

IN THE MATTER of an Adjudication  
pursuant to the Construction Contracts  
(Security of Payments) Act (NT) ("**Act**")

BETWEEN:

**[Redacted]**

**("Applicant")**

and

**[Redacted]**

**("Respondent")**

### **REASONS FOR DECISION**

1. On 21 May 2024 I was appointed Adjudicator by the Law Society Northern Territory ("LSNT") as prescribed Appointer under the Act to determine four payment disputes between the Applicant and the Respondent. There were four separate Applications all dated 20 May 2024 and the parties agreed to me determining the four Applications as each payment dispute arose under the same contract and the nature of each dispute was quite similar. I received a Letter of Appointment and the four Applications by email from LSNT on 21 May 2024 and collected the hard copies from the LSNT Offices on 22 May 2024.
2. Both parties are legally represented: for the Applicant, **[Redacted]**, hereinafter referred to as the Applicant and the Respondent respectively.
3. On 25 May 2024 I wrote to the parties in relation to the four Applications advising my appointment, providing each Application with a specific claim number 1 through to 4 and declared having no conflict of interest in the matter.
4. For jurisdictional clarity and consistency, in my letter of 25 May 2024 I requested that the parties confirm the date and method of service of the

Applications on the Respondent. I confirmed that, on the basis of service of both the Applications on 20 May 2024, by my calculation each Response would be due on or before 10 June 2024. I requested that the parties let me know immediately if that was not the case.

5. In my letter of 25 May 2024, I also confirmed that I would accept service of the Response by email with any attachment documents to be made available through a Dropbox© accessible by all parties to the adjudication, should it be necessary, and that service by electronic means would comply with ss.8 and 9 of the *Electronic Transactions (Northern Territory) Act 2000*. I requested that the parties confirm in writing their acceptance or otherwise of the electronic service process by 3:00pm CST on Thursday, 30 May 2024.
6. On 27 May 2024 I received a letter from the Applicant by email, copied to the Respondent, advising that the four Applications had been served on the Respondent's offices and the Appointer on 20 May 2023. The Applicant had no objections to the electronic service of the Responses.
7. On 30 May 2024 I received a letter from the Respondent by email, copied to the Applicant, advising that the four Applications had been served on the Respondent's offices on 20 May 2023. The Respondent had no objections to the electronic service of the Responses.
8. In the letter of 30 May 2024, the Respondent also pointed out that **[Redacted]** Architects was the respondent party to the adjudication applications and not **[Redacted]** who submitted the tender documents and entered into the construction contract.
9. That same day, 30 May 2024, I sent an email to the parties requesting further information in relation to the change of entity between the Tender Response, the construction contract and the Adjudication documents **[Redacted]**
10. On 31 May 2024, I received an email from the Applicant with two attached emails showing that the Applicant was informed on or about 20 April 2023 that **[Redacted]** novated the contract it has with the Applicant to **[Redacted]** Architects with on 1 July 2023.

11. On that same day, 31 May 2024, I received a letter by email from the Respondent which enclosed a Deed of Novation of the Main Contract **[Redacted]** had been novated to **[Redacted]** on 13 July 2023. The Respondent's letter also advised that the Applicant was informed in mid-July 2023 that the new company **[Redacted]** was trading and that the Applicant should now render its invoices to **[Redacted]**.
12. I advised the parties that I would deal with this issue in the Determination.
13. On 10 June 2024 and within time the Respondent served the four Responses, including several attachments with each Response, on both the Applicant and the Adjudicator as required by the Act.
14. Having regard to the Application and the Response for the various claims, on 25 June 2024 I sought an extension of time from the Construction Registrar under s.33(3)(a) of the Act up to and including 2 August 2024 within which to make the four determinations in this Adjudication. The Registrar granted an extension of time within which to make the determinations up to 1 August 2024.
15. On that same day, 25 June 2024 I informed the parties of the extension of time within which to make the four determinations.
16. On 28 June 2024 I wrote to the parties with several questions on which I sought submissions as follows:

*"....Dear Mr Y and Mr Z*

*There are some additional questions and a request for further documents I require from the parties as set out below:*

1. *Has the Project been completed and, if so, to what stage - PC or Final Completion. If completed, what was the final value of the Main Contract, including all variations?*
2. *How many variations were there to the Main Contract and could I please have a copy of the Variation Register or Variation Summary for the Main Contract detailing, as a minimum:*
  - a. *the date, description and value of each variation; and*
  - b. *total approved value of the variations by each variation.*

3. On 29 April 2022 when **[Redacted]** achieved 75% “design phase” completion, at the 75% complete mark, what payments had been invoiced and paid toward each of the following:
  - a. 12.12% for **[Redacted]** Design Company?
  - b. 24.24% for **[Redacted]** Design? and
  - c. 62.12% for **[Redacted]** Architects?
4. On 15 June 2022 when **[Redacted]** Design wrote to **[Redacted]** Architects seeking reallocation of the remainder of the **[Redacted]** Design Company share of the fees, which resulted in a reallocation of:
  - a. 62.12% for **[Redacted]** Architects;
  - b. 25.78% for **[Redacted]** Design; with the
  - c. the remainder to the various service providers.
  1. Was that remainder for the service providers reallocated from costs initially to be accounted for by **[Redacted]** Architects in the Main Contract?
  2. What was the overall value of the remainder of the Main Contract, including variations, to be distributed between **[Redacted]** Design and **[Redacted]** Architects?

*I request that the documents and submissions be provided on or before **Friday, 5 July 2024**.*

*Thank you for your continued assistance in this matter.*

17. On 4 July 2024 the Applicant requested some additional time within which to provide their submissions. I sought objections from the Respondent who consented to the Applicant’s request. I extended the time for the submissions to 10 July 2024 by consent.
18. On 10 July 2024 I received the submissions from both the Applicant and the Respondent with respect to the questions I had asked the parties. I confirmed receipt of the submissions from the parties on 11 July 2024.
19. On 29 July 2024 I sought a further extension of time for the determinations due to a family bereavement up to and including 24 August 2024. The Construction Registrar granted the extension and the parties were subsequently informed. There were no objections from the parties.

***Background of the Dispute***

20. This Adjudication arises out of a Tender Response for the Design Services provided to **[Redacted Project]** (Project).
21. The Tender Response was submitted on or about 3 June 2020 by **[Redacted]** Architects.
22. **[Redacted]** Architects was later known as **[Redacted]** Architects by a Deed of Novation for the new company structure provided by the Respondent in its further submissions to the question I had asked regarding the entities. The Applicant was notified of this restructure and has received payment of some of its claims from the new company entity, such that the Adjudication, the Main Contract and the Subcontract continues on the basis that **[Redacted]** Architects is the Respondent.
23. The basis of the Tender Response was that there was an identified “Design Consultant Team” which comprised the Applicant and other design subconsultants as part of the overall Tender Response design submission to the Principal. The various subconsultants were identified and nominated in the Tender Response document and the Applicant’s role for the Project was lead design consultant.
24. There was no subcontract document executed between the Applicant and the Respondent, however there was a draft Memorandum of Understanding (**MOU**) dated 24 March 2020 circulated by the Applicant to the three main parties within the Design Consultant Team prior to and during the submission of the Tender Response to the Principal.
25. The draft MOU sought to formulate an arrangement between the three main parties responsible for the design within the Design Consultant Team, namely the Respondent, the Applicant and **[Redacted]** Design Company that would establish the working relationship and roles to be performed by each during the conduct of the project.

26. The draft MOU proposed, amongst other things that:
- (a) the Applicant and **[Redacted]** Design Company would collaboratively lead the design team particularly during the earlier phases of the project;
  - (b) the Applicant and **[Redacted]** Design Company would then participate under the Respondent's lead during the later construction documentation, negotiation and services phases of the project;
  - (c) the Respondent would be the contracting party with the Principal and the Respondent would engage the Applicant and the Applicant would have an agreement with **[Redacted]** Design Company for design services to the project; and
  - (d) the three companies would agree on a written schedule of services and responsibilities to be undertaken by each party during each Phase.
27. The Applicant and the Respondent agreed on 2 June 2020, just prior to submission of the Tender Response, that the MOU would not be included in the Tender Response to the Principal.
28. The scope of work within the Tender Response was divided into 11 phases, 10 phases for design and construction of the work, each with its own task listing and objectives and commencement and completion date, with the 11th being the defect liability phase of the Project.
29. The Tender Response comprised a lump sum fee of \$2,990,856.59 (including GST) and the Applicant and **[Redacted]** Design Company nominated in the Tender Response received a copy of the submission.
30. The Tender Response was accepted on 28 July 2020 and the Principal issued a Notice of Acceptance and Service Order in the amount of \$2,990,856.59 (Including GST). By the Notice of Acceptance and Service Order the Respondent entered into a contract with the Principal that same day 28 July 2020 under the General Conditions of Contract, **[Redacted]** (**Main Contract**).

31. The division of the fixed lump sum of the Main Contract allocated for the design fee was \$1,650,000.00 (including GST) and had been agreed between the Applicant, the Respondent and **[Redacted]** Design Company prior to submission of the Tender Response with the breakdown of the design fee between the three parties in the following apportionment:
- (a) 62.12% for the Respondent, **[Redacted]** Architects;
  - (b) 12.12% for **[Redacted]** Design Company; and
  - (c) 24.24% for the Applicant, **[Redacted]** Design.
32. The Respondent sent the Applicant and **[Redacted]** Design Company an email on 1 June 2020, and prior to submission of the Tender Response, with an enclosed spreadsheet setting out the design fee breakdown by total and an amount apportioned against each phase of the Project.
33. On or about 29 April 2022, **[Redacted]** Design Company notified the Applicant and the Respondent that it was leaving the Project at completion of Phase 6 of the design work, being at or about 75% complete design for the Project.
34. Following the departure of **[Redacted]** Design Company from the Project, the Applicant and the Respondent then agreed to divide the remaining design fee in the following apportionment:
- (a) 62.12% for the Respondent, **[Redacted]** Architects; and
  - (b) 25.78% for the Applicant, **[Redacted]** Design.
35. The remainder of the design work continued to be performed by the Applicant and the Respondent through Phases 7 to 10 respectively.
36. This Adjudication relates to the second of four Applications made by the Applicant, is in relation to additional work performed in Phase 9 of the design scope of work between 1 February 2023 and 21 August 2023

37. This Application is strictly limited to the material provided by the Applicant and the Respondent to the payment dispute arising from Progress Claim 2 made by the Applicant under a tax invoice on 25 February 2024 (**PC2**).
38. The Applicant's claim in PC2 was for progress of the Works performed under the contract in the sum of **\$68,640.62 (including GST)** with payment due on or before 25 March 2024.
39. On 8 March 2024 the Respondent issued a Notice of Dispute, disputing PC2 on the basis that the Applicant had claimed for additional services that are variational to the contract without an approved or agreed variation, that the claim was not in accordance with the contract and was disputed as a whole.
40. The Respondent cites five reasons for rejecting PC2 as follows:
  - (a) the contract does not provide for payment of additional hours;
  - (b) the work was outside the Applicant's scope of work;
  - (c) the Respondent did not direct any additional work to be performed by the Applicant under the contract;
  - (d) there is no supporting evidence provided by the Applicant to support any additional work performed by the Applicant; and
  - (e) the contract does not provide for work to be claimed on a notional hourly rate.
41. The Applicant seeks a variation to the contract be determined under the implied provisions of the Act and that interest be paid on the sum determined in accordance with s.35(1)(b) of the Act.
42. No payment has been made as at the date of this Adjudication.
43. The Respondent seeks dismissal of the Application in the first instance or, in the alternative, that no payment is due to the Applicant.
44. The Respondent also submits that the parties ought bear their own legal costs and the costs of the Adjudication equally.



## ***Procedural Background***

### The Application

45. The Application for PC2 is dated 20 May 2024 and comprises a general submission and multiple annexures A through to HH with exhibits in each annexure. The general content description of the annexures, *inter alia*, include a copy of:

- (a) the Request for Tender;
- (b) the Tender Response Submission;
- (c) the Conditions of Contract for the Main Contract;
- (d) the Applicant's Memorandum of Understanding;
- (e) Tax Invoice for the Applicant's Progress Claim 2.
- (f) the Respondent's Notice of Dispute; and
- (g) supporting email correspondence between the parties relied on in the general submission.

22. The Applicant's claim was submitted to the Respondent on 25 February 2024.

23. The Application was served on 20 May 2024 pursuant to s.28 of the Act.

### The Response

24. The Response is dated 10 June 2023 and comprises a general submission and 28 attachments with exhibits in each attachment. The general content description of the attachments, *inter alia*, include a copy of:

- (h) the Request for Tender;
- (i) the Tender Response Submission;
- (j) the design fee distribution spreadsheet;
- (k) the Notice of Acceptance and Service Order;

- (l) the Deed of Novation;
- (m) the Conditions of Contract for the Main Contract;
- (n) the Applicant's Memorandum of Understanding;
- (o) various Tax Invoices for payments made to the Applicant;
- (p) the Respondent's Notice of Dispute;
- (q) Variation 37A to the Main Contract; and
- (r) supporting email correspondence between the parties relied on in the general submission.

25. The Response was served on 10 June 2024 pursuant to s.29 of the Act.

***Adjudicator's Jurisdiction and the Act***

26. The following sections of the Act apply to the Contract for the purposes of the Adjudicator's jurisdiction.

27. Section 4 of the Act – **Site in the Territory** – [Redacted]. I am satisfied that the site is a site in the Northern Territory for the purposes of s.4 of the Act.

28. Section 5 of the Act - **Construction Contract** – there is no formal contract document that has been executed between the parties for the provision of the design services into the Project. The parties agree that a contract has been formed and is in place for the provision of the design services but the form and contemporaneous documents that evidence that contract are in dispute.

29. The Applicant maintains that its MOU is the only document that forms the contract between the parties and that clauses 2, 3 and 4 of the MOU establish a process that would constitute a sub-contract for the provision of the design services under the Main Contract [Redacted].

30. The Respondent disputes that position and says that the MOU is a “*draft, tripartite*” document between the Applicant, the Respondent and **[Redacted]** Design Company requesting thoughts about the MOU draft. The MOU was not included in the Tender Response and was not intended to be a legally binding agreement between the three parties. The Respondent maintains that the MOU was only ever in draft form, was not agreed and was not signed by the Respondent, **[Redacted]** Design Company or the Applicant.
31. The Respondent also says that the draft MOU was simply a “*statement of intention*” of how the parties approached dividing the responsibilities and tasks between them to support a strong Tender Response to the Northern Territory.
32. The Respondent further submits that there is a binding contract between the Applicant and the Respondent for the provision of the design services under the Main Contract. The Respondent says that the spreadsheet of 1 June 2020 setting out the division of the design services and breakdown of tasks into the 11 Phases of the Project for the delivery of the Project design, coupled with the Notice of Acceptance and Service Order accepting the Tender Response and forming the Main Contract, forms the “*Subconsultants Agreement*” by a course of conduct between the Applicant and the Respondent. The Respondent also submits that there was a constructive acceptance by the Respondent of the Applicant’s offer to be a subconsultant for the Project, such that the Applicant would:
- (a) collaborate with the Principal Design Consultant Team and use its experience to provide the design and services for each Phase of the Project necessary for the Respondent to discharge its obligations under the Main Contract;
  - (b) be design lead for the identified subconsultants as per the organisational structure described in the Tender Response;
  - (c) in consideration of its services for each Phase, be paid its agreed portion of the design services lump sum fee for that Phase under the Main Contract; and

- (d) acknowledge and adopt the variation and payment provisions of the Main Contract.
33. I am not with the Applicant on this issue as the MOU was, in my view, a document that was designed only to establish the division of responsibilities under any subcontracts or subconsultants' agreements later formed with the Respondent by the parties of the Design Consultants Team. The Privity of Contract would also act to set aside any attempt to introduce a third active party to any agreement.
34. I am also not fully with the Respondent on the documents of the subcontract or subconsultant's agreement (**Subcontract**). I am of the view that the design services spreadsheet sent to the Applicant by the Respondent, and accepted by the Applicant, coupled with the Notice of Acceptance and Service Order accepting the Tender Response, of which the Applicant was an active participant, forming the Main Contract are the written documents of the Subcontract.
35. In addition, the implied provisions of Division 2, s.16 to s.25 and Schedule 1 of the Act are implied into the Subcontract where there are no written terms, for example - the making of a payment claim and variations to a construction contract, such that the Subcontract has certainty of its performance and functionality as a construction contract.
36. The parties agree that they entered into a construction contract for the purposes of s.5(1) of the Act. I am satisfied that the Contract is a construction contract for the purposes of the Act and that the implied provisions act to ensure certainty of the construction contract as prescribed under s.5 of the Act.
37. Section 6 of the Act – **Construction Work** – the work is the design services for the construction of **[Redacted]**. It is uncontroversial between the parties that the work is construction work and falls within the provisions of s.6 of the Act. I am satisfied that the work is construction work for the purposes of the Act.

38. Section 4 of the Act - **Payment Claim** – means a claim made under a construction contract:

*“(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations; 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.”*

39. The Applicant issued Tax Invoice on 25 February 2024 with payment due, as set out on the invoice, on or before 25 March 2024. While this timing may not align with the implied provisions of the Act, the Applicant has set and provided the Respondent additional time within which to dispute the claim.

40. The Applicant says that Tax Invoice is a payment claim made under s.7A(1)(a) of the Act and that it complies with the formal requirements in Division 4 of Schedule 1 of the Act.

41. The Respondent served a Notice of Dispute on 8 March 2024 (**Dispute Notice**):

(a) rejecting the claim on the basis that it had not been made in accordance with the Contract; and

(b) disputing the whole of the claim.

42. The Respondent’s reasoning for disputing PC2 is that, in its view:

(a) the Applicant has claimed for additional hours and there are no mechanisms within the Subcontract that provide for a claim of payment for hours worked because the Subcontract was a lump sum contract;

(b) the Applicant failed to submit any request for a variation to the scope of the services and approval of an additional fee and did not obtain a direction from the Respondent or the Northern Territory for a variation to the services under the Main Contract; and

- (c) the PC2 claim is so lacking in detail that it does not itemise and describe the obligations the Applicant claims it has performed under the Subcontract.
43. By attendance to the evidence provided by both the Applicant and the Respondent that relates to PC2, it is clear that the Applicant did not seek a variational order for the additional hours it claims it has performed in undertaking additional hours on the scope of work under the Main Contract.
44. Attendance to the Tax Invoice for PC2 and the attached worksheet does not assist in distinguishing between those tasks that were within the scope of work and those additional tasks which have been claimed as variational to the scope of work of the Main Contract.
45. For the issue of jurisdiction, it is not the content of the claim but rather whether or not the form of the claim complies with the provisions of the construction contract and the Act for the making of a payment claim.
46. Those provisions are implied into the Subcontract by the Act and I am satisfied that the Applicant's payment claim, PC2, made on 25 February 2024 complies with the implied provisions of the Act and therefore complies with the provisions of the Subcontract for the making of a claim for payment for work done and is therefore a valid payment claim for the purposes of s.4 of the Act.
47. Section 8 of the Act - **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*
- (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.”*

48. The Applicant made a valid payment claim, PC2, on 25 February 2024 which complied with the implied provisions of the Act and subsequently the Subcontract.
49. The Respondent issued a Notice of Dispute on 8 March 2024 setting out the reasons for disputing PC2 and its payment in whole, in part or at all.
50. I am satisfied that there is a payment dispute for the purposes of s.8 of the Act and that that payment dispute commenced on 9 March 2024 under section 8(a)(i) of the Act.
51. Section 28 of the Act – **Applying for Adjudication** – By reference to the documents of the Application dated 20 May 2024, served on the Respondent and the Prescribed Appointer LSNT on 20 May 2024. I am satisfied that the Application is a valid Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 6.
52. Section 29 of the Act – **Responding to Application for Adjudication** – By reference to the documents of the Response dated 10 June 2024, served on the Applicant and the Adjudicator on 10 June 2024. I am satisfied that the Response is a valid Response to the Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 7.
53. Having now considered the relevant sections of the Act and the Regulations and, following attendance to the documents of the Application and the Response, I find that I have jurisdiction to determine the merits of the payment dispute between the Applicant and the Respondent.

### ***Merits of the Claim***

#### **The Applicant and the Claim**

54. The payment claim, PC2, made by the Applicant on 25 February 2024 was for additional hours the Applicant says it worked between 1 February 2023 and 21 August 2023 within Phase 9 of the design scope of work under the Main Contract.

55. The Applicant submits that the additional time was spent marking up drawings and addressing errors in the drawings and design, attending to emails and attending meetings. The Applicant has claimed additional hours totalling 238.75 hours not provided for in the Subcontract.
56. There is no further evidence provided with the claim and there are no timesheets or comparative table showing the scope of work, any additions to that scope or the additional work done on that scope.
57. The Applicant has claimed the additional 238.75 hours at a rate of \$287.50 per hour (including GST) to arrive at the PC2 payment claim value of **\$68,640.62 (including GST)**.
58. The Applicant also seeks a variation to the contract be determined under the implied provisions of the Act and that interest be paid on the sum determined in accordance with s.35(1)(b) of the Act.

*The Respondent and the Dispute*

59. The Respondent submits that the payment claim, PC2, has not been made in accordance with the Subcontract and disputes the whole of the claim on the basis that:
  - (a) the Subcontract does not provide for payment of additional hours;
  - (b) the work was outside the Applicant's scope of work;
  - (c) the Respondent did not direct any additional work to be performed by the Applicant under the Subcontract;
  - (d) there is no supporting evidence provided by the Applicant to support any additional work performed by the Applicant; and
  - (e) the Subcontract does not provide for work to be claimed on a notional hourly rate.
60. I am not with the Applicant on this claim and find that the Respondent's basis of rejecting the claim is valid.



61. The Subcontract is a fixed lump sum contract which apportions fixed payments to each of the Design Consultants Team for each phase of the Project. The amounts to be paid to each of the parties in the team was agreed on 1 June 2020 by reference to the spreadsheet provided by the Respondent to the parties showing how the design fee of \$1,650,000.00 would be apportioned. Payments are to be made as a fixed lump sum upon completion of each Phase of the scope of work in the apportionment percentages agreed between the parties.
62. There are no provisions in the Subcontract for an hourly rate and for payment to be made for any additional hours or to be made on what amounts to a 'do and charge' contracting model.
63. There is no relevant evidence provided by the Applicant showing a request for a variation from the Respondent for the additional hours claimed and a justification as to why those additional hours were necessary to perform the scope of work under the Main Contract for each Phase of that work.
64. There is also no evidence of a direction to vary the Subcontract given by the Respondent for any additional hours or increase in scope of work under the Main Contract.
65. By reference to the Respondent's variation register, there is no evidence provided that shows that the Northern Territory approved any additional hours for the Applicant to undertake the additional work it says was necessary for completion of the design.

#### *The Risk in Lump Sum Contracting*

66. The risk profile of a lump sum contract lies with each of the parties such that they are asked how much time they will require to perform the scope of work and, should that time be insufficient and a variation for additional time not approved, the shortfall falls on the party who estimated the time necessary to undertake to complete the scope of work.
67. In this matter, the Applicant seeks to shift that risk obligation onto the Respondent and have the Respondent be responsible for any estimation

shortfall or errors made by the Applicant when initially assessing the scope of work for the Tender Response.

68. The Respondent's variation register and the Response submissions show that the Respondent has consistently worked with the Applicant and paid for additional time over and above that set out in the Tender Response as follows:

“.....

- (a) *Phase 2 —10% XYZ Design and Preliminary Investigations had [Redacted] Design estimated to expend 96 hours in the Tender Response and claiming 170 hours;*
- (b) *Phase 3 — 20% ABC Design had [Redacted] Design estimated to expend 128 hours in the Tender Response and claiming 218 hours;*
- (c) *Phase 4 — 30% LMN Design had [Redacted] Design estimated to expend 128 hours in the Tender Response and claiming 210 hours;*
- (d) *Phase 5 — 50% Design Development had [Redacted] Design estimated to expend 254 hours in the Tender Response and claiming 417 hours;*
- (e) *Phase 6 — 75% Detailed Design had [Redacted] Design estimated to expend 318 hours in the Tender Response and claiming 532 hours;*
- (f) *Phase 7 — 100% Tender Documentation and Specifications had [Redacted] Design estimated to expend 254 hours in the Tender Response and claimed 410 hours; and*
- (g) *Phase 8 — 100% For Construction Documentation had [Redacted] Design estimated to expend 64 hours in the Tender Response and claimed 104 hours.....”*

69. In its further submissions on the questions I asked, the Respondent confirmed that the Project is still ongoing and is not yet complete and, as no variation request was made by the Applicant and no request or direction was given by the Respondent for any additional time in Phase 9 for PC2, I see no obligation

arising under the Subcontract for the Respondent to pay for any additional time to perform the scope of work in Phase 9 of the Main Contract.

70. I am not with the Applicant on payment claim PC2.
71. The Applicant failed to request a variation from the Respondent to perform additional work it says was necessary on the scope of work in Phase 9 of the Main Contract such that the Respondent would have an opportunity to seek a variation from the Northern Territory for that additional work. There are no provisions in the Subcontract that provide for the Applicant to simply submit a 'do and charge' claim under a fixed lump sum contract, such that it could obligate the Respondent to make payment under the Subcontract.
72. There are no conditions precedent on requesting a variation to the Subcontract and the Applicant was obligated to first seek a variation to the Subcontract for the additional hours it says were necessary to complete the scope of work under Phase 9 of the Main Contract.
73. I value payment claim PC2 at "**NIL**".

***Interest on the claim***

75. There is no interest available to the Applicant for the payment claim PC2.

***Summary***

76. In summary of the material findings, I determine:
- (a) the contract to be a construction contract under the Act;
  - (b) the work to be construction work under the Act;
  - (c) the site to be a site in the Northern Territory under the Act;
  - (d) the claim to be a valid payment claim under the Act;
  - (e) the dispute to be a payment dispute under the Act;
  - (f) the Application to be a valid application under the Act;

- (g) the Response to be a valid response under the Act;
- (h) the Applicant's payment claim PC2 falls; and
- (i) there is no Interest available for the payment claim PC1.

77. I determine that the amount to be paid by the Respondent to the Applicant in relation to the payment claim, PC2, and Interest under the Subcontract is "**NIL**".

### **Costs**

78. The normal starting position for costs of an adjudication is set out in section 36(1) and section 46(4) of the Act is that each party bear their own costs in relation to an adjudication.

79. The Act at section 36(2) gives Adjudicators discretion to award costs:

*"...if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs..."*

80. Neither the Applicant nor the Respondent has sought costs of the adjudication or the Adjudicator's costs. The Respondent submits that:

*"....108. Neither party alleges any frivolous or vexatious conduct on the part of other party that would require the Adjudicator to exercise discretion and to apportion costs of the adjudication under section 36 of the Act. [Redacted] Architects therefore submits that the Adjudicator's costs should be apportioned equally between the parties in accordance with section 46(5) of the Act...."*

81. I have found that neither the Application nor the Response are without basis for consideration and I do not consider either the Applicant's conduct in bringing the Application or the Respondent's conduct in Response to have

been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.

82. I make no decision under s.36(2) of the Act.

83. I determine that the parties bear their own legal costs under s.36(1) of the Act and the parties pay the cost of the adjudication of the dispute in equal shares under s.46(4) of the Act.

***Confidential Information***

84. The following information is confidential:

- (a) the identity of the parties; and
- (b) the location of the works.

***Closing Remarks***

85. This is already a lengthy set of reasons, necessarily in light of the fact that the claim and several arguments I have had to consider each involved factual consideration unique to that item. I have focused on what have seemed to me to be those submissions that are most central. But I have considered all the material put before me, and the parties should not assume that my not reciting any particular piece of submission or evidence means that I have overlooked any material in this adjudication.

DATED: 24 August 2024



Rod Perkins  
Adjudicator No. 26