

Construction Contracts (Security of Payments) Act (CCA NT)
(Northern Territory)

Adjudicator's Determination under Section 33 of the CCA NT

Adjudicator – William Timothy Sullivan

Adjudicator Registration Number 49

Adjudication Number - RICS DRS NT 49-18-01

Applicant: As stated in Annexure A to this Determination.

Respondent: As stated in Annexure A to this Determination.

For the reasons set out in this Determination the Adjudication Application is dismissed pursuant to section 33(1)(a)(ii) of the CCA NT without a determination of the merits of the application.

The Respondent submitted that all of the legal and commercial issues which have arisen under the Contract are confidential to the Parties, and because of the high profile and unique nature of the Contract and the project, simply redacting the names of the Parties will not protect the confidentiality or Parties' anonymity. The Respondent requested that the Adjudicator identify all of the contents of the determination as being of a confidential nature and not suitable for publication by the Registrar under s54 of the CCA NT. Having considered information disclosed in this determination and the Respondent's request, information which, because of its confidential nature, I consider is not suitable for publication by the Registrar under section 54 of the *Construction Contracts (Security of Payments) Act* (Northern Territory) is set out in Annexure A to this Determination. Details regarding abbreviations used in this Determination for the purpose of anonymisation and confidentiality are also provided in Annexure A.

1 This adjudication arises pursuant to an application for adjudication (Adjudication Application) made under the *Construction Contracts (Security of Payments) Act*, Northern Territory (CCA NT). On 26 November 2018, the Applicant served the

Adjudication Application on RICS Dispute Resolution Service. RICS Dispute Resolution Service (the Prescribed Appointer) is a prescribed appointer as referred to in s28(1)(c) of the CCA NT.

- 2 The Adjudication Application relies on the existence of a payment dispute (Payment Dispute) in respect of a claim for payment made on 7 August 2018 or 4 September 2018. The Applicant also relies on there being a notice of dispute issued on 29 August 2018 (Notice of Dispute).
- 3 Pursuant to s30(1)(a) of the CCA NT, on 3 December 2018 RICS Dispute Resolution Service appointed William Timothy Sullivan (the Adjudicator) to adjudicate the Payment Dispute. The Prescribed Appointer sent the Adjudication Application to the Adjudicator on 3 December 2018 and gave written notice to the Applicant, the Respondent and the Registrar on that day.

Adjudication Application

- 4 The Adjudication Application is made in respect of a payment claim comprised of Invoices with reference numbers PR-AUD064-1860, PR-USD064-1861, PR-JPY064-1862, PR-JPY064-1862GST, PR-EUR064-1863, PR-EUR-1863GST, PR-GBP-1864 and PR-GBP064-1864GST all dated 7 August 2018 for certain profit and overhead costs, then reversed by Credit Notes and increased on 4 September 2018 in Invoices with reference numbers PR-AUD065-1928, PR-USD065-1929GST, PR-JPY065-1930GST, PR-EUR-1931GST and PR-GBP065-1932GST.¹
- 5 The Applicant submits in the Adjudication Application at paragraph 1.5 that *“For the purpose of definitions, [the Applicant] identifies in this Application the undisputed, Australian dollar paid, payment claim as the Undisputed Milestone 64 Payment Claim.”* According to the Applicant the total amount of the Undisputed Milestone 64 Payment Claim *“was AUD 6,110,764.77 including GST”*. The AUD 6,110,764.77 including GST is calculated from the 4 September 2018 invoices rather than from the 7 August 2018 invoices.
- 6 The Adjudication Application is comprised of 10 folders, one of which is an electronic copy of the application. The folders are as follows:

¹ Adjudication Application, para 1.4.

Volume #	Volume Description
1	Submissions, Payment Claim and Relevant Correspondence
2	Contract and Exhibit A
3	Exhibit B and Schedules to Exhibit B
4	Statutory Declaration of 'DW' (refer Annexure A)
4A	Statutory Declaration of 'DW' (<i>cont</i>) (refer Annexure A)
5	Statutory Declaration of 'CS' (refer Annexure A)
6	Statutory Declaration of 'BD' (refer Annexure A)
7	Statutory Declaration of 'SC' (refer Annexure A)
8	Statutory Declaration of 'SM' (refer Annexure A)
9	Cases and documents referred to in the Submissions
10	Electronic copy of the Adjudication Application

- 7 The Respondent's response (Adjudication Response) to the Adjudication Application was received on 10 December 2018 and is comprised of the Respondent's Submissions, Supporting Documents, Statutory Declarations, an Expert Report and Legal Authorities.

The Contract

- 8 The Applicant and Respondent entered into a contract (Contract) under which the Applicant has obligations to the Respondent to carry out the Scope of Work detailed in Exhibit A to the Contract. This includes construction work on a site in the Northern Territory and supply of goods and professional services related to the construction work as defined in ss6 and 7 of the CCA NT.
- 9 The construction work involved many things including construction of pipelines, storage and distribution facilities, buildings and civil work as part of engineering, procurement, supply, construction and commissioning work for a site in the Northern Territory. Although the Contract includes other things which are construction work or provision of goods or services related to construction work, the obligation to carry out the work and provide the goods and services mentioned is sufficient to establish that the Contract is a construction contract as defined in s5(1) of the CCA NT.

- 10 The Contract was entered into on 9 February 2012 which is after commencement of s9 of the CCA NT on 1 July 2005. There is no evidence, and no submission from the Parties, that the exceptions in either ss3 or 4 of the CCA NT apply.
- 11 Having regard to the information available for this Adjudication, the Contract is a construction contract to which the CCA NT applies.²

Payment Claim

- 12 There are three payment claims referred to in the Adjudication Application.³ The first of these is a claim issued on 2 August 2018 for the equivalent AUD amount of AUD 201,313,669.94. The Applicant refers to this as the Reimbursable Payment Claim. The second claim was issued on 7 August 2018 for the equivalent AUD amount of AUD 30,556,136. The Applicant refers to this claim as the Undisputed Lump Sum Payment Claim. The third claim was also issued on 7 August 2018 and it is for an amount of AUD 6,032,447.97. The Applicant refers to this claim as being for Milestone 64. It is only the third claim, the Payment Claim for “Achievement of the 64th Milestone” which is the subject of this Adjudication Application. The Applicant confirmed in the Adjudication Application that it is not seeking to adjudicate multiple payment claims in this application⁴ whereas the Respondent took a different view.
- 13 Invoices with reference numbers PR-AUD064-1860, PR-USD064-1861, PR-JPY064-1862, PR-JPY064-1862GST dated 7 August 2018 together constituted a single claim invoiced in relation to distinct and separate currencies. The Payment Claim is comprised of invoices with reference numbers PR-EUR064-1863, PR-EUR-1863GST, PR-GBP-1864 and PR-GBP064-1864GST dated 4 September 2018⁵ which together make up the amount claimed and pressed in the Adjudication Application. These invoices are also for amounts in several currencies. The invoices issued to the Respondent on 7 August 2018 are as set in Table A.

² CCA NT, s9.

³ Adjudication Application, para 2.7 and following.

⁴ Adjudication Application, para 2.8 and 2.9.

⁵ Adjudication Application, section 2.1.

TABLE A

Invoice	Currency	Tax	Amount
PR-AUD064-1860	AUD	Excluding GST	5,053,801.00
		GST	505,380.10
		Including GST	5,559,181.10
PR-USD064-1861	USD	Excluding GST	2,527,519
		GST Invoiced separately	
PR-USD064-1861GST	AUD	GST	342,959.05
PR-JPY064-1862	JPY	Excluding GST	47,909,496
		GST Invoiced separately	
PR-JPY064-1862GST	AUD	GST	58,205.25
PR-EUR064-1863	EUR	Excluding GST	292,743.00
		GST Invoiced separately	
PR-EUR064-1863GST	AUD	GST	46,042.62
PR-GBP064-1864	GBP	Excluding GST	147,473.00
		GST Invoiced separately	
PR-GBP064-1864GST	AUD	GST	26,059.95

14 The sum of the AUD amounts from Table A is 6,032,447.97 as set out in Table B.

TABLE B

PR-AUD064-1860	AUD	Including GST	5,559,181.10
PR-USD064-1861GST	AUD	GST	342,959.05
PR-JPY064-1862GST	AUD	GST	58,205.25
PR-EUR064-1863GST	AUD	GST	46,042.62
PR-GBP064-1864GST	AUD	GST	26,059.95
			6,032,447.97

15 On 4 September 2018 the Applicant issued Credit/Adjustment Notes and revised Invoices. The Credit/Adjustment Notes are as set out in Table C.

TABLE C

Credit/Adjustment	Currency	Tax	Amount
PR-AUD064R-1923	AUD	Excluding GST	-5,053,801.00
		GST	-505,380.10
		Including GST	-5,559,181.10
PR-USD064R-1924	USD	Excluding GST	-2,527,519
		GST Invoiced separately	
PR-USD064-1861GST	AUD	GST	-342,959.05
PR-JPY064R-1925	JPY	Excluding GST	-47,909,496
		GST Invoiced separately	
PR-JPY064R-1925GST	AUD	GST	-58,205.25
PR-EUR064R-1926	EUR	Excluding GST	-292,743.00
		GST Invoiced separately	

PR-EUR064R-1926GST	AUD	GST	-46,042.62
PR-GBP064-1864	GBP	Excluding GST	-147,473.00
		GST Invoiced separately	
PR-GBP064R-1927GST	AUD	GST	-26,059.95

- 16 The sum of the credit AUD amounts from Table C is AUD 6,032,447.97 as set out in Table D.

TABLE D

Credit/Adjustment	Currency	Tax	Amount
PR-AUD064R-1923	AUD	Excluding GST	-5,053,801.00
		GST	-505,380.10
		Including GST	-5,559,181.10
PR-USD064-1861GST	AUD	GST	-342,959.05
PR-JPY064R-1925GST	AUD	GST	-58,205.25
PR-EUR064R-1926GST	AUD	GST	-46,042.62
PR-GBP064R-1927GST	AUD	GST	-26,059.95
			-6,032,447.97

- 17 The Revised Invoices issued on 4 September are as set out in Table E.

TABLE E

Invoice			
PR-AUD065-1928	AUD	Excluding GST	5,112,415.00
		GST	511,241.50
		Including GST	5,623,656.50
PR-USD065-1929	USD	Excluding GST	2,528,101.00
		GST Invoiced separately	
PR-USD065-1929GST	AUD	GST	351,127.95
PR-JPY065-1930	JPY	Excluding GST	48,651,085
		GST Invoiced separately	
PR-JPY065-1930GST	AUD	GST	60,920.89
PR-EUR-1931	EUR	Excluding GST	300,943.00
		GST Invoiced separately	
PR-EUR-1931GST	AUD	GST	48,539.10
PR-GBP065-1932	GBP	Excluding GST	147,688.00
		GST Invoiced separately	
PR-GBP065-1932GST	AUD	GST	26,520.33

- 18 The sum of the Revised AUD amounts from Table E is AUD 6,110,764.77 as set out in Table F.

TABLE F

Invoice			
PR-AUD065-1928	AUD	Excluding GST	5,112,415.00
		GST	511,241.50
		Including GST	5,623,656.50
PR-USD065-1929GST	AUD	GST	351,127.95
PR-JPY065-1930GST	AUD	GST	60,920.89
PR-EUR-1931GST	AUD	GST	48,539.10
PR-GBP065-1932GST	AUD	GST	26,520.33
	AUD		6,110,764.77

Respondent's Notices and Correspondence

- 19 On 16 August 2018 the Respondent wrote to the Applicant disputing 21 Invoices. According to the Applicant, on 16 and 23 August 2018 the Respondent disputed a total of AUD 138,204,303.43.⁶ Although the Respondent's letter (Doc AA/1/10-16/8/18) postdates the Invoices submitted on 7 August 2018 (and pre-dates the 4 September 2018 invoices), it does not respond to any of those invoices but responds to 17 Invoices issued by the Applicant on 2 August 2018. Four other invoices referred to in the Respondent's letter were issued on 7 August 2018 but those invoices are also not the subject of the Adjudication Application.
- 20 The Respondent sent 6 notices to the Applicant on 28 and 29 August 2018 which are identified in Table G.

Table G

	Date	Description	Deducted Amount
Doc AA-5/CS13	28/8/18	Notice to Deduct Target Duration Fee at Risk for First and Second LNG Train	\$34,115,720.00
Doc AA- 5/CS14	29/8/18	Liquidated Damages for Late Completion of LNG Berth Structure	\$6,964,481.00
Doc AA-5/ CS-15	29/8/18	Liquidated Damages for Late Completion – Modules	\$2,653,715.00
Doc AA-5/CS-10	29/8/18	Tax Components on Assignment Rates	\$27,460,919.00
Doc AA-5/CS-11	29/8/18	Additional Accommodation provided to TNK-1 Subcontractors	\$8,113,491.00
Doc AA-5/CS-12	29/8/18	Flange Repairs	\$698,945.00
			<u>\$80,007,271.00</u>

- 21 The 3 notices referred to in the Adjudication Application are the 3 letters to the Applicant sent on 29 August 2018 (Docs AA/1/12-29/8/18, AA/1/13-29/8/18, AA/1/14-29/8/18 copies of which are also Docs AA-5/CS-10, AA-5/CS-11 and AA-5/CS-12).⁷ The Applicant has expressly not sought to pursue in adjudication the notices to deduct identified as Doc AA-5/CS13, Doc AA-5/CS14 and Doc AA-5/ CS-15.⁸

⁶ Adjudication Application, para 2.9, item 4.

⁷ Adjudication Application, para 2.9, item 5.

⁸ Adjudication Application, para 2.11.

- 22 In letter Doc AA/1/12-29/8/18 the Respondent referred to “*claims for payment under Article 67(b) and Article 67(c) of the Contract, which have included claims concerning tax components of assignment rates*”. The Respondent explained in some detail why it considered there had been an overpayment to the Applicant in respect of USD, JPY, GBP and AUD amounts. Applying 29 August 2018 Reserve Bank of Australia (RBA) exchange rates to the foreign currencies, the alleged overpayment totals are expressed in AUD. The alleged overpayments total AUD 27,460,919. Importantly, in Doc AA/1/12-29/8/18, the Respondent gave “*14 days prior notice to the Contractor pursuant to Article 34.5(a) of the Contract*” of the Respondent’s intention to deduct the overpayment “*from any sums due to the Contractor in September 2018, i.e. on or around 13 September 2018*”.
- 23 In letter Doc AA/1/13-29/8/18, the Respondent referred to its prior correspondence in relation to additional accommodation provided by the Applicant to its subcontractor and stated that the Respondent has no liability under the Contract to pay the costs the Applicant has incurred. The Respondent calculated additional accommodation costs it had paid to the Applicant, on account, in the sum of AUD 8,113,491, and gave “*14 days prior notice to the Contractor pursuant to Article 34.5(a) of the Contract*” of the Respondent’s intention to deduct AUD 8,113,491 from sums that the Respondent would otherwise have paid to the Applicant and that GST shall be applied to the amounts deducted. There is no express reference in the Respondent’s letter Doc AA/1/13-29/8/18 to the claims or invoices dated 7 August 2018.
- 24 The Respondent’s letter DOC AA/1/14-29/8/18 is directed to defect rectification work relating to alleged deficiencies in flanges and payments of AUD 698,945 to the Applicant for performing that work. The Respondent refers to correcting this as an overpayment and notified the Applicant that it intends to deduct the overpayment “*from any sums due to the Contractor in September 2018, i.e. on or around 13 September 2018*”.

Payment Due Dates and Payments Made

- 25 Article 34.3(a) of the Contract provides that the Respondent must pay any undisputed payment claim within forty five (45) days from the date the payment

claim is issued. The last day on which payment of an undisputed payment claim made on 7 August 2018 works out to be 21 September 2018. For an undisputed payment claim made on 4 September 2018, the last day on which an undisputed claim works out to be 19 October 2018.

26 The Applicant says that on 13 September 2018 it was paid a total of AUD 15,393,803.30 which, according to the Applicant, was AUD 84,392,464.51 less than the AUD 99,786,267.81 including GST claimed for the following three payment claims which the Applicant says were due for payment at that time:⁹

- (a) Milestone 64 Payment Claim AUD 6,110,764.77
- (b) Reimbursable Payment Claim AUD 63,109,366.52
- (c) Lump Sum Payment Claim AUD 30,566,136.52.

27 I express no views regarding whether the Reimbursable Payment Claim or the Lump Sum Payment Claim were payable at that time or at all. If the Applicant was entitled to a payment in respect of the invoices for Milestone 64 Payment, payment would not be due until either 21 September 2018 (for the 7 August 2018 invoices) or 19 October 2018 (for the 4 September 2018 invoices). However, Credit Notes were issued on 4 September 2018 for each of the amounts invoiced on 7 August 2018 and therefore payment of those amounts did not become due.

28 The 7 August 2018 invoices were either disputed or they were not. If they were not disputed then it is not satisfactorily explained in this adjudication how the right to issue invoices for different amounts on 4 September 2018 arises. If it is Article 34(2) of the Contract on which the Applicant relies, the requirement or right to resubmit arises only if the payment claim is disputed. I take it from the facts available regarding the claim on 7 August 2018, followed by credit notes and new invoices on 4 September 2018, that in fact the 7 August 2018 invoices were disputed although there is little information regarding this and a notice from the Respondent as envisaged by Article 34.2(a) of the Contract was not submitted in this Adjudication.

29 The 4 September 2018 invoices clearly constitute one payment claim rather than each invoice being a separate payment claim. Providing separate invoices for one claim to cater for the different currencies (and tax provisions applying) in which

⁹ Adjudication Application, paras 1.10, 2.6 and 3.2.

claims and payments are made in accordance with the Contract, appears to be an administrative device to give vent to the Contract requirements and to the Parties' preferred processes as may be inferred from such things as the Respondent's Invoicing and Payment Procedure provided with the Statutory Declaration of JT.

Payment Dispute

30 Section 8 of the CCA NT deals with payment disputes. No claim or submission is made that an amount retained under the Contract is due to be paid or that any security held by a party is due to be returned. Therefore, sub-sections 8(b) and (c) are not addressed in this Determination. Section 8(a) provides that a payment dispute arises if:

- “(a) a payment claim has been made under a contract and either:*
- (i) the claim has been rejected or wholly or partly disputed; or*
 - (ii) when the amount claimed is due to be paid, the amount has not been paid in full”.*

31 The Applicant submits that the Payment Claim is not disputed.¹⁰ This can only refer to the Payment Claim made on 4 September 2018 because the invoices dated 7 August 2018 must have been disputed for the Applicant to have had a right under Article 34(2) of the Contract to resubmit the invoices. If the Applicant's submission is accepted that the claim was not disputed, a Payment Dispute as referred to in s8 of the CCA NT did not arise from the 4 September 2018 claim being rejected in whole or in part.

32 It cannot be said that any of the Respondent's 29 August 2018 letters were a rejection of the 4 September 2018 claim although two of the notices notified the Applicant that the Respondent would deduct overpayments from any payments due in September. Looking at this from another stance, had the 7 August 2018 invoices been relied on as the payment claim then two of the Respondent's 29 August 2018 could be construed as notices of dispute in respect of that claim but they were not responsive to or directed to the 7 August 2018 claim or any claim in particular. The Adjudication Application was made for the amounts established from the 4

¹⁰ Adjudication Application, para 15.11.

September 2018 invoices rather than from the amounts invoiced on 7 August 2018.¹¹ A further obstacle, if the 7 August 2018 invoices were relied on as the payment claim, is that they were each countered by a Credit Note issued by the Applicant. Although initially the 7 August 2018 invoices could give rise to a liability on the part of the Respondent to pay them, that liability was displaced by the credit notes issued on 4 September 2018.

33 There can be little doubt that the invoices issued to the Respondent on 4 September 2018 are capable of giving rise to a liability on the part of the Respondent to pay them in accordance with Article 34 of the Contract. Whether the Respondent is actually liable is a matter to be determined.

34 As, according to the Applicant, the Payment Claim is not disputed, that only leaves s8(a)(ii) to support the existence of a payment dispute. If the Applicant is entitled to be paid the amount claimed or any part it, payment would be due on 19 October 2018 (45 days from 4 September 2018).

35 Payment by the Respondent to the Applicant of AUD 15,393,803.30 on 13 September 2018 raises interesting issues. The Respondent submitted that the AUD 15,393,803.30 payment was made in relation to all 3 payment claims.¹² The Applicant submitted that the Undisputed Milestone 64 Payment Claim is less than the total amount of AUD 15,393,803.30 paid to the Applicant on 13 September 2018 and that it is possible, depending on how the Deduction Notices are applied, that this payment claim was paid in full. The Respondent submitted that the Deduction Notices were not brought to account against the Milestone 64 Payment but was allocated against the M81 Reimbursable Invoices.¹³

36 As accepted by the Applicant, payment of AUD 15,393,803.30 may have paid the Undisputed Milestone 64 Payment Claim in full.

37 Based on the information available, it has not been established that the amount claimed has not been paid in full before it was due on 19 October 2018. Had the Payment Claim been constituted by the invoices dated 7 August 2018, the payment

¹¹ See for example, Adjudication Application, para 1.6.

¹² Adjudication Response, para 4.14.

¹³ Adjudication Response, para 1.10.

made by the Respondent on 13 September 2018 would still have been made before 21 September 2018 which is the date that payment of the amount claimed would be due to be paid. On either basis, it has not been established that there is a payment dispute.

Dismissal

38 It is not necessary to further analyse the Parties' submissions and supporting documents as s27 of the CCA NT provides that if a payment dispute arises under a construction contract, any party may apply for adjudication. Section 28(1) is premised on there being a payment dispute. The Court in *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited & Ors (No 2)* [2017] NTSC 11 at [37]-[38] left no doubt if there is no "payment dispute" the adjudicator is required by s 33(1)(a) to dismiss the application without a determination on the merits.

39 Based on my conclusion that there is no payment dispute I dismiss the Adjudication Application pursuant to s33(1)(a) of the CCA NT.

Costs

40 The submissions made and supporting documents provided in this Adjudication do not disclose any grounds for concluding that either Party incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by the other Party, such that I should exercise the discretion given under s36(2) of the CCA NT requiring either Party to pay some or all of the costs of the other Party.

41 In accordance with s46(5) of the CCANT, as between themselves, the Claimant and Respondent are liable to pay the costs of this Adjudication in equal shares.

William Timothy Sullivan

Adjudicator

13 December 2018

Annexure A

Information which, because of its confidential nature, is not suitable for publication by the Registrar under section 54 of the *Construction Contracts (Security of Payments) Act (Northern Territory)* is set out in this Annexure A.

Applicant: JKC Australia LNG Pty Ltd (ABN 14 154 383 409)
C/- DLA Piper Australia
Level 31, Central Park, 152-158 St Georges Terrace
Perth WA 6000
Contact: Mark Welch
Email mark.welch@jkc-lhn.com
Telephone +61 8 6444 3000
corey.steel@dlapiper.com
+61 8 6467 6244

Respondent: Ichthys LNG Pty Ltd (ABN 42 150 217 299)
Level 22, 100 St Georges Terrace
Perth WA 6000
Email atsushi.sakamoto@inpex.com.au
+61 8 6213 6000

INPEX Operations Australia Pty Ltd (as agent for Ichthys LNG Pty Ltd)
(ABN 48 150 217 262)
Level 22, 100 St Georges Terrace
Perth WA 6000
Email atsushi.sakamoto@inpex.com.au
+61 8 6213 6000

The Adjudication Application Documents

Volume #	Volume Description
4	Statutory Declaration of David Walsh (DW)
4A	Statutory Declaration of David Walsh (DW) (<i>cont</i>) (refer Annexure A)
5	Statutory Declaration of Colin Such (CS)
6	Statutory Declaration of Brian Daly (BD)
7	Statutory Declaration of Scott Crosbie (SC)
8	Statutory Declaration of Stephen Millett (SM) (refer Annexure A)

The Adjudication Response Document

	Statutory Declaration of Jun Takasuka (JT)
--	---