Determination 26.16.02

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 30 May 2016 I was appointed Adjudicator to determine a payment dispute between the Applicant and the Respondent by the Law Society Northern Territory ("LSNT") as prescribed Appointer under the Act. I received a Letter of Appointment on 30 May 2016 and I collected the application documents from the LSNT offices on 31 May 2016.

2. By attendance to the application documents, there are two applications to adjudicate, the first being a payment dispute in relation to the February Progress Payment Claim ("February Claim") and the second a payment dispute in relation to the March Progress Payment Claim ("March Claim").

3. Both applications are dated 20 May 2016 and were served on the LSNT, as Appointer, on 23 May 2016. Both applications were also served on the Respondent that same day, 23 May 2016.

4. On 31 May 2016 I initially contacted the parties by telephone, advised my appointment as Adjudicator and sought:

   (a) a single point of contact for the conduct of the Adjudication; and

(b) consent from the parties to adjudicate both payment disputes simultaneously under s.34(3)(b) of the Act.

The Applicant and the Respondent confirmed their contact details and each consented to me adjudicating both payment disputes simultaneously under s.34(3)(b) of the Act.

5. On 3 June 2016, for jurisdictional completeness, I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I also sought submissions until 2:00pm CST on Wednesday, 8 June 2016, should either party object to the appointment. There were no objections to my appointment. In my letter of 3 June 2016 I confirmed that the parties had consented to me adjudicating both payment disputes simultaneously under s.34(3)(b) of the Act and requested each party confirm their consent in writing.

6. In that same letter of 3 June 2016 I confirmed that I would accept service of the Response by email, which I calculated was due on or before 6 June 2016, with attachment documents made available through a Drop Box, which is accessible by all parties to the adjudication. A hard copy of the documents was to follow in due course. I also confirmed that service by electronic means complies with s.8 of the *Electronic Transactions (Northern Territory) Act*. There were no objections from the parties in relation to the electronic service process.

7. On 6 June 2016 I received written consent from both parties to adjudicate both payment disputes simultaneously under s.34(3)(b) of the Act.

8. On 7 June 2016 I wrote to the parties and confirmed receipt of the Response at 11:28pm CST on 6 June 2016. I also requested the Applicant confirm the receipt details of the Response. That same day, 7 June 2016, the Applicant confirmed receipt of the Response at 11:56pm EST on 6 June 2016 together with access details to an *Accellion*^{R} file sharing link.

9. On 17 June 2016 I wrote to the Construction Registrar confirming that I had undertaken a preliminary reading of the 17 lever-arch files and considered the matters before me to be complex and requiring detailed analysis. I requested additional time under s.34(3)(a) of the Act up to and inclusive of 8 July 2016 to make a determination of each payment dispute. The Construction Registrar approved the extension that same day, 17 June 2016. There were no objections from the parties.

10. On 1 July 2016, having undertaken a detailed reading of the voluminous material of each Application and its Response, I again wrote to the Construction Registrar and requested some additional time under s.34(3)(a) of the Act up to and inclusive of 15 July 2016 to make a determination of each payment dispute. The Construction Registrar approved the extension on 4 July 2016. There were no objections from the parties to the extension.

11. On 7 July 2016 I wrote to the parties confirming that a thorough reading of the voluminous material of each Application and its Response had answered many of my earlier questions, however I had one question for the parties, as follows:

> *".....please advise the contracting relationship between [redacted] (Principal) and [redacted] (Contractor) - Lump Sum, Cost Reimbursable, Rates, BOQ or other….".*

12. On that same day, 7 July 2016, the Respondent advised that:

> *"….the Contract between [redacted] (Principal) and [redacted] (Head Contractor) is a turnkey lump sum EPC contract….".*

13. On 14 July 2016, there being two simultaneous determinations in relation to complex matters, I wrote to the Construction Registrar and sought another short extension of time, under s.34(3)(a) of the Act, until 20 July 2016 to make the determinations. That same day, 14 July 2016, the Construction Registrar approved the extension up to and inclusive of 20 July 2016. There were no objections from the parties to the further extension of time.

Introduction

14. This Adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent to provide [*redacted*] electrical [*redacted*] works to the Respondent (the "Contract"). The [*redacted*] works (the "Works") were provided to the construction site [*redacted*] in the Northern Territory of Australia.

15. The Applicant claims that it is entitled to be paid its February Claim, dated 20 February 2016, in the sum of **$386,385.80 (excluding GST)**, which includes the following components of claim:

    (i) VQ-084 Variation for the Additional Costs of Spotters - **$372,843.00 (excluding GST)**;

    (ii) VQ-041 Variation for [*redacted*] Modifications - **$9,558.40 (excluding GST)**; and

    (iii) VQ-054 Supply of Generators - **$3,984.00 (excluding GST)**.

    A total claim of **$386,385.80 (excluding GST)**.

16. The Applicant also seeks interest on its claim at 8.0%, as the applicable rate of interest under the Supreme Court Rules, until the date of determination. The Contract does not provide for a rate of interest on overdue payments.

17. The Applicant seeks Costs of the Adjudication and the Application fee be paid in full by the Respondent.

18. The Respondent submits that its Payment Schedule Assessment dated 25 February 2016 (the "February Certificate") of the February Claim should stand and that there is no payment to be made in relation to the Applicant's February Claim. A total payment of **$Nil**.

16. The February Certificate has assessed the payment for the work done in the Contract at **$633,809.68 (excluding GST)**.

17. The Respondent also says that variation VQ-041 and VQ-054 have already been assessed and disputed in an earlier December Progress Payment Claim dated 20 December 2015, and is therefore out of time under the 90 day requirement to apply for adjudication under s.28(1) of the Act.

18. The Respondent seeks Costs of the Adjudication and the Application fee be paid in full by the Applicant.

19. This determination is in relation to the Application for the February Claim.

Procedural Background

The Application

20. The Application is dated 20 May 2016 and comprises a general submission and 5 lever-arch files containing 7 attachments with numerous exhibits in each attachment. The attachments, *inter alia*, include:

    (a) a copy of the Contract;

    (b) a copy of the February Claim and the February Certificate; and

    (c) supporting evidence including statutory declarations, spreadsheet reports, Gantt chart programs of the Works, photographs, specifications, site instructions, notices of delay and letter and email correspondence between the parties relied upon in the general submission.

22. The February Claim was submitted to the Respondent on 20 February 2016. The Respondent has assessed and issued its February Certificate on 24 March 2016 assessing the amounts payable to the Applicant.

23. The Application was served on 23 May 2016 pursuant to s.28 of the Act.

The Response

24. The Response is dated 6 June 2016 and comprises a general submission and 2 lever-arch files containing 7 attachments with numerous exhibits in each attachment. The attachments, *inter alia*, include:

(a) a copy of the Contract;

(b) a copy of a Quantity Surveyor's Report for VQ-084; and

(c) supporting evidence including statutory declarations, spreadsheet reports, Gantt chart programs of the Works, photographs, specifications, site instructions, variation assessments and letter and email correspondence between the parties relied upon in the general submission.

25. The Response states that the Respondent paid the Applicant $633,809.68 (excluding GST) on or about 18 April 2016 for the February Payment Claim.

26. The Response was served on 6 June 2016 pursuant to s.29 of the Act.

Adjudicator's Jurisdiction and the Act

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

28. Section 4 of the Act – **Site in the Territory** – the site is [*redacted*] and is the construction project site for [*redacted*] in the Northern Territory. [*Redacted*]. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.

29. Section 5 of the Act - **Construction Contract** - the Contract is a construction contract by reference to the Work to be carried out under the Contract and [*redacted*] is a construction project. The parties agree that they entered into a construction contract for the purposes of s.5(1) of the Act, in the terms set out in the "Works Subcontract". I am satisfied that the Contract is a construction contract for the purposes of the Act as prescribed under section 5(1)(a) of the Act.

30. Section 6 of the Act – **Construction Work** – the work is [*redacted*] electrical [*redacted*] work for [*redacted*]. That work falls within the provisions of s.6(1) of the Act and I am satisfied that the work is construction work for the purposes of the Act.

31. 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."*

32. In its submissions the Applicant says that it made a valid payment claim that "….*complies with the requirements set out in clause 18 of the Subcontract*…" and, as such, the February Claim was served as "*Payment Claim 007*" on 20 February 2016. The February Claim is a compliant claim under the Contract and fulfils the Payment Claim requirements of s.4 of the Act.

33. The Respondent at its second (number of) paragraph 2 of its submissions agrees with the Applicant that the February Claim is a compliant claim under the Contract and fulfils the Payment Claim requirements of s.4 of the Act.

34. I am satisfied that the February Claim made on 20 February 2016 complies with the stipulations of clause 18 of the Contract 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.

35. 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."*

36. The Applicant made a valid payment claim on 20 February 2016 in the form of the February Claim for the provision of Works in the Contract.

37. The Contract provides for payment of a valid payment claim on two grounds, namely:

    (a) under clause 18 the "*Payments*" terms of the Contract, clause18.5(b) provides for "….*Within **35 Business Days*** [emphasis added] *after the Superintendent receives the payment claim*…" payment of the determined amount; and

    (b) under clause 19 the "*Payments Act*" terms of the Contract, clause 19.9 provides for payment "*…**25 business days*** [emphasis added] *after the payment claim is made…*" where the Subcontractor (the Applicant) becomes entitled a progress payment.

    In this Adjudication, payment of the February Claim was due on or before 29 March 2016.

38. The Respondent issued its February Certificate on 25 February 2016 assessing for payment the sum of $633,809.68 (excluding GST). When the Respondent failed to pay the assessed amount in the February Certificate on or before 29 March 2016 a payment dispute then commenced on 30 March 2016 for the February Claim.

39. The Respondent argues that the February Claim contained components of claim that had been previously assessed in an earlier progress payment claim. The Respondent says that the work under variations VQ-041 and VQ-054 was 100% completed and claimed in the December Progress Payment Claim and on 3 January 2016 it certified that work for payment. The Respondent says that the Applicant cannot now recast its VQ-041 and VQ-054 claims into the February Claim.

40. I am not with the Respondent on this issue on two grounds. First, the Contract at clause 18.1(c) has very precise times for the making of a claim for payment:

"*…which is:*

(i) *one of the Payment Claims Times set out in item 44 of the Subcontract Particulars;*

(ii) *fourteen (14) days after the Superintendent issues a Certificate of Practical Completion; and*

(iii) *twenty-eight (28) days after the last Defects Liability Period expires….*".

41. Should the Applicant make a claim for payment outside these times, the terms of "*item 44*" act to prevent any claim made outside the precise terms of clause 18.1(c) of the Contract, namely;

"*…Monthly progress payments (to be submitted on the 20th of each month. Any claim for payment received after this day will be deemed to be received on this day the next calendar month) are calculated on agreed performance of the Subcontract Sum….*".

42. The Contract also ensures these precise times are adhered to by the use of clause 18.2 as follows:

"*…Despite clause 18.1(c), the date upon which the Subcontractor shall be entitled to lodge any payment claim shall be deferred to the date which is the later of:*

(a) *(**Stated Times**) the date the Subcontractor is otherwise to lodge a payment claim under clause 18.1(c)……".*

43. It is generally only open to the Applicant to make its variational claims together with its monthly progress payment claim and the claim for VQ-041 and VQ054 was made with progressive monthly progress claims on a progressive "rolling claim" basis.

44. Second, the Contract allows for a rolling monthly claim with payment based on progress "…*having regard to the Subcontract Sum…*". Each progress payment claim is calculated under clause 18.3 of the Contract as follows:

"*…Subject to the other terms of the Subcontract, as at each date for a payment claim to be made under the Subcontract, the Subcontractor may claim for an amount calculated as:*

(a) *(**Agreed Milestone Payment**) the amount specified in item 45 of the Subcontract Particulars as payable for the relevant progress payment (adjusted by the amount of any previous adjustment to the Subcontract Sum which is reasonably attributed to the work included in the achievement of the relevant milestone); or*

(b) *(**Initial Value of Works**) if no amount is specified, the value of the work completed to the date of the claim (having regard to the Subcontract Sum and additions or deductions under the Subcontract) as determined by the Superintendent…….*".

45. The progress payment claim is then calculated on progress or quantum against the overall Subcontract Sum under the categories of clause 18.4, being, in summary, *Amounts Previously Paid, Unfixed Plant or Materials, Deductions, Defects* and *Retentions,* amongst others. A variational claim made, certified and paid as a component part of a monthly progress payment claim cannot therefore be considered to be a recast or repeat claim. It is made, certified and paid based upon progress as a "rolling claim" consistent with the Contract.

46. The issue of repeat claims was considered by Kelly J in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 at [118] to [124] where Her Honour said:

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

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

> *Clause 13 of the appellant's standard hire agreement provides for the rendering of accounts at monthly intervals and for the payment of accounts within 30 days from the end of the month in which a valid tax invoice is received. The clause contains no express provision for the making of repeat claims and there is no basis for implying such a provision in the standard hire agreement. Further, s 8 of the Act does not permit a payment dispute to be retriggered by the making of a*

> *repeat claim in respect of the performance of the same obligations under a construction contract.*

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

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

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

> *(a) a payment dispute will arise in relation to the part unpaid when the claim is due for payment under the contract; and*
>
> *(b) despite that, each subsequent payment claim must include a "repeat claim" for that unpaid part.*

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

[124] I agree with Southwood J (in his reasons on this appeal) that a payment dispute does not come to an end – or a fresh payment dispute necessarily arise – simply because a further claim is presented seeking payment of precisely the same amounts for the performance of precisely the same work. However, I also agree with Olsson AJ that there is no reason why a contract could not authorise the inclusion in a progress payment claim of earlier unpaid amounts, so as to generate a new payment claim, attracting a fresh 90 day period. ***In each case one must look to the contract to determine when a payment was due and hence when the payment dispute arose*** [emphasis added]. *One imagines that in most contracts, a "repeat invoice"*

> *claiming no new work and simply served in an attempt to "re-set the clock" for the purpose of an application for adjudication, would not have the desired effect. However, one cannot be dogmatic. There are contracts, for example, where the contractor is to put in a final claim setting out all amounts claimed: each of these may have been the subject of one (or more) progress claims, and there may have been no new work done. It is always a matter of going to the contract to determine when the payment dispute arose according to the express and/or implied terms of the contract."*

47. The Respondent did not review variations VQ-041 and VQ054 in its December Payment Schedule but wrote to the Applicant on 31 December 2015 in relation to VQ-041 and 1 January 2016 in relation to VQ-054. There were two grounds for rejecting the variations:

    (a) the claims were time barred by clause 15.7 of the Contract; or

    (b) the work claimed as a variation formed part of the scope of the Works under the Contract.

48. The December and January Payment Schedules show the Respondent systematically reviewing each variation submitted by the Applicant with acceptance of some and rejection of others with reasons. The Respondent continued this process into the February Certificate, which shows a clear departure from the terms of the Contract and an alternative process of acceptance and review of each variation submitted by the Applicant. The review process was not an isolated incident that might attract an argument of discretion on the part of the Superintendent, but a systematic acceptance and review process inconsistent with the terms of the Contract. In such circumstances, the Respondent cannot now insist on strict application of the stipulations of the Contract when dealing with variation VQ-041 and variation VQ-054 submitted by the Applicant. The time bars will not bite.

49. In relation to the second limb of the rejection, the Respondent has found that the work set out in each variation is already contained within the scope of the Works under the Contract and therefore cannot be considered by the Respondent as a variation of the Contract. The Applicant says that this is not the case and has continued to press the variation claims in its February Claim. Consistent with the Respondent's process, there are several other

variations claims contained in the February Claim and the Respondent has reviewed and accepted some of these variations while refusing others with reasons on a rolling claim basis for the whole of the Works under the Contract.

50. I am of the view that the variation claim VQ-041 and variation claim VQ-054 form part of the February Claim and, when the February Claim was not paid by the Respondent on or before 29 March 2016, a payment dispute commenced the next day on 30 March 2016.

51. 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 30 March 2016 under section 8(a)(ii) of the Act.

52. Section 28 of the Act – **Applying for Adjudication** – By reference to the documents of the Application dated 20 May 2016, served on the Respondent and the Prescribed Appointer LSNT on 23 May 2016. 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.

53. Section 29 of the Act – **Responding to Application for Adjudication** – By reference to the documents of the Response dated 6 June 2016, served on the Applicant and the Adjudicator on 6 June 2016. 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.

54. 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

55. The claims made by the Applicant in the Application are as follows:

(a) VQ-084 Variation for the Additional Costs of Spotters - **$372,843.00 (excluding GST)**;

(b) VQ-041 Variation for [*redacted*] - **$9,558.40 (excluding GST)**; and

(c) VQ-054 Supply of Generators - **$3,984.40 (excluding GST)**.

A total claim of **$386,385.80 (excluding GST)**.

56. I deal with each claim below.

VQ-084 Variation for the Additional Costs of Spotters - $372,843.00 (excluding GST)

57. The Applicant submits that the Contract contained specific "Working at Heights" safety management requirements that did not require spotters for the Elevated Work Platforms ("EWP") that were being used by the Applicant to install cables at height. The requirements for spotters to be used during EWP operations was then introduced on 21 August 2015 by a "Safe Work Instruction" which carried at Section 8 "…*Spotters are to be deployed with all EWP operations…*".

58. The Applicant submits that on 1 December 2015 a revised "Safe Work Instruction" was issued which contained requirements at Section 11 for the safe operation of EWPs which confirmed this additional requirement and caused a variation to the Contract with the associated costs of the spotters.

59. The Respondent submits that there is no variation to the Contract because the Applicant:

(a) Should have been fully aware of the safety operator requirements when operating EWPs on the Site; and

(a) The claim is time barred by clause 15.7 in the Contract for failing to notify the Respondent of the variation to the Contract.

The Applicant's claims

60. In reaching its position the Applicant says that the Respondent is not able to strictly impose the terms of the Contract to reject late variation claims because:

(i) there was an established course of conduct and the Respondent is therefore estopped from insisting on strict compliance with contractual timeframes and notification requirements;

(ii) by its conduct, the Respondent waived any entitlement to rely on time bars and notification requirements;

(iii) the time bar provisions of the Contract, to the extent that they operate as a condition precedent to payment under the Act, have no effect; and

(iv) the Applicant substantively complied with the notification requirements of the Contract such that the Respondent was fully aware of the circumstances giving rise to the variation claims.

61. While I have no jurisdiction in equity, in my view there is no estoppel or waiver in the process adopted by the parties when dealing with variations under the Contract. Neither party fully complied with the Contract when dealing with variations to the Contract.

62. The Respondent and the Applicant engaged in a process of acceptance and review of each of the variations submitted by the Applicant over several months of progress claims on a rolling claims basis.

63. Both parties have not fully complied with the requirements to vary the Contract. The obligations fall to both parties when directing a variation in the Contract, unlike the requirements of timely notification imposed solely on the Applicant for a grant of an extension of time in the Contract. There is no evidence advanced by the Respondent that the Respondent's Superintendent Representatives and their Limits of Authority were properly notified to the Applicant under clause 8.4 of the Contract. The Respondent's

Electrical Supervisor and Electrical Engineer both directed variation work to the Applicant in circumstances where they held no power under the Contract to give those directions.

64. When directing the variation in the Contract the Respondent gave that direction in writing and the Applicant gave full and immediate effect to the additional work under clause 15.6 of the Contract. The notification requirements of clause 15.7 seek to avoid the claim by imposing a 5 day notice requirement "….*after the direction or approval is given*...." on the Applicant of its price and any additional time necessary to complete the variation in the Contract. As it is wholly unclear as to whether or not the Respondent (Superintendent) has actually and properly exercised the power given to a Superintendent or Superintendent Representative under the Contract, the Respondent cannot now insist on strict compliance by the Applicant with the stipulations of the Contract to avoid a claim for additional work properly done.

65. The Respondent ought to have fully understood that it was directing a variation to the Works under the Contract. The Respondent has full and competent knowledge of the Works under the Contract. The Respondent prepared the scope of the Works and the Respondent was in full management control of the Site at all material times the Works were being constructed. The Respondent did not comply with the Contract when it directed the variation to the Contract.

66. It is therefore unnecessary for me to consider estoppel or waiver further in this dispute.

67. There is a clear departure from the terms of the Contract and an alternative process of acceptance and review by the Respondent of each variation submitted by the Applicant took place in the Contract. The review process was not an isolated incident that might attract an argument of discretion on the part of the Superintendent, but a systematic acceptance and review process inconsistent with the terms of the Contract. In such circumstances, the Respondent cannot now insist on strict application of the stipulations of

the Contract when dealing with a variation submitted by the Applicant. The time bars will not bite.

Awareness of the Safety Requirements

68. The Respondent submits that the Applicant ought to have been aware of the safety requirements for spotters when operating EWPs on the Site. The management Plans and HSE Documentation of the Contract was not an exhaustive list of safety documentation for the Contract and the purpose of the documents is to provide a list of control measures that the Applicant should consider in order to safely manage its risk when working at heights.

69. The Applicant says that there was a specific procedure in the Contract for "Working at Heights" and that procedure provided that *"…No worker to work alone when working at heights. If not working in a group, then a spotter is required…"*. The Applicant also says that standard practice does not permit workers to work alone when doing electrical work and spotters are not allowed for in the rates in the Contract.

70. The Applicant submits that when the Respondent changed the requirements for spotters when operating EWPs and then issued its Safe Work Instructions containing that requirement it caused a variation in the Contract for the additional cost.

71. The Respondent also argues that if I find that the spotters are a variation to the Contract then, in the alternative, the price is overstated and should be $188,664.58. In reaching this position the Respondent relies on Quantity Surveyor's Report dated 6 June 2016 (the "QS Report"), which sets out the calculations and reasoning in valuing the variation VQ-084.

72. I am not with the Respondent on this issue.

73. The Applicant is entitled to rely on the documents of the Contract as the requirements for the construction of the Works under the Contract. There are obligations and rights that each party holds as well as an apportionment of risk. As a competent contractor the Applicant would have considered the

documents and the associated requirements before pricing and entering into the Contract.

74. The documents of the Contract clearly held conflicting information in relation to the use of spotter requirements when “Working at Heights” and this was evident by the amendment and issue of “Safe Work Instructions” by the Respondent during the construction of the Works under the Contract.

75. The documents show an increased requirement for spotters to be used during EWP operations which caused additional costs in the Contract for the Applicant. In its alternative submission the Respondent has identified this issue and has sought to address and limit the claim to an amount set out in the QS Report.

76. I do not agree with either the Applicant or the Respondent on the pricing of the variation VQ-084.

Pricing of VQ-084

77. The Applicant has calculated the variation on the basis of using 6 EWPs, however the actual extract of timesheet records shows that there are only 4 spotters used during the period of 8 September 2015 to 22 December 2015 inclusive. During that period of 105 days only 2 spotters were used on most Saturdays and during the beginning of the work in early September 2015.

78. The Applicant claims 3892 hours at the rate in the Contract for a qualified Electrician of $95.80.

79. The Respondent in the QS Report says that the appropriate rate to be used in the Contract is $86.30 for a Trades Assistant. The Respondent also says that some of the spotters were claimed in variation VQ-005 and that there should be a deduction for that claim.

80. I agree with the Respondent on these points.

81. The Applicant's time sheet extract shows that the spotters have been claimed during the period of 8 September 2015 to 22 December 2015, a total of 3892 hours over 105 days. Variation VQ-005 has claimed 4 spotters during the period November/December/January 2015 to 2016. The hours allocated to the spotters during that period was 4 spotters x 229.25 hours per spotter = 917 hours of claim.

82. The rate in the Contract for a spotter should be that of a Trades Assistant who could easily undertake the safety spotter task with some general safety and operational training. If the Applicant were to use a qualified Electrician, then the reasonable rate applicable for this work would be at the lower rate in the Contract of $86.30 per hour.

83. A calculation of the applied rate against the hours claimed with a deduction for the duplicated claimed hours is set out in Table 1.

Variation VQ-084 Pricing			
Item	**Hours**	**Rate**	**Price**
Claimed Hours for Timesheets	3892	$86.30	$335,879.60
Hours to be Deducted for VQ-005	-917	$86.30	($79,137.10)
TOTAL			**$256,742.50**

Table 1.

84. I am satisfied that the Applicant's claim for the additional spotters it supplied into the Works under the Contract stands in the sum of $256,742.50 (excluding GST) and I award this component of the claim to the Applicant.

VQ-041 Variation - [*redacted*] Modifications - $9,558.40 (excluding GST)

85. The Applicant submits that when designing and constructing the [*redacted*] it incurred additional cost for the locking bracket due to the Respondent's drawing amendments.

86. The Respondent submits that there is no variation because this portion of the Works was a design and construct portion requirement by the Applicant and the drawings the Respondent provided were clearly marked "*INFORMATION ONLY NOT FOR CONSTRUCTION*" and were provided only to assist the Applicant.

87. I agree with the Respondent on this point.

88. The Applicant held the design and the construction obligations under the Contract to provide the Respondent with an acceptable and serviceable product that complied with the specifications under the Contract, a fit for purpose product.

89. It is common practice to be provided with information from an employer when undertaking such design and construct components of work. A contractor cannot attempt to take advantage because the employer provided some information assistance, general concept or information drawings of what was required.

90. The drawings were clearly marked "*INFORMATION ONLY NOT FOR CONSTRUCTION*" and were provided only to assist the Applicant.

91. I am satisfied that the Applicant's claim falls.

<u>VQ-054 Supply of Generators - $3,984.40 (excluding GST)</u>

92. The Applicant claims a variation in the Contract for the hire and refuelling costs of a generator to supply temporary power [*redacted*] to complete its Works under the Contract.

93. The Respondent says that there is no variation for the generator supply as this was the Applicant's responsibility under the Contract and within its scope of the Works.

94. I agree with the Respondent on this point.

95. The Contract at Part H, clause 2.3 Schedule of Rates first paragraph states:

"…All rates shall be inclusive of all direct and indirect costs associated with the supply and/or installation of materials and fabricated items on Site including profit, overheads, on-costs, supervision, supply, fabrication, surface treatment, delivery, unloading, handling, storage, ***construction equipment*** [emphasis added]*, labour and touch-up…..".*

96. The rates in the Contract contain a sum for the provision and use of all construction equipment, which would include hand tools, welding machines and generators etc for the proper construction and delivery of the Works under the Contract.

97. The Applicant would have or should have made an allowance in its rates for this equipment and cannot now attempt to shift that component of risk to the Respondent as a claimed variation to the Contract.

98. I am satisfied that the Applicant's claim falls.

Reconciliation of the Claims

75. The claims of the Application for Adjudication are reconciled at Table 2.

Claims of the Adjudication			
Item	**Applicant**	**Respondent**	**Determined**
Claim 1 - VQ-084 Cost of Spotters	$372,843.00	$0.00	$256,742.50
Claim 2 - VQ-041 [*redacted*]	$9,558.40	$0.00	$0.00
Claim 3 VQ-054 - Supply Generators	$3,984.40	$0.00	$0.00
TOTAL	**$386,385.80**	**$0.00**	**$256,742.50**

Table 2.

76. The adjudicated February Claim reconciles to a payment to the Applicant of $256,742.50 (excluding GST).

Interest on the claims

77. In reconciling the February Claim and the February Certificate with the Claims of the Adjudication, the amount the Respondent is to pay the Applicant is $256,742.50 (excluding GST).

78. There are no written contract terms in relation to interest in the Contract and therefore the implied provisions of the Act are implied and form the contract terms applicable to the amount of interest to be paid to the Applicant. Interest on overdue payments is set out in section 7 of the Schedule and states:

> *" …(1) Interest is payable on the part of an amount that is payable under this contract by a party to another party on or before a certain date but which is unpaid after that date.*
>
> *(2) The interest must be paid for the period beginning on the day after the date on which the amount is due and ending on and including the date on which the amount payable is paid.*
>
> *(3) The rate of interest at any time is equal to that prescribed by the Regulations for that time….".*

79. The rate of interest prescribed by regulation 9 of the Regulations is:

> *"….the interest rate is the rate fixed from time to time for section 85 of the Supreme Court Act...".*

80. The Supreme Court Act refers to the Rules. The Supreme Court Rules follow Rule 39.06 of the Federal Court Rules and provides that the interest rate is to be the rate that is 6% above the cash rate set just before the 6 month period being considered. The Reserve Bank cash rate is currently 2.0%, therefore the interest rate applicable to this contract is 8.0% per annum. The parties agree that this is the applicable interest rate.

81. 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 interest amount awarded in a determination under Goods and Services Tax Determination 2003/01.

82. I award interest of **$6,341.40** on the sum of **$256,742.50 (excluding GST)** from 29 March 2016, the date of due payment, to 20 July 2016, the date of determination, pursuant to section 35 of the Act. The payment of GST is only applicable on the sum of **$256,742.50 (excluding GST)**.

Summary

83. 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;

(e) Claim 1 - VQ-084 - Variation for the addition of Spotters to stand in the sum of $256,742.50 (excluding GST);

(f) Claim 2 - VQ-041 - Variation for [*redacted*] Modifications to fall;

(g) Claim 3 - VQ-054 – Supply of generators to fall; and

(a) Interest on the unpaid sum of $6,341.40 (excluding GST).

84. Reconciling the February Claim and February Certificate against the material findings, I determine that the amount to be paid by the Respondent to the Applicant in relation to the February Claim is **$263,083.90 (excluding GST)**.

85. This sum is to be paid to the Applicant by the Respondent on or before **10 August 2016**.

Costs

86. 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.

87. 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...".*

88. I have not found either the Application or the Response without merit and I do not consider the Applicant's conduct in bringing the Application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.

89. The test for determining whether a proceeding is vexatious can is set out by Roden J in *Attorney General v Wentworth* (1988) 14 NSWLR 481 at 491 where:

> *"1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.*
>
> *2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*
>
> *3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless."*

90. I have not found either the Applicant or the Respondent to have made any unfounded submissions or caused additional costs due to vexatious or frivolous conduct and I am not persuaded that either party has acted in a way that requires me to apply the provisions of s.36(2) of the Act.

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

92. 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

93. The following information is confidential:

(a) the identity of the parties;

(b) the identity of the principal; and

(c) the location of the works.

DATED: 20 July 2016

Rod Perkins
Adjudicator No. 26