payment of $4,657.37 excl. GST for V034.

VARIATION V036 NEW KERB DESIGN AND ELECTRICAL CONDUIT INSTALLATION

525) The Applicant claimed $8,851.00 excl. GST to carry out V036 and the Respondent has certified $Nil.

526) In the payment claim, the Applicant asserts;

> *"This variation V036 addresses late changes to a section of the kerb.*
>
> *This variation is for additional work to be carried out due to late changes to the kerbing and conduits directed by the Superintendent.*

527) The Applicant asserts that the Respondent's instruction caused it to incur an increase of direct costs in the amount of $6,168.00 due to additional work to alter a trench and conduits that had been installed, which delayed the date for completion. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

528) In the Respondent's payment certificate (Notice of Dispute) referenced C1217-01-GNO-236 dated 16 August 2017, the Respondent;

a) Asserts that at the time the kerb design was issued, the completed work along the north eastern perimeter that the Applicant claims had to be changed, had in fact not commenced;

b) Values the change to the kerb design and conduit installation in the amount of $Nil excl. GST.

Valuation of V036

529) The Respondent provides photographs taken on 19 November 2016 of the areas where the Applicant claims it had to undertake remedial work to work that had been completed. The photograph discloses that the construction of the strip footings and kerbing in that area had not commenced at the time the design of the kerbing was issued.

530) I determine that the Applicant is not entitled to any payment ($Nil) for V036 because it has not shown that it was required to undertake any additional work.

VARIATION V037 CHANGES (LATE) TO STREET LIGHT CONDUITS ALREADY INSTALLED

531) The Applicant claimed $7,971.00 excl. GST to carry out V037 and the Respondent has certified $Nil.

532) In the payment claim, the Applicant asserts;

> *"This variation V037 addresses late changes to design of conduits after prior installation to an earlier design.*
>
> *This variation is for additional work, changes in the character of the work and changes to the positions of conduits due to as a consequence of changes to the design previously issued for construction by the Superintendent.*

533) The Applicant asserts that the Respondent's instruction caused it to incur an increase of direct costs in the amount of $5,555.00 and delayed the date for completion. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

534) In the Respondent's payment certificate (Notice of Dispute) referenced C1217-01-GNO-237 dated 16 August 2017, the Respondent;

a) Asserts there was no site instruction directing this work and no change to the design of conduits;

b) Values the change to the sewer design in the amount of $Nil.

535) The Applicant claims that it re-installed 4 conduits in accordance with revised drawings C1217-05-EGA-134 Rev 1 to 2 and C1217-05-EGA-133 Rev 1 to 2 and has set out its pricing accordingly.

536) The Applicant also claims 43.5% for overhead and profit, which it asserts it is entitled to claim under cl. 36.4.

537) The Respondent's cost assessor states; "*I can only see one street light that has been relocated (south-west corner). I have, therefore assessed the value of this claim to be $1,597.06*".

538) The Applicant has only claimed to relocate electrical conduits for a light pole on the western end of the site.

539) I prefer the Applicant's valuation of the additional work because it correlates to the referenced drawings.

540) The Applicant;

a) is entitled to claim overheads and profit on the works the subject of the variation and not on the works (that were not revised) plus the new related work the subject of the variation; and

b) is only entitled to retain the overhead component of any deduction but not the profit.

Reasonable margin for overhead and profit

541) I have considered this question regarding reasonable margin for overhead and profit above at paragraphs 125) to 128) and in the context that I will determine below the delay damages, I accept the Respondent's submissions that 15% is a reasonable margin for overhead and profit of which 5% is profit and 10% is overhead as proffered by the Respondent's cost assessor.

Valuation of V037

542) I determine that the Applicant is entitled to payment of the following amount for the work the subject of V037 being;

a) The supply and re-installation of conduits the amount of $5,554.86; and

b) 15% for overheads and profit.

543) The Applicant is entitled to payment of $6,388.09 excl. GST for V0376388.

VARIATION V039 REFRIGERATION OF CONCRETE

544) The Applicant claimed $64,238.00 excl. GST to carry out V039 and the Respondent has certified $Nil.

545) In the payment claim, the Applicant asserts;

> *"This variation V039 is for the extra costs of refrigeration of concrete.*
>
> *This variation is for the significant additional works and significant changes in the order and character of the work as a consequence of major and constant changes to designs directed by the superintendent. This resulted in much hotter conditions than expected thereby requiring the contractor to use chilling equipment during the placement of certain works. It also required in the contractor to pay a premium to start work earlier to perform works in the coolest part of the day.*

546) The Applicant asserts that the Respondent's instruction caused it to incur an increase of direct costs in the amount of $44,828.00 and delayed the date for completion. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

547) The Applicant asserts that it suffered extensive delays and also relies on an email exchange that it asserts was an instruction to provide the chilling equipment claimed under V039. Specifically;

a) The delays suffered the Applicant and caused by the Respondent will be considered in the Applicant's delay damages claim below.

b) On 12 January 2017, the Applicant's project manager wrote to the Respondent as follows:

> *"…There will be a premium required for the chilled water used in the concrete which all together will total roughly $25K. I believe the chilled water is a critical requirement to enable the concrete to meet the specification and to ensure a high-quality finish. To avoid delays to the apron slab pours, which we intend to commence in part tomorrow, please confirm your acceptance of the additional cost associated with this variation."*

c) On 12 January 2017, the Respondent's project manager wrote to the Respondent as follows:

> *"As discussed it is [the Applicant's] responsibility to provide concrete to specification.*
>
> *[The Respondent] acknowledges that the chiller in the current circumstances will provide the best guarantee to get the works completed in the shortest possible time and confirms it is willing to contribute to the additional costs to ensure timely completion of the works from here on."*

548) In the Respondent's payment certificate (Notice of Dispute) referenced C1217-01-GNO-238 dated 16 August 2017, the Respondent;

a) Referred the Applicant to Note C4 on Contract drawing WAD151238-CFD-000 (**Note C4**);

b) Reminds the Applicant that the Applicant's proposed construction schedule indicates it planned to pour the concrete in late October and early November 2016 and, therefore, the Applicant should have anticipated that it would have had to provide chilling equipment to satisfy the requirements of Note C4 referred to above;

c) Values the claim in the amount of $Nil.

Valuation of V039

549) It is an implied term of the Contract that the Applicant will plan and perform the WUC in a manner that could be reasonably expected of a competent contractor. Accordingly, I consider that the Applicant should have considered a range of information contained in the public domain about conditions on or about the site (including temperature) in order to plan and execute the WUC.

550) The Respondent has provided publically available average annual temperature charts for the site that indicate that night time temperatures during the months of October and January were between 21.7^0C and 24.8^0C and the daytime temperatures were between 34.8^0C and 37.1^0C.

551) The Applicant indicated that it had paid a premium to its employees and to its suppliers to commence the concrete batch plant at 3:00 am and pour the concrete early in the morning.

552) It appears to me that the Applicant was aware of its obligation to batch and pour the concrete during the cooler daily temperatures (during the night and early morning) to ensure that the concrete temperatures did not exceed those stated in Note C4 and arranged for the placement of the concrete accordingly.

553) The Applicant requested the Respondent to accept up to "$25K" of additional costs associated with chilled water in order to ensure that a good finish.

554) The Respondent reminded the Applicant that the Applicant remained responsible to deliver the concrete to the standard required under the contract, which implicitly means that the Applicant had to comply with, among other things, the requirements of Note C4.

555) The Respondent indicated that it would "*contribute to the additional costs to ensure timely completion of the works from here on*".

556) There have been no submissions made by the Respondent that indicate that the only way for the Applicant to achieve the requirements of Note C4 was to do so by utilising chilled water.

557) In this context, it appears to be that the Respondent decided to contribute in order to ensure an acceptable standard of finish rather than to rely on the provisions of the Contract and enforce its rights if the standard of concrete finish was not achieved.

558) Accordingly, I determine that the Respondent agreed to a variation implicitly instructing the Applicant to provide chilled water but on the condition that it would only contribute up to $25K.

559) I do not accept that instruction meant that the Respondent accepted all costs associated with the chiller and carrying out the works during the night and or early morning because that was one construction methodology that would satisfy the requirements of Note C4 without the need to have to resort to chilled water.

560) I determine that the Applicant is entitled to payment of $25,000.00 excl. GST for the provision of chilled water in relation to V039.

VARIATION V040 REVISED [REDACTED] DETAILS ON THE EASTERN SIDE OF [REDACTED]

561) The Applicant claimed $80,093.00 excl. GST to carry out V033 and the Respondent has certified $51,462.00 excl. GST.

562) In the payment claim, the Applicant asserts;

> *"This variation V040 is for extra work directed at site instruction 002.*
>
> *… this variation is for a direction issued by the superintendent for varied and additional work to be carried out for in ground [redacted] works already performed."*

563) The Applicant asserts that the Respondent's instruction caused it to incur an increase of direct costs in the amount of $55,814.00 and delayed the date for completion. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

564) In the Respondent's payment certificate (Notice of Dispute) referenced C1217-01-GNO-239 dated 16 August 2017, the Respondent;

a) Acknowledges that the site instruction referenced 002 to the Applicant to carry out remedial work to the [*redacted*] on the eastern side of the [*redacted*];

b) Reject the claim for 43.5% overheads and margin in addition to actual costs;

c) Assert the actual costs are the be valued in accordance with the rates set out in Schedule C to the contract;

d) Assert that $160.00 per hour inclusive of overheads and profit is a reasonable rate for an electrician, which is not specified in rates set out in Schedule C;

e) Rejects that the instruction caused the Applicant any delay; and

f) Values the additional work performed pursuant to site instruction 002 in the amount of $51,642.00 excl. GST.

Determination and valuation of V040

565) I do not accept that the Applicant is entitled to 43.5% margin for overhead and profit because in the absence of any agreement, clause 36.4(b) of the Contract operates and requires the variation to be valued using the rates set out in Schedule C and when there are no applicable rates, then pursuant to clause 36.4(d) it must use reasonable rates and is entitled to add a reasonable amount for overheads and profit.

566) For the avoidance of doubt, Schedule C makes it clear that the overhead and profit applied to the cost of carrying out a variation is included in the rates stated in Schedule C.

567) There were no agreed rates for an electrician in the contract.

568) In the Notice of Dispute, the Respondent asserted that the rate claimed for an electrician was 40% more than the industry average but would nonetheless pay $160.00 per hour for an electrician on the basis that overheads and profit were included in that rate.

569) The Applicant has not provided any justification for its claim for $160.00 per hour for an electrician.

570) The Respondent's cost assessor opines that $95.00 per hour is a reasonable rate for an electrician.

571) I determine that the Applicant is entitled to payment of $160.00 per hour for an electrician on the basis that overheads and profit are included in that rate, which is a reasonable rate.

572) I also accept the Respondent's rejection of the claim for $300.00 for a concreter because valued pursuant to Schedule C. the Applicant is only entitled to payment of $225.00 for the concreter.

573) The Respondent appears to accept all other parts of the claim for V040.

574) The Applicant is entitled to payment of $55,739.31 excl. GST for performing the variation work referred to in V040.

VARIATION V042 [REDACTED] TRENCH

575) The Applicant claimed $74,106 excl. GST to carry out V042 and the Respondent has certified $5,389.00 excl. GST.

576) In the payment claim, the Applicant asserts;

"This Variation V042 is for extra work at the [redacted] trench.

The variation is for additional new work directed by the superintendent for [redacted] trenching by the issue of a new drawing C1217–05 –CFD – 912 Rev 0 dated 24–01–17.

It also includes for the extra costs associated with impacts of inclement weather and client access requirements leading to use of stabilised sand in sections across the roadway and under new curb in this area. This is all additional work and costs to that required by the contract."

577) The Applicant asserts that the revised drawing caused it to incur an increase of direct costs in the amount of $51,642.00 and delayed the date for completion. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

578) In the Respondent's payment certificate (Notice of Dispute) referenced C1217-01-GNO-240 dated 16 August 2017, the Respondent asserts that;

a) the revised drawing necessitated the Applicant to perform some additional work but disputes the parts of the claimed work as set out below.

b) the Applicant had to trench across the roadway and into the new pit in accordance with the Contract drawing. Accordingly, this activity did not arise from the issue of the revised drawing.

c) the Applicant would have allowed to under excavate and hence would have had to supply stabilised sand to backfill.

d) Asserts all other works associated with this trench and conduits were part of the WUC.

e) Rejects the claim for 43.5% overheads and margin in addition to actual costs;

f) Rejects that the variation delayed the works and the date for practical completion.

How is this variation to be valued?

579) By reference to the drawings referred to me in the statement of [*the Applicant's representative*], the Applicant's measure, the Respondent's assessment and the Respondent's cost assessor's measure of the additional works claimed under V042, I have determined the additional work, which is set out in the table below.

580) I do not accept that the Applicant is entitled to claim for excavation, bedding, laying of conduits and backfilling of the trench because that is required under the original Contract drawings C1217-05-EGA-132, 133 AND 134 all Rev A and, therefore, that work is not a variation.

581) Drawing C1217–05–CFD –912 Rev 0 now requires the Applicant to use stabilised sand as backfill. I do not accept that the type of work set out in the previous revision implicitly required Applicant to provide stabilised sand backfill because the drawing was not specific and it could have been backfilled with many other materials including the excavated material.

582) The Applicant was entitled to claim for additional cutting of concrete, the supply and placement of stabilised sand and the reinstatement of the concrete bund.

583) I do not accept that the Applicant is entitled to 43.5% margin for overhead and profit because in the absence of any agreement, clause 36.4(b) of the Contract operates and requires the variation to be valued using the rates set out in Schedule C and when there are no applicable rates, then pursuant to clause 36.4(d) it must use reasonable rates and is entitled to add a reasonable amount for overheads and profit.

584) The Applicant claims that it performed excavation, bedding, laying of conduits and backfilling of the trench and additional cutting of concrete, the supply and placement of stabilised sand and the reinstatement of the concrete bund in adverse conditions to a design that was previously not certain in the Contract drawings and suffered delays. The Applicant has claimed its costs for that work accordingly. It is not possible, however, to ascertain which costs were for the variation and which costs were for the original works. The Applicant also claims 43.5% for overhead and profit, which it asserts it is entitled to claim under cl. 36.4.

585) I am not, however, persuaded by the Applicant's valuation of the additional work because the Applicant incorrectly claimed original work as a variation as well as the work that was a variation and it is not possible to distinguish which part of the valuation is for the original Contract works and which part is for performing the variation.

586) The Applicant makes it clear that the claimed work includes for delays caused by the Respondent due to a new but late issue, and then conflates delay damages and cost of additional work to perform a variation.

587) Under clause 34.2 of the contract, the Applicant must notify the Respondent of delay for which the Respondent is liable. If those delays were caused by the Respondent and the Applicant is entitled to an extension of time pursuant to clauses 34.3 and 34.4, then the claimant may make a claim for delay damages under clause 34.9.

588) The Contract does not permit a global claim of the type made by the Applicant where delay damages and a claim for variation and a claim for performing original Contract work are all blended together under one claim including a deduction for the original work less 43.5% for overheads and profit.

589) The Respondent's assessment in relation to the changes in response to the claim for variation V042 is $5,389.00 excl. GST.

590) The Respondent's cost assessor has provided an assessment of the additional works under V042 in the amount of $19,959.83.

591) I prefer the Respondent's cost assessor's valuation of V042 because the cost assessor has identified and valued the items of extra work that I consider are a variation.

Determination and valuation of V042

592) For the avoidance of doubt, Schedule C makes it clear that the overhead and profit applied to the cost of carrying out a variation is included in the rates stated in Schedule C.

593) The Applicant is entitled to payment of $19,959.83 excl. GST for performing the variation work referred to in V042.

VARIATION V046 ADDITIONAL COST OF MEDICALS

594) The Applicant claimed $19,502.00 excl. GST to carry out V046 and the Respondent has certified $Nil.

595) In the payment claim, the Applicant asserts the Respondent changed its procedure for allowing the Applicants personnel to access the site.

596) The Applicant asserts that the Respondent's instruction caused it to incur an increase of direct costs in the amount of $13,950.00. The Applicant further asserts that it is entitled to 43.5% for overheads and margin.

597) In the Respondent's payment certificate (Notice of Dispute) referenced C1217-01-GNO-239 dated 16 August 2017, the Respondent:

a) asserts that in accordance with section 11.10 of the site management plan (referred to below as the SMP), which forms a part of the contract, the Applicant was required to prove the fitness and or provide a medical for each employee within one month;

b) reject the claims;

c) values the claim 046 in the amount of $Nil.

Determination and valuation of V046

598) The parties agree that at the time of tender the Applicant was provided with a document entitled Safety Management Plan referenced C1217-02-SMP-001-0 (the **SMP**). The parties also agree that the Respondent made it clear to the Applicant that if the Contract was awarded to the Applicant, then the Applicant must comply with the provisions of the SMP.

599) Part 5.1 of the SMP indicates that the Applicant's personnel can only be engaged to work on the Contract provided each person satisfies 7 items identified in the SMP, one of the items was a pre-employment medical. Another item was described as "*Other Client or site specific requirements*".

600) On or about 22 July 2016, which was during the course of the tender, the Applicant asked the Respondent to provide its "site-specific requirements" referred to in the SMP. The Respondent provide its Entry to Site Checklist referenced CEA 07-001-FOR_B. This document appears to be the [*Respondent's*] Human Resources process referred to in Part 5.1 of the SMP.

601) Section 9 of the Entry to Site Checklist referenced CEA 07-001-FOR_B states:

> *"All [Respondent] and subcontractor personnel performing work on the [redacted] site are required to arrive to work 'Fit for Work'.*
>
> *Contractors coming to site must be confirmed to be fit for their work. This can be confirmed by;*
>
> 1. *providing a current medical assessment (within the past 12 months) OR,*
>
> 2. *providing a signed and dated statement from the employer (contractor) that employees are fit for the work they are conducting*
>
> *[The Respondent] will assess the information provided by the contractor and provide approval for them to proceed.*

602) At paragraph 846 of the statement of [*the Applicant's representative*], he states;

> "*Following this, the superintendent, on the half of [the Respondent], insisted that [the Applicant] have all personnel undertake a pre-employment medical assessment before being allowed to the site.*"

603) The Respondent does not dispute that it required each person to undergo a medical as deposed by [*the Applicant's representative*].

604) The process referred to above that was incorporated into the Contract by agreement of the parties, provides the Applicant the discretion to either provide a signed statement advising that each employee is fit for work or a current medical certificate.

605) The Respondent changed that process and directed that all personnel must provide a current medical certificate prior to being permitted onto the site. That was an instruction under clause 36.1 of the contract.

606) The Applicant claims the cost of the medicals incurred due to the Respondent's instruction and indicates that it would otherwise have only provided the signed statement as it was entitled to do under the Respondent's Site Checklist referenced CEA 07-001-FOR_B.

607) Accordingly, the Applicant is entitled to payment of the costs identified in claim V046.

608) I do not, however, accept that the Applicant is entitled to 43.5% margin for overhead and profit because in the absence of any agreement, clause 36.4(b) of the Contract operates and requires the variation to be valued using the rates set out in Schedule C and when there are no applicable rates, then pursuant to clause 36.4(d) it must use reasonable rates and is entitled to add a reasonable amount for overheads and profit, which I have determined above is 15%.

609) The Applicant is entitled to payment of $15,628.50 excl. GST for performing the variation work referred to in V046.

VARIATION V047 VARIATIONS AS PER PURCHASE ORDER PO026293

610) The Applicant has claimed $143,853.00 excl. GST to carry out V047 and the Respondent has certified $143,853.14 excl. GST.

611) The Applicant further claims $26,495.00 as its cost for the preparation of the document entitled "*Details of delay and disruption by [the Applicant]*". The Applicant, however, does not refer me to any provision of the Contract or any agreement between the parties about who is liable for such costs.

612) The Respondent's cost assessor submits that the cost of preparing any claim is an overhead cost for which the Applicant is liable.

613) I agree with the Respondent's cost assessor's submission and determine that the Applicant is not entitled to any payment in relation to costs it incurred in the preparation of the document entitled "*Details of delay and disruption by [the Applicant]*".

614) There is no dispute in relation to V0047.

VARIATION V048 VALUATION OF VARIATIONS

615) The Applicant claimed $128,991.00 excl. GST for additional costs incurred in the preparation of the payment claim under V048 and the Respondent has certified $Nil.

616) In the payment claim, the Applicant asserts the Respondent failed to value its payment claims in a timely manner. The Applicant asserts that it was required to undertake its own measures of multiple changes across numerous revised drawings.

617) The Applicant asserts that the Respondent's instruction caused it to incur an increase of direct costs in the amount of $109,314.00. The Applicant further asserts that it is entitled to 18.0% for overheads and margin.

618) In the Respondent's payment certificate (Notice of Dispute) referenced C1217-01-GNO-242 dated 16 August 2017, the Respondent;

a) asserts that the Applicant

i) never made a claim for a variation until after all works were complete;

ii) in breach of clause 36.2 of the contract, never notified the Respondent the particulars of any variation;

iii) never notified the Respondent that it intended to procure the services of cost consultants to price the variations;

b) rejects the claim and values the claim 049 in the amount of $Nil.

Determination and valuation of V048

619) The Contract is a lump sum contract. The Contract requires the Applicant to prepare its claims for payment in accordance with clause 37.1. There is nothing in the Contract that entitles the Applicant to any additional payment for the preparation of its claims.

620) The fact that the Respondent may have been in breach of its obligations to provide a payment certificate within the time prescribed by clause 37.2 of the Contract does mean that the Applicant is entitled to be paid to the cost of its preparation of claims.

621) The Applicant may be entitled to damages flowing from the Respondent's breach of clause 37.2, however, the Applicant has made no such submission.

622) The Applicant is entitled to payment of $Nil for performing the variation work referred to in V048.

VARIATION V049 CLAIM FOR DELAY DAMAGES

623) The Applicant claimed 20 weeks extension of time and consequent delay damages in the amount of $847,789.00 excl. GST under V049 and the Respondent has certified $Nil.

624) In the payment claim, the Applicant asserts that;

a) it submitted the requisite notices pursuant to clause 34.2 of the contract;

b) it claimed extensions of time in accordance with clause 34.3 of the contract;

c) the Respondent failed to fairly assess the claims for extension of time and or to assess at all the claims for extension of time within the time prescribed in clause 34.2 of the contract;

d) it is entitled to delay damages at the rate of $34,509.00 per week excluding GST for 20 weeks in the amount of $690,195.00 excl. GST;

e) it is also entitled to payment of costs incurred during the periods that it could not work (11/11/2016 to 6/02/2017) due to inclement weather in the amount of $68,310.00 excl. GST;

f) it is further entitled to payment of costs it incurred in the preparation of this claim in the amount of $26,495.00 excl. GST.

625) The Applicant asserts that the delays for which the Respondent is liable caused it to incur an increase of direct costs in the amount of $784,900.00 excl. GST. The Applicant further asserts that it is entitled to 8.0% for off-site overheads.

626) In the Respondent's payment certificate (Notice of Dispute) referenced C1217-01-GNO-243 dated 12 July 2017, the Respondent;

a) Acknowledges that the Applicant previously claimed for an extension of time under the Applicant's letter referenced "C2-C0029";

b) States that the claim for an extension of time was rejected by way of the Respondent's letter referenced C1217-01-GNO-126 on the basis;

"the EOT claim was submitted after PC date and not in line with the contract, specifically

clause 34.3b) requires the contractor to provide within 28 days of when the contractor should reasonably have become aware of the causation occurring, a written claim for an EOT evidencing the facts of causation and of the delay to WUC (Including extent). Such notification was not provided by [the Applicant*]"*

c) rejects the claim and values claim 049 in the amount of $Nil.

Determination of V049

627) The Respondent claims that the claim for an EOT was submitted after the Date for Practical Completion and did not submit the claim for an EOT in accordance with clause 36.3b). The Respondent asserts that the Applicant is, therefore, not entitled to submit a claim for an EOT.

628) In breach of its obligations under clause 37.2(a) of the contract, the Respondent made no assessment of the claim V049 for delay damages nor did it give reasons for rejection of V049. The Respondent only states that V049 was previously submitted as a claim for an EOT, which it rejected. The Respondent makes it clear that the Applicant is not entitled to any EOT and has determined that $Nil is certified in response to the payment claim. The inference must be that the Respondent has determined that the Applicant is not entitled to any delay damages as now claimed under V049.

Background

629) The Applicant submits that the Respondent made numerous design changes to the design up to about 10 March 2017. In its claim for an extension of time in the letter referenced C2-C-0029 dated 24 March 2017, the Applicant identifies some of the late design changes as follows:

a) As of 13 January 2017, some of the slabs on drawing C1217–05–CFD–904 Rev 2 were still on hold;

b) On 24 January 2017, the Respondent issued the following revised drawings; C1217–05–CFD–903 Rev 5, C1217–05–CFD–908 Rev 4, C1217–05–CFD–905 Rev 3, C1217–05–CFD–912 Rev 0.

c) As of 27 February 2017, some of the slabs on drawing C1217–05–CFD–904 Rev 3 were still on hold;

d) On 28 February 2017, the Respondent issued the following revised drawings; C1217–05–CFD–904 Rev 3, C1217–05–CFD–908 Rev 5, C1217–05–CFD–909 Rev 2, C1217–05–EGA–137 Rev 0.

e) On 10 March 2017, the Respondent issued the following revised drawing; C1217–05–CFD–903 Rev 6.

630) The Respondent does not deny that the above mentioned design changes were instructed on or about the above mentioned dates.

Claim for EOT was submitted after 16 December 2016 (the date for practical completion) and did not comply with clause 34.3(b) and is invalid?

631) The superintendent (for whom the Respondent is liable) should have directed an EOT at least up to 10 March 2017 plus some reasonable time to construct in accordance with the last issued drawing for the following reasons.

632) Clause 34.5 of the Contract states:

> *"…*
>
> *Notwithstanding that the Contractor is not entitled to or has not claimed an EOT, the Superintendent may at any time and from time to time before issuing the final certificate direct an EOT."*

633) Clause 20 of the Contract states:

> *"The Principal shall ensure that at all times there is a Superintendent, and that the Superintendent fulfils all aspects of the role and functions reasonably and in good faith.*

634) The Respondent knew that it was issuing drawings that contain information that must be used by the Applicant to complete the WUC prior to being able to achieve Practical Completion.

635) The Respondent issued a notice to the Applicant regarding completion on 31 January 2017 referenced C1217-01-GN0-082. On 10 May 2017, the Respondent issued a letter stating;

> "*the Contractor has failed to reach practical completion by the date for practical completion, being 16 December 2016. As per 34.7 of the Contract and [the* Respondent*'s] notice thereof dated 31 January 2017 (C1217–01 –GNO–082), the superintendent assesses liquidated damages to the sum of $64,341.65 excluding GST are due from the contractor.*

636) I acknowledge that the date for practical completion is still 16 December 2017.

637) I also note that the Respondent continued to instruct the Applicant to make changes to the WUC at least up to 10 March 2017.

638) As at 24 January 2017, the superintendent knew that some slabs were still on hold and that it had issued new design on 24 January 2017.

639) In these circumstances, I do not consider that the superintendent (for whom the Respondent is liable) acted reasonably when on 31 January 2017 it indicated it would apply liquidated damages. The superintendent knew or should have known that it was simply impossible for the Applicant to achieve practical completion at least until the last of the design changes had been issued. Furthermore, the superintendent knew or should have known that there were even more design changes to come.

640) As at 30 January 2017, even if the Applicant had not made any claims for EOT, the superintendent should have exercised its discretion under clause 34.5 and directed an EOT at least until the last date that an amended design was issued.

641) The Respondent issued further amended designs up to 10 March 2017. Again, the superintendent knew or should have known that the Applicant could not have achieved practical completion at least until up to the date of issue of the last design change, which was on 10 March 2017 and that was due to an act or omission of the Respondent (the late issue of design).

642) The superintendent should have directed an EOT at least up to 10 March 2017 plus some reasonable time to construct in accordance with the last issued drawing.

Did the Applicant *comply with the requirements of clause 34.2 and clause 34.3 of the contract?*

643) The Applicant has complied with its obligations under clauses 34.2 and 34.3 of the Contract for the following reasons.

644) Clause 34.2 of the Contract states:

> *"A party becoming aware of anything which will probably cause delay to WUC shall promptly give the Superintendent and the other party written notice of that cause and the estimated delay."*

645) That clause requires the Applicant to notify the Respondent of anything that may affect it achieving practical completion by the date for practical completion.

646) That clause similarly requires the Respondent to notify the Applicant of changes to design or anything else that would prevent the Applicant from achieving practical completion by the date for practical completion.

647) The Applicant asserts that it notified the Respondent of delays by way of its weekly report that it provided to the superintendent. The Respondent does not dispute that the Applicant provided notice of delays by way of the Applicant's weekly reports.

648) I have reviewed the weekly provided in the Applicant's submissions and I determine that the Applicant satisfied its obligations under clause 34.2 by providing its weekly reports to the Respondent.

649) Clause 34.3 of the Contract states:

> *The Contractor shall be entitled to such extension of time for carrying out WUC (including reaching practical completion) as the Superintendent assesses ('EOT'), if:*
>
> *a) the Contractor is or will be delayed in reaching practical completion by a qualifying cause of delay; and*
>
> *b) the Contractor gives the Superintendent, within 28 days of when the Contractor should reasonably have become aware of that causation occurring, a written claim for an EOT evidencing the facts of causation and of the delay to WUC (including extent).*
>
> *If further delay results from a qualifying cause of delay evidenced in a claim under paragraph (b) of this subclause, the Contractor shall claim an EOT for such delay by promptly giving the Superintendent a written claim evidencing the facts of that delay.*

650) The Applicant made 19 claims for extension of time during the period 7 February 2017 to 11 March 2017.

651) The Respondent asserts that the Applicant is not entitled to any extension of time because "a qualifying cause of delay has not arisen".

652) Clause 1 of the Contract defines qualifying cause of delay as follows:

> *"…any act, default or omission of the Superintendent, the Principal or its consultants, agents or other contractors (not being employed by the Contractor);*

653) I do not accept the Respondent's argument because an instruction (including revised drawings) to perform more work given by the superintendent is an act of the superintendent or principal.

654) The Respondent asserts that the Applicant was in breach of the Contract from the commencement of the project and is not entitled to benefit from its own breach.

655) Even if the Applicant caused delays, that does not mean that it is not entitled to claim an extension of time for a delay due to an act of the superintendent or principal. The Respondent's remedy in this case lay in clause 34.4 of the contract, which states:

When both non-qualifying and qualifying causes of delay overlap, the Superintendent shall apportion the resulting delay to WUC according to the respective causes' contribution.

In assessing each EOT the Superintendent shall disregard questions of whether:

a) WUC can nevertheless reach practical completion without an EOT; or

b) the Contractor can accelerate,

but shall have regard to what prevention and mitigation of the delay has not been effected by the Contractor

656) The Respondent has not provided me with any submission of how the Respondent determined which was the EOT to which the Applicant is entitled (if any) after proper consideration of the non-qualifying and qualifying causes of delay overlap. From the Respondent's submissions, it appears to me that the Respondent has simply denied that the late changes in design had any delaying effect (which is an impossibility) and held the Applicant liable for all delays that it asserts was due to the Applicant's mismanagement of the performance of the WUC.

657) The Respondent's cost assessor estimates that the Applicant is entitled to 30 working days extension of time but fails to account for the fact that the last changes made by the Respondent were on 10 March 2017. Accordingly, the date for practical completion could not be earlier than 10 March 2017, even if it was possible for the Applicant to finish all work on the day of issue of the last AFC drawing.

658) Unfortunately, neither the Respondent nor the Respondent's cost assessor have taken into account the non-qualifying causes of delay (for which the Applicant may be liable) to properly determine the amended date for practical completion.

659) Neither has made any submission regarding concurrent delays and who is liable for delay damages or liquidated damages or any other form of damage in such circumstances.

660) The Respondent has made numerous assertions regarding the Applicant's failure to prevent and mitigate the effects of delays, which the Applicant has an obligation to do. The Respondent, however, has provided little or no evidence to support those assertions and absolutely no analysis to show the impact of the asserted lack of prevention and or mitigation.

661) The Respondent's cost assessor has provided the following facts extracted from the site records provided by the Respondent that could have been used as evidence in support of the Respondent's assertion:

a) The Applicant provided 795 man days comprised of labour, supervision and subcontractors on-site over 97 working days;

b) The Applicant provided 92 man days of supervision on-site over 97 working days;

c) The Applicant provided 198 man days of its direct labour on-site over 97 working days;

662) I do not accept the Respondent's assertion that the Applicant is liable for all delays and not entitled to any EOT because the Respondent issued AFC drawings at least two months after the date for practical completion.

663) The Respondent asserts that the Applicant is effectively barred from making claims for extensions of time because it failed to make the EOT claim within 28 days of becoming aware of the delay occurring.

664) The Applicant asserts that it is not barred in claiming for an EOTs due to the operation of clause 41.2 of the contract, which states:

> *"The failure of a party to comply with the provisions of subclause 41.1 or to communicate a claim in accordance with the relevant provision of the Contract shall, inter alia, entitle the other party to damages for breach of Contract but shall neither bar nor invalidate the claim.*

665) Even if, the Applicant submitted its claims for EOT outside of the 28 day time prescribed by clause 34.3, it remains entitled to submit a claim for EOT up to the date of final completion.

666) In circumstances where the Applicant submitted its claim for EOT after the prescribed 28 days, it remains open to the Respondent to claim damages that it has incurred due to the Applicant's failure to submit each claim for EOT within 28 days of becoming aware of the delay. I note the Respondent has made no such claim in relation to this payment claim.

667) The Respondent argues that regardless of clause 41.2, the Applicant must have satisfied the requirements of clause 34.3 in order to accrue a right to claim an EOT. The Respondent refers me to *Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd* (1996) 12 BCL 317 as authority for that proposition. That case however is distinguished because the Contract between the parties did not contain an equivalent provision to clause 41.2 of AS 4000.

668) It would be a non-sense to provide clause 41.2 that provides for late notification and claims and to assert that clause 41.2 is of no effect because the time limits in clause 34.3 are strict. That is just not possible on any reading of this contract.

669) I do not, therefore accept that the Applicant is barred from making its claims for EOT.

Deemed extension of time

670) At paragraphs 516 to 528 of the application for adjudication, the Applicant asserts that it is entitled to an extension of time to 24 March 2017 by the operation of clause 34.5 of the Contract because the Respondent failed to assess the Applicant's claims for extension of time within 28 days of service of those claims.

671) Clause 34.5 of the Contract states:

> *"Within 28 days after receiving the Contractor's claim for an EOT, the Superintendent shall give to the Contractor and the Principal a written direction evidencing the EOT so assessed. If the Superintendent does not do so, there shall be a deemed assessment and direction for an EOT as claimed.*
>
> *Notwithstanding that the Contractor is not entitled to or has not claimed an EOT, the Superintendent may at any time and from time to time before issuing the final certificate direct an EOT.*

672) The table at paragraph 520 of the Applicant's submissions indicates that the Respondent failed to respond to the Applicant's claims for EOT within the prescribed time.

673) Clause 34.3(b) requires the Applicant's claim for an EOT to provide certain particulars as follows:

> *b) the Contractor gives the Superintendent, within 28 days of when the Contractor should reasonably have become aware of that causation occurring, a written claim for an EOT evidencing the facts of causation and of the delay to WUC (including extent).*

674) The Applicant has confused delays it suffered with "*delay to WUC*".

675) The Applicant in most cases has simply calculated the time between the date it expected to start a certain activity and the day that it started that activity and claimed that period as the extension of time. I do not accept that analysis because it provides no evidence of prevention and mitigation, which the Applicant was obliged to do.

676) In any event, the Applicant's claim referenced C2-C-0005 dated 7 February 2017 states;

> "*the contractor anticipates, after allowing for procurement of materials (including principal supply items) and operational constraints in impeding access to a areas of the site, that the extra work (variation) described above will be completed (assuming no inclement weather) by 13 March 2017.*
>
> *Subsequent activities – 20 mm gravel screenings – will not be likely completed until 17 March 2017 followed by demobilization expected by 24 March 2017.*

The contractor claims an extension of time for carrying out WUC to 24 March 2017. Relative to the date for practical completion (currently unamended) this is a delay to WUC and practical completion of 98 days."

677) I consider that claim, is a valid claim for EOT under the contract.

678) The other claims do not satisfy the requirements of clause 34.3(b). For example, claim referenced C2-C-0012 dated 20 February 2017 states;

"*Overall completion of [redacted] will be delayed from 19 September 2016 to 18 February 2017.*

The contractor considers it has been delayed in the execution of WUC by the order of 152 days.

The contractor claims an extension of time to WUC of 152 days."

679) That claim does not explain the delay to WUC. It merely claims the period of delay as the delay to WUC. For the reasons stated above, that means that even though there was a delay that caused a delay to the date for practical completion, that was not the period that the Applicant was entitled to claim as an EOT because it failed to evidence the delay to WUC.

680) Most of the claims referenced in the table at paragraph 520 of the Applicant's submissions do not explain the delay to WUC and, therefore, are not claims for EOT.

681) In any event, I take it that the Applicant has made a claim for an EOT to 24 March 2017 by way of its claim referenced C2-C-0005 dated 7 February 2017. The Respondent failed to respond within 28 days of the service of that claim and, by the operation of clause 34.5, the date for practical completion was deemed to be extended to 24 March 2017.

682) The Applicant notified the Respondent that it achieved practical completion by way of its letter referenced C2-C-0034 dated 24 March 2017. The Respondent appears to not responded to the Applicant's claim.

683) In these circumstances, I decide that the date for practical completion was extended to 24 March 2017 and the Applicant achieved practical completion at that time.

684) The Applicant has claimed 20 weeks EOT and delay damages under clause 34.9 of the Contract based on a weekly rate of $34,509.00 excl. GST in its claim for variation V0049.

685) The Respondent's has assessed that the Applicant is not entitled to any EOT. Its cost assessor has, nonetheless, provided its estimate of delay damages rate as $18,068 per week.

686) I determined above that the date for practical completion is 24 March 2017, which is a period of 98 days or 14 weeks.

687) Clause 34.9 of the Contract states:

> *"For every day the subject of an EOT for a compensable cause and for which the Contractor gives the Superintendent a claim for delay damages pursuant to subclause 41.1, damages certified by the Superintendent under subclause 41.3 shall be due and payable to the Contractor."*

688) That clause indicates that the Applicant was required to submit its actual damages suffered due to the delays for which the Respondent is liable.

689) For the reasons set out above, the Respondent has not made any proper assessment of the delays for which it is responsible or the delays for which the Applicant is responsible.

690) I acknowledge that the Respondent's cost assessor has determined that the Applicant is entitled to 30 working days extension of time. In other words, it suggests that the date for practical completion was 30 January 2017. That, however, does not account for the fact that amended approved for construction drawings were issued up 10 March 2017. The importance of that fact is that the date for practical completion could not have been before 10 March 2017.

691) The Respondent did not account for the delays for which it asserts the Applicant was liable. Neither the Respondent nor its cost assessor has provided me any evidence to show that the Applicant caused and was liable for a certain delays.

692) The Respondent only made unsupported statement that the Applicant was poorly managed and under resourced. I cannot give that assertion any real weight.

693) Accordingly, I determine that the Applicant is entitled to payment of its actual delay damages. I will, therefore, apply a delay damages rate (to be determined below) for each working day between 16 December 2016 and 24 March 2017, which is 80 working days.

694) The Applicant has made a claim on the basis of delay costs being calculated by way of a weekly rate. The Respondent has impliedly accepted that method of valuation and provided an alternative weekly rate.

695) The averaged delay rate, however, must satisfy clause 34.9 in so far as when applied to the total period of delay for which the Respondent is liable, it fairly represents actual costs suffered by the Applicant.

696) On the basis that;

a) The Applicant provided 795 man days comprised of labour, supervision and subcontractors on-site over 97 working days;

b) The Applicant provided 92 man days of supervision on-site over 97 working days;

c) The Applicant provided 198 man days of its direct labour on-site over 97 working days;

697) I assess the delay rate as follows:

a) The Applicant claims $5,143.00 for [*name redacted*] and $8,066 for a supervisor. The Applicant also claims $6,986.00 for a Peggie.

b) The Respondent says that a total allowance of $8,680.00 is appropriate for a superintendent, a supervisor and a Peggie for an average of 8 working persons.

c) I accept the Respondent's assessment as 2 non-working supervisors and 1 non-productive Peggie for 8 working persons is about double the reported non-working site overhead to working person ratio industry averages. I accept 1 superintendent, 0.25 supervisor and 0.25 Peggie. Both the supervisor and the Peggie would perform productive work (which is work other than supervision and Peggie services) when they were not engaged as a supervisor or Peggie. I determine the weekly rate for [*name redacted*] a supervisor 25% of the time and a Peggie 25% of the time as $8,906.00

d) The Applicant claims $4,725.00 for weekly accommodation, which the Respondent accepts is a fair rate.

e) The Applicant claims $4,212.00 as the cost of flights for 30 weeks. The Respondent points out that the records show that the period for which travel costs are provided is actually 38 weeks. Accordingly, the Respondent asserts that the weekly rate is $3,325.00, which I accept.

f) Respondent points out the Applicant previously disclosed $1,200.00 per week for 3 utes. Accordingly, I accept the Respondent's assessment.

g) The Applicant claims $1,200.00 for small tools. The Respondent says that is excessive but does not provide any assessment of what constitutes a reasonable rate. Accordingly, I accept the Applicant's assessment.

h) The Applicant claims for the provision of a Trimble and a bob-cat as overheads. The Respondent asserts those are costs that were claimable as direct costs of performing the variations but are not overheads. I agree with the Respondent's cost assessor.

i) Accordingly, the delay rate is $21,203.00 excl. GST, which is $3,533.83 per working day (based on a 6 working day week) plus 8.0% for off-site overheads, which is agreed by both the Applicant and the Respondent's cost assessor.

698) Accordingly, I assess the delay damages claim as; 80 working days x $3,533.83 x 1.08, which is $305,323.20 excl. GST.

Claim for costs of labour during inclement weather

699) The Applicant has also claimed $68,310.00 as its costs of labour during a rain event or in cleaning up after a rain event in V049.

700) The Respondent has not responded to that claim in the payment certificate and provides no response to the claim in its response. The Respondent's cost assessor states that he interprets note "3o" in Schedule A as relating only to claims for extension of time and float with a program and means that the Applicant has made no provision for inclement weather.

701) I do not accept the cost assessor's interpretation because that cannot be the meaning all of the notes in Schedule A are read together.

702) In claim for variation V049, the Applicant states;

> "*The costs incurred on inclement weather are an exclusion – see note 3o. at Schedule A.*"

703) Note 3o in Schedule A of the Contract states:

> *"The Price is subject to the following clarifications and exclusions:*
>
> *…*
>
> *The Contractor has made no allowance for delays caused by inclement weather."*

704) The meaning of the note 3o in Schedule A is that the Contract sum does not include any provision for costs incurred due to inclement weather.

705) Clearly, the parties are aware of that fact and the Applicant has made it clear that it is not liable for such inclement weather costs and that it does not expect to pay for inclement weather costs. The implication of that clause is that as the Applicant was not paying for the costs it incurred during inclement weather then liability for those costs passed to the Respondent.

706) The Respondent accepted term 3o (and the other terms) drafted by the Applicant into Schedule A to the Contract.

707) Accordingly, I determine that clause to mean that the Applicant was not required to price in the risk of any inclement weather because the Respondent accepted that risk. Accordingly, the Respondent is liable for the payment of costs incurred by the Applicant during inclement weather events.

708) In light of note 3o of Schedule A, I determine the Applicant is entitled to payment of $68,310.00 excl. GST.

Claim of costs of preparation of claim for EOT

709) The Applicant further claims $26,495.00 as its cost for the preparation of the document entitled "*Details of delay and disruption by [the Applicant]*". The Applicant, however, does not refer me to any provision of the Contract or any agreement between the parties about who is liable for such costs.

710) The Respondent's cost assessor submits that the cost of preparing any claim is an overhead cost for which the Applicant is liable.

711) I agree with the Respondent's cost assessor's submission and determine that the Applicant is not entitled to any payment in relation to costs it incurred in the preparation of the document entitled "*Details of delay and disruption by [the Applicant]*".

Valuation of V049

712) The Applicant is entitled to payment of $305,323.20 excl. GST plus $68,310.00 excl. GST, which is $373,633.00 excl. GST for V049.

RESPONDENT'S SET-OFF(S)

713) The Respondent has set off an amount of $345,497.55 and referred to previous correspondence that gave reasons for the set-off(s) comprised of the following:

a) Liquidated damages in the amount of $64,341.65 excl. GST and particularised in its previous letter referenced C1217-01-GNO-151 dated 10 May 2017;

b) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $99,522.50 excl. GST in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017;

c) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $7,572.00 excl. GST in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017;

d) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $54,061.40 excl. GST in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017; and

e) Negative variations (work deleted from the Applicant's contract) in the amount of $120,000.00 excl. GST.

RESPONDENT'S LIQUIDATED DAMAGES

714) The Respondent has set off liquidated damages in the amount of $64,341.65 excl. GST that are particularised in its previous letter referenced C1217-01-GNO-151 dated 10 May 2017.

715) Specifically, the Respondent argues that;

a) The date for practical completion was 16 December 2016.

b) The Applicant is not entitled to any extensions of time and, accordingly, the date for practical completion has never been extended.

c) The Applicant is, therefore, in breach of clause 34.1 of the Contract which states:

"*The Contractor shall ensure that WUC reaches practical completion by the date for practical completion.*"

d) Pursuant to clause 34.7, the Respondent became entitled to apply liquidated damages as of 17 December 2016.

716) The Applicant asserts that it achieved practical completion by the date for practical completion and, therefore, the Respondent is not entitled to apply liquidated damages.

Determination of claim that Respondent *cannot apply liquidated damages*

717) I have determined above at paragraphs 623) to 683) that the Applicant is entitled to an extension of time up to 24 March 2017 and that the adjusted date for practical completion is 24 March 2017.

718) Accordingly, the Respondent is not entitled to apply liquidated damages in the amount of $64,341.65 excl. GST.

SET-OFF(S) DUE TO COSTS INCURRED ARISING FROM ALLEGED FRAUD

719) The Respondent has set off costs that it asserts were incurred and arose from the Applicant's project manager's falsification of soil tests. The Respondent referred to previous correspondence that gave reasons for the set-off(s) comprised of the following:

a) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $99,522.50 excl. GST in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017;

b) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $7,572.00 excl. GST in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017; and

c) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $54,061.40 excl. GST in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017.

720) In a letter referenced C1217-01-GNO-244 dated 7 July 2017, the Respondent changed its position in relation to the amount it proposed to set-off as follows:

a) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $99,522.50 excl. GST in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017 was reduced to $7,850.00 excl. GST;

b) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $7,572.00 excl. GST in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017 was increased to $13,322.70 excl. GST; and

c) Costs incurred by the Respondent arising from the Applicant's alleged fraud in the amount of $54,061.40 excl. GST in its previous letter referenced C1217-01-GNO-204 dated 23 June 2017 was increased to $100,000.00 excl. GST;

721) The Respondent has also withheld the sum of $97,644.44 excluding GST, which it certified as payable in its payment certificate, for the following reason;

> *"As per previous correspondence, [the head contractor] continues to claim that the concrete related works are not in accordance with the contractual requirements and has requested that [the Respondent] reserves its rights with respect to these works as against the Contractor. Whilst we continue to try and resolve this issue with [the head contractor], we must continue as per their request as head contractor. As such, we do not accept these works as complete and continue to hold 10% of the Contract sum by reference to these works being incomplete.*
>
> *As the total amount outstanding to be paid on the Contract ($97,644.44) is less than 10% of the Contract Sum. I assess the value of money is due from [the* Respondent*] to the Contract under Progress Claim 11 as $0."*

Background

722) The Applicant concedes that it has not provided test results proving that soil under the *[redacted]* slabs was constructed in accordance with the Contract (98% of modified maximum dry density). The soil tests carried out were rendered nugatory because the Applicant's prior employee (project manager) allegedly altered the test results, which was discovered after the *[redacted]* slabs were poured.

723) Subsequently the [*plant items*] were installed on the slabs and further construction was carried out and *[the head contractor]* has taken possession of the works.

724) Accordingly, the Applicant has failed to carry out the testing required by the Contract and is, therefore, in breach of contract.

725) There is no evidence, however, that the compaction of the sub-base did not meet the requirements of the contract.

726) For the avoidance of doubt, the Respondent's claimed costs are comprised as follows;

a) $7,850.00 excl. GST for the Respondent's personnel in dealing with the breach of contract;

b) $13,322.70 excl. GST for legal expenses in considering the breach of contract; and

c) $100,000.00 excl. GST as an estimate of [*the head contractor*'s] legal fees and engineering fees in relation to the breach of contract.

727) In the response at paragraphs 133 to 137, the Respondent asserts that;

a) Pursuant to Clause 2 of Division 2 of the Schedule to the CCA, the Contractor is entitled to be paid a reasonable amount for performing its obligations;

b) Relies on the authority of *Matrix Projects (Qld) Pty Ltd v Luscombe [2013] QSC 4* that requires an adjudicator to make provision for defective work when assessing the value of work claimed to be completed.

c) At paragraph 136 of the response;

> "*the costs incurred or to be incurred by the* Respondent *with respect to any work performed by the* Applicant *and the defects associated with that work are not a claim for damages as alleged by the* Applicant *in paragraphs 66 to 85 of the* Applicant*'s submissions and is a matter within the jurisdiction of the adjudicator.*"

728) In application, the Applicant asserts;

a) It has complied with the Contract specifications, by compacting the subgrade adequately and carrying out 4 density tests as required by the specification;

b) the Respondent is not entitled to set off concrete related costs under the Contract because what the Respondent is alleging is a breach-of-contract, the existence of which is to be determined by a court of law;

c) the terms of the Contract do not allow for the Respondent to deduct these damages against monies owing to the Applicant under the contract;

d) The Applicant is not entitled to withhold $97,644.44 dollars and forty-four cents excluding GST from the Applicant, for the reason that the Respondent is effectively attempting to rely on a pay when paid to principle which is disallowed under section 12 of the CCA.

e) The Applicant asserts that the works as performed have in no way been substantially impacted, and that the compaction of the sub-base satisfied the contractual requirements, and is fit for purpose.

Determination of the set-off for damages/defective work

729) I do not accept the Respondent's argument relating to Clause 2 of Division 2 of the Schedule to the CCA, because that section is only relevant to the Applicant. It has nothing to do with the Respondent in this case.

730) For the avoidance of doubt and for the purposes of the CCA, section 5(1) makes it clear that the Contract referred to in Clause 2 of Division 2 of the Schedule to the CCA is the Applicant and not the Respondent.

731) I accept that *Matrix Projects (Qld) Pty Ltd v Luscombe [2013] QSC 4* requires an adjudicator to consider the costs of defects rectification of certain work when assessing the claimed value of that work.

732) In this case, however, the Respondent has identified the 4 soil tests did not satisfy the requirements of the Contract (the defective work) but has not identified any other work performed by the Applicant as defective and which will require future rectification.

733) The only submission that the Respondent has made is that 4 test results were defective. The Respondent has not made any submission as to the value of the 4 test results that were agreed to be defective.

734) The Respondent has set-off $7,850.00 for its staff costs and $13,322.70 for its legal expenses in considering the breach and further considering (presumably) the what may have to be done in the future if the sub-base is shown to have not been compacted in accordance with the Contract or if there is some other failure arising from the failure of the sub-base material.

735) The Respondent has further set of $100,000.00 in anticipation of its client's legal and engineering fees.

736) I do not accept the Applicant's submissions that it complied with the Contract because by its own admission it has never provided 4 (complying) soil tests.

737) The Applicant further asserts that it constructed the sub-base in accordance with the contract, but provides no evidence of how it came to that conclusion.

738) In this context, I can make an allowance for the defective work when I am assessing the overall value of the claimed completed work, but that can only be limited to the 4 tests.

739) The Respondent's consideration that the sub-base may not be in accordance with the Contract and its client's consideration that the sub-base may not be compacted in accordance with the Contract are costs that Respondent is not entitled to set-off for the following reasons.

740) Contractual rights of set-off are only created by express set-off terms in the contract. The only provision for set-off available to the Respondent is in clause 37.6 of the contract, which states;

> *"The Principal may elect that moneys due and owing otherwise than in connection with the subject matter of the Contract also be due to the Principal pursuant to the Contract."*

741) I also refer to paragraphs [232]-[237] in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* where Olsson A-J held:

> *"[213] It is tantamount to asserting that any specific contractual provisions regulating how and when monies are to become payable under a construction Contract are irrelevant to the question of when a party to that Contract may raise what can properly be categorised as a payment claim, with a view to generating a payment dispute. i.e. the statute confers jurisdiction on an adjudicator to adjudicate a claim in any case in which a claim is made for payment of monies in relation to a construction contract, there being no requirement to even prima facie relate a payment claim to any specific contractual pre-requisites for such payment.*
>
> *[233] On that argument such pre-requisites only become relevant merits considerations after the adjudicator actually embarks upon the process of adjudication.*
>
> *[234] In my opinion such an approach has the practical effect of ignoring the existence and significance of the word "under" in the statutory definition of "payment claim".*
>
> *[235] According to its normal English connotation, that word signifies "in accordance with", "governed or controlled or bound by", "on condition of" or "subject to", to list but a few of the many applicable dictionary expressions of meaning.*
>
> *[236] Applying the concepts of such meanings to the relevant definition in s 4 of the statute, the clear intent of the definition is that, to constitute a payment claim, the claim must be shown to be a claim for monies in accordance with or subject to the conditions of a construction contract.*
>
> *[237] In other words, it is not merely a claim at large in respect of works under a construction contract, it must be one that can properly be categorised as a genus of claim provided for by that contract. The existence of a mere causal nexus with a construction Contract is plainly not what is in contemplation by the legislation.*

742) That extract makes it clear that I can only determine a party's claim in relation to a right they have under the Contract.

743) The only provision for set-off available to the Respondent is in clause 37.6 of the contract, which states;

> *"The Principal may elect that <u>moneys due and owing otherwise than in connection with the subject matter of the Contract also be due to the Principal pursuant to the Contract.</u>"*

744) In other words, the Respondent has a right under this Contract to deduct moneys that are <u>due and owing</u> from the Applicant to the Respondent even if the debt is incurred under another unrelated contract between the parties. However, it must be a debt and not a claim.

745) An amount that is "*Due and Owing*" is a debt and for the purposes of clause 37.6 of the Contract necessarily implies that there was some arrangement (or contract) between the parties where an amount became due for payment from one party to the other party in accordance with that arrangement. That is the amount that the Respondent is entitled to set-off.

746) The Respondent has not made in submissions claiming that in was entitled to claim payment of a debt under clause 37.6.

747) The Respondent asserts that the Applicant was in breach of Contract in relation to certain tests. In relation to the tests, the Respondent was entitled to instruct the Applicant to perform the tests in accordance with the Contract and that option is still open to the Respondent.

748) Under clause 301.1 of the contract, the Respondent was entitled to instruct the Applicant to perform any other tests to establish whether or not the sub-base was incorrectly constructed.

749) If tests instructed under clause 30.1 showed that the sub-base was incorrectly constructed, the Applicant accrued an obligation to rectify the defective work under clause 30.6 of the contract.

750) The Respondent, however, does not have the right to simply deduct $121,172.70 excl. GST because it does not have the benefit of a properly conducted soil test showing compliance or otherwise with the compaction requirements of the contract.

751) For the above stated reasons, I determine the Respondent is also not entitled to withhold $97,644.44 excluding GST as insurance if the construction of the sub-base does not comply with the contract.

NEGATIVE VARIATIONS.

752) The Respondent instructed the deletion of certain WUC which it described as follows;

a) Variation VO0A

i) Deletion of the supply and installation of pit A1 in the amount $37,202.00 excl. GST referenced in Contract drawing C1217-05-EGA-132 Rev A, which identifies pit A1.

ii) The legend on that drawing indicates that the Applicant was to supply and install pit A1 in the following terms;

(1) "A1" concrete pit (1off);

(2) 1.20m SQ x 2.0m deep;

(3) Penetration to be made into existing cable trench;

(4) Installation details to be confirmed;

b) Variation VO0B

i) A fire hydrant concrete slab had to be demolished and reconstructed by others in the amount of $7,500.00 excl. GST for the following reasons;

(1) NCR 395 was issued in relation to a fire hydrant standpipe that was not installed in accordance with the contract. The pipe was out of plumb by 35mm over 1200mm length. The Applicant did not comply with the requirements of Table F2 from AS4458 specifies the construction tolerances.;

(2) The Applicant did not comply with the instruction in NCR 395 because it asserted that the Contract does not require the installation of any fire hydrant standpipe to any tolerance;

(3) The Respondent arranged for another contractor to perform the rectification work;

c) Variation VO0C

i) Reduced work to [*redacted*] main. This variation forms a part of the Respondent's assessment of variation V018 (Refer to the Applicant's correspondence referenced C2-C- 0079);

d) Variation VO0D

i) Deletion of retaining walls on south/east and South/west end of site 25m in the amount of $10,625.00 excl. GST

(1) Drawing CEW-001 Rev B requires a "pre-cast panel retaining wall" in 2 locations;

(2) The valuation of the deletion is based on item 3F of the Tender Schedule;

e) Variation VO0E

i) Deletion of [*redacted*] slabs in the amount of $6,103.00 excl. GST.

(1) Drawing CFD-001 rev B and CFD-006 rev B requires the [*redacted*] slabs.

(2) The valuation of the deletion is based on item 2.2 of the Tender Schedule.

f) Variation VO0F

i) Deletion of [*redacted*] slabs $6,318.00 excl. GST.

(1) Drawings CFD-001 Rev B and CFD-006 Rev B require the [*redacted*] slab.

(2) The valuation of the deletion is based on item 2.2 of the Tender Schedule.

g) Variation VO0G

i) Deletion of [*redacted*] slab in the amount of $1,434.00 excl. GST;

(1) Drawing CFD-001 rev B and CFD-006 rev B require the [*redacted*].

(2) The valuation of the deletion is based on item 2.2 of the Tender Schedule.

h) Variation VO0I

i) Deletion of supply and install new service conduit in the amount of $8,157.00 excl. GST;

(1) Contract drawing C1217-05-EGA-132 Rev A requires a "new cable trench to match existing";

(2) The valuation of the deletion is based on item 5.9 of the Tender Schedule.

i) Variation VO0K

i) Deletion of the supply and installation of a fence in the amount of $6,870.00 excl. GST.

(1) Contract drawing CEW-001 Rev B requires the construction of a new fence;

(2) The deletion was valued in accordance with item 3J of the Tender Schedule;

753) In relation to the above mentioned negative variations, the Applicant asserts:

a) That pursuant to clause 36.4 of the Contract the valuation of any deletion must include a reasonable amount for profit but not for overheads. A reasonable amount for overheads is 33.5% and 10% is a reasonable amount for profit.

b) Variation VO0A

i) Schedule A of the Contract does not require the supply and installation of pit A1.

ii) *Drawing* C1217-05-EGA-132 identifies pit A1 but this was on hold throughout the course of the works.

iii) The Applicant should have been given the opportunity to perform the work and the Applicant never agreed to this deduction;

iv) The quotation from [*concrete contractor*] indicates that cost for the pit is $2,200.00. The amount deducted by the Respondent is, therefore, unreasonable.

c) Variation VO0B

i) The Applicant did not comply with the instruction in NCR 395 because it asserted that the Contract does not require the installation of any fire hydrant standpipe to any tolerance;

d) Variation VO0C

i) This variation forms a part of the Applicant's claim for variation V018 (Refer to the Applicant's correspondence referenced C2-C-0079);

e) Variation VO0D

i) Accepts the deletion of the item but rejects the valuation because the Respondent is not entitled to deduct the overhead component of 33.5%.

f) Variation VO0E

i) Accepts the deletion of the item but rejects the valuation because the Respondent is not entitled to deduct the overhead component of 33.5%.

g) Variation VO0F

i) Accepts the deletion of the item but rejects the valuation because the Respondent is not entitled to deduct the overhead component of 33.5%.

h) Variation VO0G

i) Accepts the deletion of the item but rejects the valuation because the Respondent is not entitled to deduct the overhead component of 33.5%.

i) Variation VO0I

i) Accepts the deletion of the item but rejects the valuation because the Respondent is not entitled to deduct the overhead component of 33.5%.

j) Variation VO0K

i) Accepts the deletion of the item but rejects the valuation because the Respondent is not entitled to deduct the overhead component of 33.5%.

Determination of the claims for negative variations

754) I determine that;

a) Variation VO0A

i) The Applicant was required to supply and install Pit A1, which is properly identified on a Contract drawing. The fact that pit A1 is not specifically identified in schedule A is of no consequence.

ii) Pursuant to the Instrument of Agreement, the drawing C1217-05-EGA-132 Rev A forms a part of the Contract and pursuant to clause to 2.1, the Applicant was required to complete the WUC in accordance with the Contract (including that drawing).

iii) The Applicant has only provided a quotation for the supply of the pit. The Applicant does not provide any indication as to a reasonable deduction for the installation of pit A1.

iv) Accordingly, I determine that the Respondent is entitled to deduct $37,202.00 excl. GST less 10% for overheads, which I have determined above is 10%. Accordingly, the permissible deduction is $33,418.80 excl. GST.

b) Variation VO0B

i) The Applicant did not comply with the instruction in NCR 395 because it asserted that the Contract does not require the installation of any fire hydrant standpipe to any tolerance;

ii) I do not accept that the Contract does not require the construction of a fire hydrant standpipe to be plumb. The Applicant was required to construct to the tolerance set out in AS2419.1 and [*redacted*] standards as a condition of its licence in the NT. I prefer the Respondent's submission and accept that 35 mm in 1200mm is unacceptable.

iii) The Applicant does not dispute the quantum of deduction.

iv) Accordingly, I decide that the Respondent is entitled to deduct $7500.00 les 10% for overheads, which is $6,750.00 excl. GST.

c) Variation VO0C

i) This negative variation forms a part of the Applicant's claim for variation V018, which I determined above;

d) Variation VO0D

i) The Applicant accepts the deletion of the item but rejects the valuation because the Respondent is not entitled to deduct the overhead component of 33.5%.

ii) For the reasons stated above, I decide that the Respondent is entitled to deduct $10,625.00 less 10% for overheads, which is $9,562.50 excl. GST.

e) Variation VO0E

i) This negative variation forms a part of the Applicant's claim for variation V032, which I determined above;

f) Variation VO0F

i) This negative variation forms a part of the Applicant's claim for variation V032, which I determined above;

g) Variation VO0G

i) This negative variation forms a part of the Applicant's claim for variation V032, which I determined above;

h) Variation VO0I

i) For the reasons stated above, I decide that the Respondent is entitled to deduct $8,157.00 less 10% for overheads, which is $7,341.30 excl. GST.

i) Variation VO0K

i) For the reasons stated above, I decide that the Respondent is entitled to deduct $6,870.00 less 10% for overheads, which is $6,183.00 excl. GST.

THE DETAILS OF THE DETERMINATION

755) Pursuant to s 34(1)(a) of the CCA, I have made this determination on the basis of the application and its attachments and the response and its attachments and the parties' submissions.

756) Specifically, I have determined each claim as follows:

	$ Claimed	$ Certified	Determination
Original Contract sum	$1,286,833.00	$1,286,833.00	$1,286,833.00
Variations	$2,779,338.00	$427,300.00	$1,270,861.70
Deduct for delay damages	$(315,032.00)	$-	$-
Liquidated damages	$-	$(64,341.65)	$-
Set-offs	$-	$(121,172.70)	$-
Negative variations	$(17,058.59)	$(84,209.00)	$(63,255.60)
Total	**$3,734,080.41**	**$1,444,409.65**	**$2,494,439.10**

less amount paid	$1,077,258.14	$1,077,258.14	$1,077,258.14
This payment claim	**$2,656,822.27**	**$367,151.51**	**$1,417,180.96**

Variation	$ Claimed	$ Certified	Determination
1	$4,420.00	$1,300.00	$1,300.00
2	$13,246.00	$-	$9,895.34
3			
4	$330,802.00	$10,140.00	$76,498.33
5	$27,682.00	$11,286.00	$18,027.60
6			
7	$(11,688.00)	$(17,842.00)	$(3,817.09)
8	$29,693.00	$-	$23,795.80
9			
10	$16,550.00	$-	$13,262.95
11	$17,010.00	$11,846.00	$11,846.00
12	$10,041.00	$4,573.00	$5,248.20
13			
14	$6,985.00	$6,985.00	$6,985.00
15	$39,683.00	$17,064.00	$31,802.00
16			
17			
18	$34,935.00	$-	$34,509.27
19	$7,667.00	$5,343.00	$6,144.45
20	$87,591.00	$3,960.00	$12,143.66
21	$27,581.00	$2,239.00	$22,561.62
22			
23	$100,239.00	$-	$71,143.35
24			
25	$142,124.00	$30,368.00	$92,523.32
26			
27			
28	$149,833.00	$31,862.00	$36,641.30
29			
30	$141,864.00	$94,330.00	$94,330.00
31			
32	$161,410.00	$(1,939.00)	$35,417.00
33	$43,294.00	$12,951.00	$25,745.00
34	$22,982.00	$1,950.00	$4,657.37
35			
36	$8,851.00	$-	$-
37	$7,971.00	$-	$6,388.09
38			

39	$64,238.00	$-	$25,000.00
40	$80,093.00	$51,642.00	$55,739.31
41			
42	$74,106.00	$5,389.00	$19,959.83
43			
44			
45			
46	$19,502.00	$-	$15,628.00
47	$143,853.00	$143,853.00	$143,853.00
48	$128,991.00		
49	$847,789.00		$373,633.00
TOTAL	$2,779,338.00	$427,300.00	$1,270,861.70

Liquidated damages			
Liquidated damages	$-	$(64,341.65)	$-

Set-off(s)			
Respondent personnel	$-	$(7,850.00)	$-
Respondent legals	$-	$(13,322.70)	$-
[the head contractor] legals	$-	$(100,000.00)	$-
	$-	$(121,172.70)	$-

Negative Variations			
V00A	$-	$(37,202.00)	$(33,418.80)
V00B	$-	$(7,500.00)	$(6,750.00)
V00C	$-	$-	$-
V00D	$(7,065.63)	$(10,625.00)	$(9,562.50)
V00E	$-	$(6,103.00)	$-
V00F	$-	$(6,318.00)	$-
V00G	$-	$(1,434.00)	$-
V00H			
V00I	$(5,424.41)	$(8,157.00)	$(7,341.30)
V00J			
V00K	$(4,568.55)	$(6,870.00)	$(6,183.00)
	$(17,058.59)	$(84,209.00)	$(63,255.60)

757) Pursuant to s 33(1)(b), I have determined that;

a) the Respondent must pay to the Applicant the sum of $ 1,417,180.96 excl. GST (which is $1,558,899.06 incl. GST) within 7 days after the issue of the determination;

b) in accordance with clause 35(1)(b) of the CCA, I determine that interest is payable on the amount the Respondent must pay to the Applicant is the rate agreed by the parties and stated in the Contract, which is 10% per annum from 16 July 2017.

758) Neither party properly followed the administrative procedures required under the contract during the course of the works. Accordingly, I determine that;

a) pursuant to section 36(1) of the CCA, each party shall bear their costs in relation to this adjudication.

c) pursuant to section 46(5) of the CCA, the costs of the adjudication shall be shared equally by both parties.

759) The costs of the adjudication amount to 297.80 hours @ $305.00 plus GST, which is $98,905.40 incl. GST.

760) I acknowledge that each party paid me a deposit of $19,800.00 incl. GST on 6 October 2017.

761) I will issue one Tax Invoice in the amount of $59,305.40 incl. GST (which is $98,905.40 less deposits paid 2 X $19,800.00 = $59,305.40) to the Applicant and the Respondent must pay the Applicant one half of the invoiced amount, which is $29,652.70 within 7 days after the issue of the determination.

CONFIDENTIAL INFORMATION

762) The parties have not indicated which parts of the information provided to me with their submissions are to be treated as confidential.

763) If either party considers any part of their submissions confidential or any part of this determination as confidential, I request that they notify me accordingly within 2 working days of receipt of this determination.

John Tuhtan
NT Adjudicator #35