Determination 26.14.01

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

BETWEEN:

Applicant

and

Respondent

REASONS FOR DECISION

1. On 20 December 2013 [the Applicant] served its Application dated 18 December 2013 on Master Builders Northern Territory (**"MBANT"**) as prescribed Appointer under the Act. [The Respondent] was also served a copy of the Application on 19 December 2013. By letter from MBANT dated 20 December 2013 I was appointed adjudicator to determine the payment dispute between the parties. I received the letter and Application on 20 December 2013.

2. On 21 December 2013 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I also sought submissions should either party object to the appointment. There were no objections to my appointment.

3. On 30 December 2013 I received by courier a second Application under covering letter dated 23 December 2013 from [the] solicitors for [the Applicant], advising me that they understood I had also been appointed by the MBANT to hear the second application under the same contract and that they had requested, but had not yet received,

consent from [the Respondent] to have both applications adjudicated simultaneously under section 34 of the Act. For the purpose of clarity, hereinafter I will refer to the first Application of 18 December 2013 as "the PC9 Application" ([the Applicant's] Payment Claim No. 9) and the second Application of 23 December 2013 as "the PC10 Application" ([the Applicant's] Payment Claim No. 10).

4. On 3 January 2014 I received by hand from [the] solicitor for [the Respondent], a document titled:

> *"Response by [the Respondent] to an Adjudication Application by [the Applicant] under the Construction Contracts (Security of Payments) Act NT"*

which requested me to dismiss the PC10 Application under section 33(1)(a) of the Act because it had not been served in accordance with section 28(1)(b) of the Act. The PC10 Application had not yet been served on [the Respondent].

5. On 3 January 2014 I wrote to the parties and advised that I had only been appointed to adjudicate the PC9 Application and that: *"…I <u>have not</u> been appointed to hear matters relating to* ***Progress Claim No 10****…."*, referring to the PC10 Application. I also advised that I had contacted the Appointer at MBANT to seek their further direction before writing to the parties. I had been informed by MBANT that they had not been served with the PC10 Application. I then delivered the PC10 Application documents to MBANT as I had no authority under the Act to deal with them.

6. On 6 January 2014 I received [the Respondent's] Response to the PC9 Application.

7. On 6 January 2014 [the Applicant] served its PC10 Application dated 23 December 2013 on MBANT as prescribed appointer under the Act.

On that day [the Respondent] was also served a copy of the PC10 Application. By letter from MBANT dated 6 January 2014, I was appointed adjudicator to determine the payment dispute between the parties. I received the letter and the PC10 Application on 6 January 2014.

8. On 7 January 2014 I wrote to the parties advising my appointment to adjudicate the PC10 Application and declared no conflict of interest in the matter. I also sought submissions should either party object to the appointment. There were no objections to my appointment.

9. On 8 January 2014 I received a letter from [the Applicant's] solicitors advising that [the Respondent] had objected to the PC9 Application and PC10 Application being adjudicated simultaneously under section 34 of the Act.

10. On 8 January 2014, having attended to both the Application and Response, and due to the numerous and complex issues of the matter, I wrote to the Construction Contracts Registrar and sought additional time in which to make my decision under section 34(3)(a). On that date the Construction Contracts Registrar approved my request for additional time, which gave me up to and including 31 January 2014 for the PC9 Application and up to and inclusive of 14 February 2014 for the PC10 Application. There were no objections from the parties.

11. On 17 January 2014 I received [the Respondent's] Response to the PC10 Application.

12. On 25 January 2014 I wrote to the parties seeking clarification submissions on two issues as set out below:

"Having now read the Application and Response documents of the above matter, I require clarification of certain information.

It is unclear from both the Application and Response as to what precisely was transmitted between the parties for each of the variations.

Setting aside for the moment the issue of Jurisdiction, I would like from both parties the following:

<u>Variation Number 1</u>

1. *a copy of what was transmitted by [the Applicant] to [the Respondent], including any transmittal advice;*

2. *a copy of [the respondent's] assessment and any transmittal to [the Applicant]; and*

3. *the process each party followed when dealing with this variation.*

<u>Variations Numbers 2, 4, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, and 21</u>

1. *a copy of what was transmitted by [the Applicant] to [the Respondent], including any transmittal advice; and*

2. *a copy of [the Respondent's] assessment and any transmittal to [the Applicant]."*

13. The parties conferred and sought minor clarification from me on each issue on 29 January 2014. I provided to each of the parties further direction on that day.

14. On 30 January 2014 both [the Applicant] and [the Respondent] provided their submissions and further information.

15. This determination is only in relation to the PC9 Application.

Introduction

16. This adjudication arises out of a contract pursuant to which [the Applicant] agreed with [the Respondent] to build [the works] in the Northern Territory. The Respondent is the head contractor to the Principal *[omitted]*.

17. [The Applicant] claims it is entitled to be paid its variation claims in Payment Claim No. 9 in the sum of $1,801,850.28 (including GST) for the additional costs it has incurred in the contract. [The Applicant's] claim comprises the following components:

    (a) Variation 2 – delay time for concrete pour to G8 *[details omitted]* - $129,112.50 (including GST);

    (b) Variation 4 – extended work time for concrete pour to G8 *[details omitted]* - $11,361.90 (including GST);

    (c) Variation 5 – concrete slump and test cylinder costs incurred owing to unavailability of NATA tester - $770.00 (including GST);

    (d) Variation 6 – delay time for lack of available fill material - $164,910.88 (including GST);

    (e) Variation 10 – omitted rate for *[details omitted]* - $46,200.00 (including GST);

    (f) Variation 12 – additional costs for excavation *[details omitted]* into hard sandstone - $882,000.00 (including GST);

    (g) Variation 13 – additional costs for the purchase of *[details of materials omitted]* - $105,600.00 (including GST);

(h) Variation 14 – additional costs for administration and overhead time dealing with errant decisions - $4,680.00 (including GST);

(e) Variation 15 – delay time associated with late excavation of *[details omitted]* - $17,215.00 (including GST); and

(e) Variation 16 – mobilisation and de-mobilisation of an additional *[equipment details omitted]* - $440,000.00 (including GST).

18. [The Applicant] also seeks interest payable on its claim under the General Conditions of Contract ("GC") 42.1, as amended by the Amendments to General Conditions of Contract ("AmdGC") 2.15, at the rate of 2.8% per annum.

19. Neither party has sought costs of the Adjudication.

Procedural Background

The Application

20. The PC9 Application is dated 18 December 2013 and comprises two volumes enclosing a general submission tabulated 1 through to 30 and a variation submission tabulated V1 through to V21. The attachments include:

(a) a copy of the construction contract;

(b) a copy of the payment claim;

(c) a copy of the payment certificate; and

(d) supporting evidence including tender documents, sub-grade report documents, statutory declarations, emails, photographs and general correspondence between the parties.

21. The Payment Claim was initially submitted to [the Respondent] on 17 October 2013 for the sum of $2,499,299.12 including GST and then amended details of claim were submitted to [the Respondent] on 18 October 2013 in the sum of $2,958,797.45 including GST. The Respondent issued a "Progress Claim Certificate" on 8 November 2013 certifying the 18 October 2013 claim for a payment of $473,880.05 less retention and GST. The Respondent rejected the variation claims 2 to 18 as *"…not yet approved by Client."*

22. The Application was served on 20 December 2013.

The Response

23. The Response is dated 6 January 2014 and comprises a general submission and 105 listed attachments. The attachments include:

    (a) copies of prior payment claims;

    (b) tender response schedule from the contract;

    (c) email correspondence and photographs;

    (d) letters from [the Respondent] to [the Principal] and [the Principal's] corresponding response;

    (e) statutory declarations; and

    (f) copy of general authority relied on in the submissions.

24. The Response was served on 6 January 2014.

Adjudicator's Jurisdiction and the Act

25. The following sections of the Act apply to the contract for the purposes of the Adjudicator's jurisdiction.

26. Section 4 of the Act – **Site in the Territory** – the site is a site *[site details omitted]*, as per the location map provided at tab 19 of the PC9 Application. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.

27. Section 5 of the Act - **Construction Contract** - the contract is a construction contract by reference to the contract documents and the parties agree that they entered into a construction contract. However, the parties cannot agree on precisely what documents are contained in the contract. The particular document disputed is the Douglas Partners' Technical Report TR 03/11 *"Geotechnical Investigation [project and site details omitted]"* ("Geotech Report") prepared for [the Principal] in March 2012.

28. [The Applicant] submits that the Geotech Report was incorporated into the contract on 8 November 2012 by reference to Subcontract number C3202-02 at Tab 3 of the PC9 Application. The Respondent states that the Geotech Report does not form part of the Subcontract because Preliminary Clause 4.12 of the Request for Tender T12-1467, which was later incorporated into the Subcontract, expressly excludes it.

29. The Respondent also submits that the Geotech Report was provided with the tender documents for design and documentation purposes only and that [the Applicant] was to have made its own enquiries as to the site conditions.

29. I am not convinced that [the Respondent's] position can be sustained when turning to [the Respondent's] Subcontract document at Tab 3 of the PC9 Application and the Statutory Declaration of *[name omitted]* the Project Manager for [the Respondent], at Tab 1 of the Response.

30. [The Project Manager] states at paragraph 9 of his declaration that: *"[The Applicant] emailed the signed contract to [the Respondent] being subcontract number C3202-02 on 7 March 2013…"*. Attendance to that document shows that it is a one page form document with the relevant sections or 'boxes' pre-typed and pre-completed by [the Respondent] sent to [the Applicant] to sign ("Form of Agreement"). The date of the contract is pre-typed by [the Respondent] as 8 November 2012 and the *"Relevant documents"* of the contract are also pre-typed by [the Respondent] and listed as:

"Specification	*RFT T12-1467 pages 1-216, Addendum 1 and 2*
Drawings	*R12-1694 to R121741*
Other	*Douglas partners geo report TR 03/11"*

The Geotech Report was therefore incorporated into the contract by agreement between the parties on or about 7 March 2013 when the contract document was returned fully executed to [the Respondent] under the covering email at Tab 9 of the Response.

31. Even though Preliminary Clause 4.2 of the Tender RFT T12-1467, later incorporated into the contract, attempts to exclude the Geotech Report from the contract, it is clear that the parties intended to include the Geotech Report into the contract and the last document in time to be provided to [the Applicant] was the Form of Agreement. Absent a precedence of documents in the contract, the Form of Agreement takes precedence and the Geotech Report is incorporated into the contract.

32. This is a well established principle in Australia under the seminal appellant case of *Butler Machine Tool Co v Ex-Cell-O Corp (England) Ltd [1979] 1 All ER* at 968, Lord Denning MR.

33. Also attached to the Form of Agreement by [the Respondent] at page 2 of 3 were additional "Conditions of Contract". A careful reading of those conditions shows that they are [the Respondent's] standard conditions of contract. Neither party has raised any issue with or made reference to those conditions of contract and have acted at all material times as if bound by the NPWC Edition 3 (1981) General Conditions of Contract as amended by RFT T12-1467 by its incorporation into the contract.

34. Included on [the Respondent's] Form of Agreement are the dates of commencement and completion of the contract in the section titled *"Schedule"* and these are:

"Commencement 14/11/ 2012

Completion 28/2/2014"

The parties have agreed to those dates and I will use those dates as the relevant dates in the contract for this Adjudication.

35. I am satisfied that the contract and the incorporated documents is a construction contract for the purposes of the Act.

36. Section 6 of the Act – **Construction Work** – the work is *[project and site details omitted]* and s 6(1)(c) specifically provides for this type of civil work. I am satisfied that the work is construction work for the purposes of the Act.

37. 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.

38. [The Applicant's] claim has been lodged under GC 42.1 amended by AmdGC 2.15 ("Amended GC 42.1") of the contract and annotated:

"PROGRESS CLAIM #9 – October 2013"

The progress claim is covered by a Tax Invoice number 8862 and is dated 17 October 2013 but signed on 18 October 2013.

39. Amended GC 42.1 sets out the payment claim provisions of the contract and [the Applicant] submits that the claim it has made is a valid payment claim made by the contractor to the Principal under the contract.

Contractual validity of a payment claim under the contract

40. [The Respondent] does not agree with [the Applicant] and submits at [9] through to [12] and [13] through to [19] of its Response that [the Applicant's] payment claim is an:

"Invalid payment claim because it is

(a) too late and has unauthorised amendment; alternatively
(b) has insufficient detail."

41. [The Respondent's] primary position is that [the Applicant's] payment claim under Amended GC 42.1 of the contract was invalidated when it delivered its amended progress claim on 18 October 2013 rather than by 15 October 2013 as is required by the contract. It is clear that [the Respondent] relies on the Form of Agreement for this date of 15 October 2013.

42. [The Respondent] also says that the contract:

> *"….gives no power to amend an invoice – that cannot be done until the next month when the correction can be accounted for in that month's invoice."*

43. [The Respondent] does not deny that [the Applicant] is entitled to make a claim to be paid certain amounts under the contract, however it says that, because [the Applicant] submitted the claim too late and with an amendment, the claim is invalid under the contract. This is an arid submission.

A. First – [the Respondent] has accepted the claim for processing and has issued a payment certificate part paying the claim. A copy of [the Respondent's] payment certificate certifying the assessment and payment is at Tab 17 of the PC9 Application. [The Respondent] cannot now say that the progress claim 9 is invalid.

B. Second – [the Respondent] departed from the contractual requirement to have [the Applicant] provide its payment claim by 15th of each month. The table at paragraph 14 of the PC9 Application sets out the dates previous payment claims were submitted and [the Respondent] accepted those claims for assessment and payment and have done so throughout the contract. [The Respondent] has also accepted those dates and payments at paragraph 7 of its Response.

It appears, however, that [the Respondent] did not provide any payment certificates for the previous eight claims submitted by [the Applicant]. Neither party has provided these certificates as evidence of the payment claim assessments. In any event, [the Respondent] cannot now insist on [the Applicant's] strict

compliance with the contract provisions when it has itself departed from the contract requirements.

C. Third – failure to accept and process a payment claim including amended details of claim, particularly where there has been an error, would offend the requirements for a contract administrator to act fairly, reasonably and in good faith when administering a contract. The parties have agreed that a reference in the contract to the Superintendent is a reference to [the Respondent]. [The Respondent] therefore holds a requirement to act fairly and reasonably when exercising the power given to it under the contract as determined in the appellant case of *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211* (3 July 2002) and as is pointed out by [the Applicant] in paragraph 86 of the PC9 Application.

D. Fourth – Amendment of a Tax Invoice is entirely appropriate under section 29.75(2)(b) of *A New Tax System (Goods and Services Tax) Act 1999* as the commissioner may treat any document as an adjustment note which would include a revised and amended Tax Invoice that is required to be issued under a contract.

44. [The Respondent] also submits that the payment claim has insufficient detail and, in particular, the variational claim information [the Applicant] submitted on 18, 19 and 20 October 2013. [The Respondent] argues that because this information was sent to [the Respondent] after [the Applicant's] progress claim 9 document was submitted, it invalidates the claim. I do not subscribe to that view at all. In fact, it is not at all uncommon in large construction contracts for volumes of supporting documents to be transmitted over the days following submission of the actual claim document.

45. Notwithstanding this commonly adopted process throughout the construction industry, neither party has strictly adhered to the process of making, assessing and paying payment claims under the contract. [The Respondent] accepted [the Applicant's] progress claim 9 as a valid payment claim and assessed and part paid that claim on 8 November 2013. It cannot now attempt to argue that the claim was invalid because, in their view, it lacked some information.

46. On 31 October 2013, after being advised by [the Principal] that it required more information to enable assessment (Tab 39 of the Response), [the Respondent] rejected [the Applicant's] variational claims. [The Applicant's] variational claims were rejected and not paid, however the claims were appropriately made, assessed and not paid *under the contract*. Lack of information does not invalidate the claim and neither [the Principal] nor [the Respondent] has particularised exactly what it is that they required.

46. I am satisfied that the progress claim 9 made by [the Applicant] was a valid payment claim made under the contract. I am also satisfied that [the Applicant's] payment claim is a valid payment claim for the purposes of the Act.

47. Section 8 of the Act - **Payment Dispute** – A payment dispute arises if:

> *(a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed; 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 titled Progress Claim 9 on 18 October 2013. [The Respondent] subsequently assessed and part paid that claim on 8 November 2013. Progress claim 9 was to be paid under the contract provisions by 1 November 2013.

49. [The Respondent] part rejected [the Applicant's] progress claim 9 on 31 October 2013 and failed to fully pay the claim by 1 November 2013. The contract payment requirement of section 8 of the Act arose in *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor [2012] NTSC 22* at para 20 where Barr J stated:

> *"In my opinion, the correct construction of s 8(a) is that the due date for payment under the contract is the only date on which a payment dispute may arise. That is the date at which the existence of the relevant fact (non-payment, rejection or dispute) is to be ascertained in order for the statutory definition to be satisfied. Therefore, even though there may be a rejection or dispute prior to the due date for payment, the "payment dispute" does not arise until the due date for payment.''*

50. In this matter a payment dispute arose between [the Respondent] and [the Applicant] on 1 November 2013 and I am satisfied that there is a payment dispute for the purposes of the Act in which [the Applicant] has applied for an adjudication of the dispute under section 27 of the Act.

51. Section 28 of the Act – **Applying for Adjudication** – by reference to [the Applicant's] documents of the Application dated 18 December 2013, served on [the Respondent] and the Prescribed Appointer MBANT on 20 December 2013.

52. In its Response, [the Respondent] submits that [the Applicant] has failed to serve all of the Application because it has not included the particulars of variation 18, which forms part of the PC10 Application. [The Respondent] submits that because it has not been served with the application which *"must state or have attached to it all of the information, documents and submissions on which the party making it relies in the adjudication"* it does not meet the provisions of s 28(2) of the Act and must therefore be dismissed.

53. Section 28(2) of the Act states:

"*(2) The application must:*

(a) be prepared in accordance with, and contain the information prescribed by, the Regulations;

(b) state the details of or have attached to it:

(i) the construction contract involved or relevant extracts of it; and

(ii) any payment claim that has given rise to the payment dispute; and

(c) state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication."

54. Turning to the PC9 Application at paragraph 212, [the Applicant] states in relation to variation 18 that:

"Full particulars of this are included in the adjudication application for progress claim 10 submitted contemporaneously herewith."

55. I do not share the view of [the Respondent]. Failure by an applicant to submit the relevant details of their claims could not invalidate an application properly made under the Act. It may, however, prejudice the applicant's claims in the adjudication itself.

56. If [the Respondent's] position were correct, any application could easily be described as 'invalid' by a respondent claiming that an applicant *must* provide information which the respondent subjectively thinks appropriate so as to fulfil the requirements of s 28 of the Act. While this position may be tactically advantageous to a respondent, it is also the case that an Adjudicator has broad powers under s 34 of the Act to seek further information as he or she requires to make a determination. Under s.34(1)(b) an Adjudicator:

> *"is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator consider appropriate."*

57. In any event, under s 34(1)(a)(i) the Adjudicator must act informally and if possible make a determination on the basis of *"the application and its attachments".* If an applicant does not attach all the information on which it seeks to rely, it would likely be to the applicant's detriment.

58. 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.

59. Section 29 of the Act – **Responding to Application for Adjudication** – by reference to [the Respondent's] documents in the Response dated 6 January 2014, served on [the Applicant] and the Adjudicator on 6 January 2014. 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 by Regulation 7.

60. 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 Claims

61. The claims made by [the Applicant] in their PC9 Application are variational claims as follows:

    (a) Variation 2 – delay time for concrete pour *[work details omitted]* - $129,112.50 (including GST);

    (b) Variation 4 – extended work time for concrete pour *[work details omitted]* - $11,361.90 (including GST);

    (c) Variation 5 – concrete slump and test cylinder costs incurred owing to unavailability of NATA tester - $770.00 (including GST);

    (d) Variation 6 – delay time for lack of available fill material - $164,910.88 (including GST);

    (e) Variation 10 – omitted rate for *[work details omitted]* - $46,200.00 (including GST);

    (f) Variation 12 – additional costs for excavation of *[work details omitted]* into hard sandstone - $882,000.00 (including GST);

    (g) Variation 13 – additional costs for the purchase of new *equipment details omitted]* - $105,600.00 (including GST);

    (h) Variation 14 – additional costs for administration and overhead time dealing with errant decisions - $4,680.00 (including GST);

(e) Variation 15 – delay time for associated with late excavation *[work details omitted]* - $17,215.00 (including GST); and

(e) Variation 16 – mobilisation and de-mobilisation of *[equipment details omitted]* - $440,000.00 (including GST).

62. [The Respondent] has no counter claims in its Response.

The assessment of construction contract claims generally

63. When reading the PC9 Application and the Response it becomes somewhat obvious that neither party to this dispute has considered the risk apportionment in the contract. The contract documents contain an addendum titled "Tender Response Schedules – Addendum 1" ("Addendum 1") which, *inter alia*, sets out a "Schedule of Rates". Thereafter all parties, including [the Principal], appear to treat the rates as if this were a schedule of rates contract where the contractor usually holds the majority of the risk in the contract.

64. I am of the view that this is not the case and that this is not a schedule of rates contract in the true sense, despite the title given to Addendum 1 in the documents.

65. Page 4 of Addendum 1 sets out the total contract price which is calculated by multiplying the quantities given by the Principal, and in turn [the Respondent], by the rate tendered by [the Applicant] which is then totalled into an amount for that entire quantity. While this type of schedule provides good commercial clarity for the contract, it also attempts to avoid any risk to the Principal.

66. A bill of quantities contract is one where the design is mostly complete and the employer has a quantity surveyor or suitably qualified engineer break the work down into a number of items from that design and prepare the quantities, usually in accordance with a standard system of measurement. The contractor then prices a rate for these quantities

and undertakes construction on the basis of full design. The contractor is paid an amount for the work completed based on the rate in the bill of quantities multiplied by the quantity of work completed. The risk in this model is mostly held by the employer both in the quantities and the design provided to the contractor.

67. A schedule of rates contract is one where the design is usually incomplete and the employer is unsure of the exact quantities that will be required. Schedules are prepared identifying items that will likely be constructed and the contractor is required to only provide a rate for each item in the schedule. The contractor is then paid an amount for work completed based on the rate in the schedule multiplied by the quantity of work completed. The risk in this model is with the contractor in the rates as both the design and the quantity of work to be done is not fully understood.

68. I am of the view that this contract is a *hybrid* contract that contains a lump sum, for commercial assessment and budgeting purposes, which is then broken down into a bill of quantities. The risk to [the Respondent] is in the design and the quantities, and GC 3.3 amended by Special Condition ("SC") 3.3 attends to part of that risk through a limits of accuracy clause that shifts plus or minus 15% of the quantities provided in the bill to [the Applicant]. For there to be an adjustment of the price, that is, a variation, the quantity must increase or decrease by 15%. Adjustment is to be by agreement between the parties or, where the parties fail to agree, by [the Respondent].

Variation 2 – delay time for concrete pour $129,112.50 (including GST)

69. [The Applicant] claims 7.5 days of delay at a daily rate of $17,215 including GST for being delayed by [the Respondent] and their client [the Principal] with a scheduled concrete pour *[work details omitted]* on 8 October 2013. The claimed delay came about by the failure of [the

Principal's] Geotechnical Engineers to attend site to inspect the sockets before concrete was poured into them.

70. [The Respondent] submits that while [the Applicant] did request the inspection and testing in accordance with the contract, that request was cancelled by [the Principal] owing to [the Principal's] concerns with the *[work details omitted].* [The Respondent] sent a letter to [the Principal] seeking additional time and costs for the delay to [the Respondent] and its subcontractors, including [the Applicant] (Tab 89 of the Response). [The Respondent] sent [the Principal's] response letter of 29 October 2013 to [the Applicant] that same day, 29 October 2013 (Tab 90 of the Response). [The Principal's] letter rejected [the Respondent's], and in turn [the Applicant's] claim for the delay caused.

71. From [the Principal's] letter dated 29 October 2013 it appears that the main reason the engineers did not attend site to inspect the sockets prior to the scheduled pour on 8 October 2013 was that they had been in attendance on three prior occasions and there were no sockets available or completed for inspection. The letter further states that the reason the pour was not approved for 8 October 2013 was:

> *"...due to a prior non conformance against a hold point of the socket inspection…"*

This, it seems, was due to [the Applicant] having proceeded with a concrete pour on 4 October 2013 without prior [Principal] approval. The main reason here was that the engineer was unavailable until the afternoon of 5 October 2013.

72. It is uncontroversial between the parties that the delay took place. The concrete pour was scheduled for 8 October 2013 and a prior request was made to have the socket inspected prior to the pour. Approval was withheld, the request cancelled and the pour did not take place. This much was admitted by [the Principal] in paragraph 5 of its letter.

[The Applicant] was directed by [the Respondent] to proceed with other works available.

73. It is a requirement for the Superintendent, in this instance [the Respondent], to act impartially and in a fair, reasonable and honest manner when administering a contract, as set out in *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211*. That decision has, however, caused some controversy and the preferred method of delay analysis is through objective review of the event impact on the critical path for construction and delay apportionment against the culpable party. This latter process provides a clear picture as to whether or not it is necessary to extend time in the contract.

74. [The Respondent] did not attend to the events of the delay, despite those events being relatively obvious. A concrete pour was requested well in advance and then cancelled by [the Principal] and notified by [the Respondent] at the last moment due to an unrelated, prior event of non-conformance. Had the socket been inspected, it is likely that the pour could have gone ahead and a day's delay in this respect would simply be a day added to the end date of the contract. It is unnecessary to prove the critical path as this activity was on the critical path and did not take place on time. Rescheduling had to take place and it is likely any float in the schedule of work for that activity was lost as a result, with the increased risk to [the Applicant].

75. When dealing with time related claims, it is well established that an Arbitrator or Adjudicator may step into the shoes of the Contract Administrator as set out in *Transgrid & Ors v Siemens Ltd & Ors [2004] NSWCA 395* and in *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 2) Supreme Court of Victoria, Unreported 14 December 2006, BC 200610448*, in which Osborn J's decision followed that of Victorian Chief Justice Warren in *Kane Constructions v Sopov (2006) 22 BCL 92,* to extend time in the contract.

76. [The Applicant] has claimed 7.5 days of delay for this concrete pour not going ahead on time however, as [the Respondent's Project Manager] at paragraphs 60 to 62 of his statutory declaration has indicated, [the Applicant] was on a scheduled stand-down break for 5 of the 7.5 days claimed. [The Respondent] has not challenged [the Applicant's] daily rate of $17,215.00, including GST, and [the Respondent] also submitted to [the Principal] a claim for [the Applicant's] delay in the amount of 2.5 days.

77. I am satisfied that I may stand in the shoes of [the Respondent] and extend time to complete the contract for 2.5 additional days from 28 February 2014 until 3 March 2014. I am also satisfied that the daily cost of this time is **$39,125.00**, including GST, and I award this claim to [the Applicant].

Variation 4 – extended work time - $11,361.90 (including GST)

78. [The Applicant] claims 0.7 days of overtime for an extended working day on 4 October 2013 at a daily rate of $17,215 including GST. The claimed delay came about during clarification discussions over a hold point in the contract for inspection of the sockets prior to pouring concrete into them.

79. [The Respondent] submits that [the Applicant] received a direction not to pour concrete *[work details omitted*] on that day and that [the Applicant] ignored that direction and went ahead with the pour. [The Respondent] rejected [the Applicant's] claim on 31 October 2013. [The Respondent] has not challenged [the Applicant's] daily rate of $17,215.00 including GST.

80. It is clear that [the Applicant] has ignored the direction from [the Respondent] and [the Principal] and that this resulted with a non-conformance for the [concrete] [the Applicant] poured on 4 October

2013. The harm caused to [the Respondent] and the works is yet to emerge as [the Principal's] engineer was quite clear that:

> *"The Contractor shall provide details of what it intends to do to ensure that the installed [works] have adequate capacity. This shall be at Contractors own risk, cost and time."*

81. It is clear that [the Applicant] has caused the extended day to itself. By proceeding with the work to pour the *[work details omitted]* they have not only ignored a direction from [the Respondent], but have caused an additional integrity issue with the engineering of *[work details omitted]* that is yet to be resolved.

82. On balance, I am satisfied that [the Applicant's] claim fails.

Variation 5 – slump and test cylinder costs - $770.00 (including GST)

83. [The Applicant] claims two self-tests of concrete at $350.00 each, excluding GST, for a total claim of $770.00, including GST. The claim came about because, according to [the Applicant], [the Respondent] had no NATA approved tester available on the day and they had, on 6 August 2013, requested testing between 8 August 2013 and 14 August 2013.

84. [The Applicant] has not provided the test results as part of their submission for this variation, has not indicated on which day the tests were carried out and has not provided any third party invoices of the NATA approved tester.

85. [The Respondent] submits at [47] of the Response that [the Applicant] is expressly excluded for doing any testing under the contract and clause 13.1, and clause 13.2 of the "Conformance Testing" section of the contract expressly requires all conformance testing to be carried out by the Superintendent, in this case [the Respondent].

86. [The Respondent] has also asked for further particulars of claim on 22 October 2013, [the Respondent's Project manager] at [67], and [the Applicant] has failed to provide any further information in relation to this claim.

87. On 25 January 2014 I sought further submissions in relation to the variations in the contract and each of the parties sent their submissions to me on 30 January 2014. The submissions made did not shed any further light on this variation and I am of the view that [the Applicant] has failed to make out this claim.

88. On balance, [the Applicant's] claim for the two concrete self-tests they claim to have undertaken fails for lack of evidence.

Variation 6 – delay time for fill material - $164,910.88 (including GST)

89. [The Applicant] claims 68 days of delay at $2,267.66 per day and an additional de-rig and re-rig of their piling machine at a cost of $10,710.00, giving a total claim of $164,910.88, inclusive of GST. The claim came about because approved access was not available to the nominated gravel pits set out in the contract. The Principal had not secured a Land Use Agreement with the traditional owners of the land in question.

90. [The Applicant] claims that it had to wait from 4 May 2013 through to 25 July 2013 before it could commence its *[omitted]* works on the [project]. The delay is broken down into 50 days waiting for the gravel availability and then 12 days for [particular works] to be constructed before any [further] work could commence. [The Applicant] also claims the lack of work fronts during this time caused multiple drill/drive rig set-ups and movements it had not allowed for in its pricing.

91. [The Respondent] submits that the deferred use of the gravel pits did not commence until 8 May 2013 when [the Principal] gave it notice (Tabs 20 and 21 of the Response) to cease clearing the gravel pits 1,2 and 3 due to the absence of a Land Use Agreement, [the Respondent's Project manager] at [19]. [The Respondent] also submits that [the Principal] gave it alternative use pits on 21 June 2013 and had finalised and had in place the Land Use Agreement for the original gravel pits on 25 July 2013 (Tabs 22 and 23 of the Response).

92. It is clear that the contract was delayed by [the Principal] not having in place a suitable Land Use Agreement and, as a result, [the Respondent] and its subcontractors were seriously restricted in the works and could only partially get on to the critical path for construction. This delay is not of [the Respondent's] making and in this regard it is unfortunate that [the Respondent] will be claimed against for the delay by its subcontractor [the Applicant].

93. I am of the view that a delay in the contract has occurred as a result of [the Principal] not having in place the Land Use Agreement with the traditional owners. The knock-on effect was to restrict the use and access of the land for clearing and use for construction materials. It could not be said that [the Principal] had been caught by surprise at the need to have an appropriate Land Use Agreement in place, given the three month period from contract inception date in early to mid 2012 to the contract award date on 12 October 2012. It then took [the Principal] a further 13 months to put in place a suitable agreement to use the surrounding land for the civil construction material.

94. It is also not necessary to conduct a critical path analysis as this delay prevented [the Applicant] from getting up on to the critical path for construction. I am of the view that the delay period caused was from 8 May 2013 through to 21 June 2013, a period of 44 days.

95. As to the continual relocation of [the Applicant's] drilling rig to make use of the available work fronts, I cannot see any real evidence submitted such as daily logs and/or notifications etc. to support this portion of the claim. Accordingly, this portion of the claim fails for lack of evidence.

96. I am satisfied that I may stand in the shoes of [the Respondent] and extend time to complete the contract for 44 additional days from 3 March 2014 until 16 April 2014. I am also satisfied that the daily cost of this time is $2,267.66 per day, including GST, as submitted and not the $1,215.14 submitted by [the Respondent], [the Respondent's Project manager] at [77]. I award this claim to [the Applicant] in the sum of **$99,777.04, including GST**.

Variation 10 – omitted rate for liners - $46,200.00 (including GST)

97. [The Applicant] claims an additional $5,775.00 each, including GST, to *[details of required works omitted].* [The Applicant] states that there is a rate missing from the schedule in relation to *[labour and materials associated with works]*.

98. [The Respondent] states that this cost has already been dealt with in Variation 1 that was submitted, approved and paid at a rate set up in the contract, [58] of the Response.

99. In Variation 1, [the Applicant] advised [the Respondent] of the missing rate for *[details of required works omitted]*, Tab 78 of the Response. On 27 March 2013 [the Principal] requested [the Respondent] to provide a quote for:

> *"1. All costs involved including Materials and labour for [details of works and project site omitted] when and as required. Details [omitted] shown on Drawing No R12 – 1700*

> *2. Refer to measurement and payment Clause 36.3.5 of the Specification ([work details omitted]) for method of Payment"*

100. [Omitted] Measurement and Payment clause 36.3.5 *[omitted]…*clearly establishes that the quotation [the Applicant] provided to [the Respondent] in respect of the request made by [the Principal] included costs for [these works claimed by the Applicant]. [The Applicant] held an obligation under the contract to ensure it had fully accounted for all costings when it provided that rate. The rate was accepted and included into the contract and [the Applicant] cannot now revise its quote. I agree with [the Respondent] in this respect, as [the Respondent] has already paid for [these works].

101. On balance, I am satisfied that [the Applicant's] claim fails.

Variation 12 – sockets into hard sandstone - $882,000.00 (including GST)

102. [The Applicant] claims an additional 21 cubic meters of excavation into hard sandstone at an additional cost of $882,000.00, including GST. The basis of this claim is built on the difference between drilling in soft sandstone and drilling in hard sandstone. [The Applicant] submits that the drilling rate in hard sandstone is in the order of magnitude of 10 to 15 times that of soft sandstone. [The Applicant] has only used a 5 times multiplier in making their claim.

103. [The Applicant] also argues that adjustment of the rate is permissible under GC3.3(a). Presumably, [the Applicant] means GC3.3(c) amended by SC 3.3, "Adjustment of Rates". This sets out the limits of accuracy at plus or minus 15% and, provided that the actual quantity is greater than the upper limit, the rate may be adjusted by agreement or, failing agreement, by [the Respondent].

104. [The Respondent] submits that the Geotech Report does not form part of the contract and therefore cannot be used. This is not the case as has already been established at paragraph 30 of this decision. [The Respondent] also submits that [the Applicant] held an obligation to inform themselves of the site conditions in advance of submitting their tender. [The Respondent] does not challenge the 21 additional cubic meters of excavation carried out by [the Applicant].

105. Attending to the Geotech Report, it can be seen from the borehole information that the area experiences siltstone and medium sandstone. The Geotech Report also references a paper by P.J.N. Pells et al in the Australian Geomechanics Journal of December 1999 that deals with the structural strength of Foundations on Sandstone and Shale in the Sydney Region. In Table 4. of that paper the structural strength of Sandstone (1) and Sandstone (2) is defined in megapascals ("MPa") as 20-33MPa for Sandstone (1), or soft sandstone, and 103Mpa for Sandstone (2), or hard sandstone. In the Australian Geomechanics Journal of 1971 at page 36, drilling rates into siltstone (similar to soft sandstone) and hard sandstone were compared. It was found that a drill rate of 50mm per minute could be achieved into siltstone compared to a reduced 20mm per minute drilling rate in hard sandstone. This information is comparable with the hardness and abrasivity index of Sandstone (1) and Sandstone (2).

106. Further, the SME Mining Engineering Handbook 2011 at chapters 7 and 8 establish the hardness range for sandstone on the Moh scale is in a range of 3 - 6.5, soft to hard sandstone, and the Cherchar Abrasivity Index or CAI is 0.1 – 2.6 for soft sandstone and 2.3 – 6.3 in hard sandstone. That is, at or about a 2 times multiplier for hard sandstone.

107. When considering this information, it is difficult to see how a drill rate in the order of 10 to 15 times greater for hard sandstone when compared to soft sandstone could be supported. [The Applicant] has reduced its drill rate multiplier to 5 times for hard sandstone, however I am of a view that this is also excessive given the comparative hardness and abrasiveness of soft sandstone when compared to hard sandstone.

108. [The Respondent] has not dealt with this variation well and I am of the view that [the Applicant] has excessively inflated its claim. There is no doubt that the drilling rate for hard sandstone should be set out in the contract because the Geotech Report at paragraphs 8.2 and 8.7 clearly indicate unexpected ground conditions may be encountered in *[site details omitted]* and given that the bore hole results from either side of this *[location]* indicate medium sandstone deposits. It is therefore highly probable that hard sandstone would be encountered at some stage of the drilling process.

109. I am not of the view that [the Applicant] encountered a full 21 cubic meters entirely made up of hard sandstone in its drilling operations, however I am satisfied that it has encountered harder than usual sandstone when drilling *[work details omitted]* and I am also convinced that the several breakdowns of their drilling machine added to this drilling time as indicated by [the Respondent's Project manager] at [26]. Given the Geotech Report showing medium sandstone in the test bore holes with the possibility of unexpected ground conditions in the *[location]*, I am of the view that a <u>combination of medium and hard sandstone</u> was likely encountered in the drilling operation and that the drilling rate multiplier for this type of material should be in the order 1.5 times that of soft sandstone. That is, 1.5 times the excavation rock socket rate at item 11.02(e) of Addendum 1 in the contract.

110. On balance, I am satisfied that I may stand in the shoes of [the Respondent] and establish the value of this claim on a fair and reasonable basis. The quantum of material was not challenged by [the Respondent], nor was the fact that harder than usual sandstone was encountered by [the Applicant] when drilling *[details omitted].* [The Applicant] has not challenged the fact that their machinery was aged and had several breakdowns and I am of a view that [the Applicant's] claim was excessively inflated.

111. Accordingly, I award the sum of **$264,600.00, including GST,** for the additional 21 cubic meters of harder than usual sandstone excavated by [the Applicant]. This sum is the calculation of the 21 cubic meters of harder than usual sandstone multiplied by 1.5 times the excavation rock socket rate of $8,400.00, including GST.

Variation 13 – new steel liners - $105,600.00 (including GST)

112. [The Applicant] claims that it had incurred $105,000.00, including GST, of additional costs for purchasing new materials, *[details of materials omitted]*, for a direction issued through [the Respondent] by [the Principal], rather than use second-hand *[materials]* that were priced in [the Applicant's] Tender.

113. [The Respondent] submits that clause 2.17 of the Specifications requires materials incorporated into the works to be new and [the Applicant] was contractually obliged to use new [*materials]* for the works.

114. Attending to the tender submission made by [the Applicant] at Tab 2 of the PC9 Application, a price of $187,600.00, including GST, was tendered at Item 11.02(b) of Addendum 1 for:

"Supply, handle and drive [details omitted]"

115. Turning to the Specification at Tab 1 of the PC9 Application, clause 2.17 is, in fact, AmdGC 2.17 which amends GC 30.1 “Quality of Materials and Work” and states:

> *“Unless otherwise specified in the Contract, any materials to be incorporated in the Works shall be new and, where applicable, materials and workmanship shall be in accordance with the relevant standard of Standards Australia”.*

116. There is no evidence which supports that [the Applicant] tendered to use “*second hand*” *[materials]* as set out in paragraph [172] of the PC9 Application and the contract is clear on what materials are to be used when performing the works. In fact, [the Applicant] ended up using the second hand *[materials]* in the works after some lengthy negotiations with [the Principal] and [the Respondent], set out at Tabs 96 to 103 inclusive of the Response.

117. However, as [the Respondent’s Project manager] points out at [87]:

> *“It was evident there was not sufficient second hand [materials] to complete the project, and some new [materials] would need to be purchased.”*

[The Respondent’s Project manager] also points out in this paragraph that:

“…the cost of using the second hand [materials] should actually be a deduction of $20,000.00.”

118. It is clear that [the Principal], through [the Respondent], relaxed the contract compliance requirement for new materials to assist [the Applicant] however, as stated by [the Respondent’s Project manager], there was insufficient second hand *[omitted]* material and [the Applicant] had to purchase some new material to perform the work.

119. On balance, I am satisfied that [the Applicant's] claim fails.

Variation 14 – errant decisions - $4,680.00 (including GST)

120. [The Applicant] claims $4,680.00, inclusive of GST, additional administration and overheads for time spent dealing with *"errant"* decisions made or conveyed by [the Respondent].

121. [The Respondent] claims that these costs have been accounted for and *"…incorporated into the SOR Item 2.01B Ongoing Costs."*

122. Turning to Item 2.01(b) of Addendum 1, [the Applicant] has allowed the sum of $610,000.00 for "on going costs" in its Tender.

123. In my view, this is a nonsense claim which has no likelihood of success. The allowance of $610,000.00 provides for [the Applicant's] administration and overheads in the contract.

124. I am satisfied [the Applicant's] claim fails.

Variation 15 – late excavation of [work details omitted] - $17,215.00 (including GST)

125. [The Applicant] claims one day of delay at a cost of $17,215.00, including GST, for bringing forward a concrete pour because [the Principal's] geological engineer had to leave site as soon as possible on 17 October 2013.

126. [The Respondent] claims that there was no delay as the concrete pour went ahead as intended by [the Applicant].

127. It is clear that the pour went ahead on 17 October 2013 and that [the Applicant] had made the choice to pour the concrete on that day to accommodate the departure of [the Principal's] geological engineer who had to leave site as soon as possible on the same day.

128. [The Applicant] chose to undertake the concrete pour on 17 October 2013 and did so of its own volition. If the pour did not go according to plan, [the Applicant] cannot now seek an extension of time and costs for a harm it has caused to itself.

129. On balance, I am satisfied that [the Applicant's] claim fails.

Variation 16 – mobilisation piling rig - $440,000.00 (including GST)

130. [The Applicant] has claimed an additional $440,000.00 for mobilising and de-mobilising [additional equipment] to the site works.

131. [The Respondent] submits that the costs associated with this claim have already been accounted for in the Mobilisation 2.01A and Demobilisation 2.01C in the Schedule. [The Respondent] also submits that, in any event, it was [the Applicant's] responsibility to identify the equipment it required on site to undertake the work it had to perform under the contract.

132. Turning to Item 2.01(a) of Addendum 1 at Tab 2 of the PC9 Application, [the Applicant] has allowed the sum of $980,000.00 for "Mobilisation" and Item 2.01(c) has allowed $630,000.00 for "Demobilisation" which includes all its Plant and Equipment.

133. I am of the view that this claim is wholly unfounded as [the Applicant] was to have made sufficient allowance in its pricing to allow for the mobilisation and de-mobilisation of all of its Plant and Equipment to perform the works. A competent contractor mindful of the conditions in the Northern Territory would make an adequate allowance for such Plant and Equipment on a remote site.

134. In any event, as Mr Thompson has pointed out at [98] [the Applicant] undertook to: *"…send out [further equipment] to speed up the [omitted] work."*

> This was as a result of a meeting with [the Respondent] and [the Principal] where it was identified that [the Applicant] was behind in its works due to several equipment failures. It is clear that [the Applicant] undertook to mobilize [further equipment] of its own volition and cannot now claim additional costs for not fully mobilising all its plant and equipment to perform the works.

135. I am satisfied [the Applicant's] claim fails.

136. I have not considered Variation 18 in this decision as it forms no part of the PC9 Application for the reasons I have set out in paragraphs 51 to 58 in this decision.

Interest on the claims

137. In reconciling the claims, the amount [the Respondent] is to pay [the Applicant] is **$403,502.04 (including GST)**.

138. The interest rate payable under GC 42.1 amended by AmdGC 2.15 is 2.8% as set out in the PC9 Application at [215].

139. Interest is not calculated on the GST component of the amount [the Respondent] is to pay [the Applicant] and GST is not payable on an amount awarded in a determination under *Goods and Services Tax Determination 2003/01*.

140. I award interest of **$2,560.71** on the sum payable, excluding GST, from 1 November 2013, the date of due payment, to 31 January 2014, the date of determination, pursuant to section 35 of the Act.

Summary

141. 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) Variation 2 to stand in the sum of **$39,125.00, including GST**;

(g) Variation 4 to fail;

(h) Variation 5 to fail;

(i) Variation 6 to stand in the sum of **$99,777.04, including GST**;

(j) Variation 10 to fail;

(k) Variation 12 to stand in the sum of **$264,600.00, including GST**;

(l) Variation 13 to fail;

(m) Variation 14 to fail;

(n) Variation 15 to fail;

(o) Variation 16 to fail; and

(p) Interest awarded in the sum of **$2,560.71**.

142. Accordingly, I determine that the amount to be paid by *[omitted]*, [the Respondent], to *[omitted]*, [the Applicant], is **$406,062.75 (including Interest and GST)**.

143. This sum is to be paid to [the Applicant] by [the Respondent] on or before 28 February 2014.

Costs

144. I have not found either the PC9 Application or the Response to be without merit and I do not consider [the Applicant's] conduct in bringing

the PC9 Application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.

145. I make no decision under section 36(2) of the Act. The parties must bear their own costs.

Confidential Information

146. The following information is confidential:

(a) the identity of the parties;

(b) the identity of the principal; and

(c) the location and nature of the works.

DATED: 31 January 2014

Rod Perkins
Adjudicator No. 26