Determination 26.14.02

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 20 December 2013 I was appointed adjudicator to determine a payment dispute between the Applicant and the Respondent by the Master Builders Northern Territory (**"MBANT"**) as prescribed Appointer under the Act.

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 a 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 dated 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] solicitors 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 have not 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 of the PC10 Application 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:

Variation Number 1

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.*

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

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 **PC10** Application.

Introduction

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

17. The Applicant claims it is entitled to be paid its claims in Payment Claim No. 10 in the sum of $715,905.23 (including GST) for the additional costs it has incurred in the contract. The Applicant's claim comprises the following components:

Part A

(a) Contract Works claim – Item 2.01(C) demobilisation costs - $427,748.10 (including GST);

Part B

(b) Variation 11 – delay time associated with lay-down areas - $33,139.70 (including GST);

(c) Variation 17 – delay time for damaged [materials] - $44,286.00 (including GST);

(d) Variation 18 – revised variation 18 (initially extension of time ("EOT") Days, ongoings in Progress Claim 9 (at tab 11 of the Application) now renamed and claimed as additional [materials] - $1,145.10 (including GST);

(e) Variation 20 – additional costs for fire break at lay-down area - $957.00 (including GST);

(f) Variation 21 – delay time for unavailability of NATA approved concrete testing personnel - $17,215.00 (including GST); and

Retention Return – hereinafter referred to as Part C

(g) Contract Retention – return of one half of the $382,828.66 retention under the contract - $191,414.33 (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 PC10 Application is dated 23 December 2013 and comprises two volumes enclosing a general submission tabulated 1 through to 27 and a variation submission tabulated V1 and V2 and V4 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 Applicant's Progress Claim 10 was submitted to the Respondent on 25 November 2013 for the sum of $3,393,983.24 including GST which sum included from Progress Claim 9:

        (i) repeat claims in the sum of $1,844,116.00;

        (ii) a revised down EOT claim in the sum of $466,141.36 from $641,516.25; and

        (iii) a deleted claim in the sum of $24,000.00.

22. The Payment Claim in the PC10 Application is only for $715,905.23 (including GST) of the $3,393,983.24 claimed in the progress claim.

23. The Respondent rejected the Applicant's Progress Claim 10 in its entirety by letter dated 29 November 2013 at Tab 2 of the Response.

24. The Application was served on 6 January 2014.

The Response

25. The Response is dated 17 January 2014 and comprises a general submission and 2 attachments. The attachments are:

    (a) a print copy of *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor (2011) 29 NTLR 1*; and

    (b) the Respondent's letter of 29 November 2013 rejecting the Applicant's Progress Claim 10.

26. The Response was served on 17 January 2014.

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 a site [site details omitted]. 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 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 of*

[project works]" ("Geotech Report") prepared for the Principal in March 2012.

30. 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 PC10 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.

31. 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.

32. 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 PC10 Application. The document is referred to as a "Schedule" by the Respondent [51], which in the normal context would be analogous to schedules contained in the Australian Standard form contracts (AS2124 and AS4000 for example). However, the document at Tab 3 of the PC10 Application is much more than a simple schedule that summarises the general requirements of the terms of the contract. It is an executed document that clearly sets out the intentions of the signatory parties to the contract. It defines the terms and the relevant documents of the contract. It also sets out specific terms of the agreement between the parties for the purposes of commencement, completion, liquidated damages, retention, claims and payment. The document at Tab 3 of the PC10 Application would be more accurately described as a 'Form of Agreement' overarching the other contract documents and is consistent with the intention of the Applicant and the Respondent at the time they entered into the contract.

33. Attendance to the 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"*

It is clear from the relevant documents listing that the Geotech Report was incorporated into the contract by agreement between the parties.

34. Even though Preliminary Clause 4.2 of the Tender RFT T12-1467 that also forms part of the contract, attempts to exclude the Geotech Report, 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.

35. 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.

36. 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 generally by the NPWC Edition 3 (1981) General Conditions of Contract as amended by RFT T12-1467 by its incorporation into the contract.

37. 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.

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

39. Section 6 of the Act – **Construction Work** – the work is to erect and build [works details and project 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.

40. 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.*

41. 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 #10 – November 2013"

The progress claim is covered by a Tax Invoice number 8875 ("Tax Invoice 8875") and is dated and signed on 25 November 2013.

42. Amended GC 42.1 sets out the payment claim provisions of the contract as:

> *"The Contractor shall submit to the Superintendent a Tax Invoice every month showing the Contract value of the work carried out in performance of the Contract and incorporated in the Works."*

43. The Applicant submits that the claim it has made is a valid payment claim made by the Contractor to the Principal under the contract. Attendance to Progress Claim 10 shows that the Applicant has fulfilled this requirement and has attached a schedule that shows the components of its claim.

44. Amended GC 42.1 also states:

> *"The Contractors Tax Invoice shall include details of any Adjustments under the clause titled "Goods and Services Tax" of the Special Conditions of Contract and an explanation as to how such Adjustments were calculated"*

Special Condition ("SC") 3.23 defines "Adjustment" to mean:

> *"…each form of adjustment to consideration provided for in this clause. The parties acknowledge that the consideration under this Contract is inclusive of GST, where GST is calculated using the GST at the time of forming this Contract. The Contractor shall provide the Recipient with a Tax Invoice and/or adjustment notes in relation to the supply prior to an amount being paid by the Recipient under this Contract, and shall do all things reasonably necessary to assist the Recipient to enable it to claim and obtain any Input Tax Credit available to it in respect of a Supply."*

45. Attendance to Progress Claim 10 shows that GST is included on Tax Invoice 8875 according to the requirements of the *New Tax System (Goods and Services Tax) Act 1999*.

Contractual validity of a payment claim under the contract

46. The Respondent does not agree with the Applicant and submits at [11] through to [65] of its Response that the Applicant's payment claim is an invalid payment claim because "*PC10*", referring to the Applicant's Progress Claim 10:

> *"a. ….was required to be provided by the 15th November* (2013 year added) *and it was not;* [29]
>
> *b. ….was not a claim that could in any way be remotely described as "correct and in order for payment" for the purposes of clause 42.1 (as amended) of the Subcontract;* [44] *and*
>
> *c. ….was not a complying "payment claim" for the purposes of the Act, the time for payment did not run, no debt was due and payable....*[65]*"*

47. The Respondent's primary position is that the Applicant's Progress Claim 10 or payment claim under Amended GC 42.1 of the contract was invalidated when it delivered its claim on 25 November 2013 rather than by 15 November 2013 as required by the contract. It is clear that the Respondent relies on the Form of Agreement for this date of 15 November 2013.

48. The Respondent also says that the payment claim does not comply with the Amended GC 42.1 as it did not fulfil the administrative requirements and therefore the time and due payment did not arise in the claim.

49. 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 the claim is invalid under the contract. I do not agree with the Respondent on this point.

50. Attendance to the payment claims at Tab 11 of the Application shows that the Respondent departed from the contractual requirement to have the Applicant provide its payment claim by 15th of each month. The table at [14] of the PC10 Application sets out the dates previous payment claims were submitted and the Respondent accepted those claims for assessment and payment and has done so throughout the contract.

51. It appears, however, that the Respondent did not provide any progress/payment certificates for the previous claims submitted by the Applicant. The amended GC 42.1 says that:

> *"Principal shall issue a progress certificate and make payments within thirty (30) days of receipt of claims that are correct and in order for payment."*

Neither party has provided these certificates as evidence of the payment claim assessments process having been followed under the contract. 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 throughout the contract period and invited the Applicant to do the same.

52. In establishing the Applicant's failure to comply with the *"correct and in order for payment"* administrative requirements of Amended GC 42.1, the Respondent concedes and agrees with the Applicant that:

> *"(a) "the Principal" and "Superintendent" should be treated as references to [the Respondent];*
>
> *(b) the "Contract" should be treated as references to the Subcontract; and*
>
> *(c) the "Contractor should be treated as reference to [the Applicant]."*

Turning to the Amended GC 42.1.

53. First - the Respondent says that the Applicant did not provide the material required by Amended GC 42.1. In forming its position the Respondent relies on the rejection letter sent by the Respondent to the Applicant on 29 November 2013 (Tab 2 of the Response). The Respondent submits that:

> *"The Application was premature and made in circumstances were* (sic) *[the Applicant] had failed to perfect PC10 by provision of the material both required under clause 42.1 and requested by [the Respondent] in the correspondence at Tab 2."*

54. The Respondent does not particularise exactly what it wants from the Applicant by way of "*full details of claim*", however it is fair to say that a competent contractor would have a good understanding of what was necessary when it made its claim. A lack of evidence does not invalidate the making of a claim under the contract and the additional information was not requested by the Respondent until after the Applicant had made its claim. The only thing to consider at this point is whether or not the Applicant followed the administrative process in the contract for making a claim. Attendance to the Applicant's documents shows that it has provided a Tax Invoice 8875 and a schedule showing the various elements of claim as required by Amended GC 42.1. This form of claim was consistent throughout the earlier nine (9) Progress

Claims (payment claims) made by the Applicant in the contract and those claims were assessed and paid by the Respondent.

55. Second – the Respondent submits that the language in the document it calls a "Schedule", but can more accurately be described as a Form of Agreement, is inconsistent with the language and intent of Amended GC 42.1. In forming this view, the Respondent cites and relies on the High Court of Australia ("HCA") in *Fitzgerald v Masters [1956] HCA 53; (1956) 95 CLR 420 (11 September 1956)*. In summary, the Respondent says that where the High Court, per Dixon CJ and Fullagar J at 426 to 427, held that:

> *"…the parties' intention that the usual conditions be incorporated to the extent they were "consistent' with the contract there concerned. In short, the word "inconsistent' should be read as "consistent" so as to give effect to the parties' contractual intention and so as to avoid absurdity…"*

therefore the proper construction of Amended GC 42.1 given that:

> *"(a) clause 42.1 provides for thirty (30) days for [the Respondent] to "Issue a progress certificate and make payment"; and*
>
> *(b) the Schedule requires payment within fourteen (14) days."*

is that the Respondent has sixteen (16) days to issue a progress certificate and then another fourteen (14) days in which to make payment of the amount approved in that certificate.

56. I do not agree with this interpretation. While *Fitzgerald v Masters* was primarily an appellant case for abandonment of contract, the Court's reasoning in that case related to the terms of a contract signed in 1927 for the sale of private land and whether or not those terms were suitable for the sale of Crown land or an interest therein under the *Crown Lands Act*. The Appellant's main argument was based on cl.8 that the "*the terms were so uncertain that the "sale' could not be enforced*".

57. The HCA reasoned that cl.8 could be severable so as to give effect to the contract because the parties had intended to contract for the sale and no term should be given the ability to nullify a contract after the parties have agreed on everything essential. This resulted in the Court's reasoning for reading the words of a term as "*consistent*" when the words were "*inconsistent*" so as to give legal effect to the parties' intention to contract.

58. That is not the circumstance in the contract between the Applicant and the Respondent. A careful reading of the Form of Agreement says:

> *"Claims by 15th of each month Retention amount 10% Payment within 14 days."*

59. The intention is clear between the parties in this instance and I am of the view that the Respondent was to have assessed, provided a progress certificate and paid the Applicant's claim within fourteen (14) days.

60. Third – the Respondent submits that:

> *"…in his decision in Northern Territory of Australia v Urban and Rural Contracting Pty Ltd & Anor (2012) 31 NTLR 139, Barr J Relevantly opines:*

> *"The existence of a payment dispute is the foundation of the adjudicator's jurisdiction. In my view it is a jurisdictional fact such that, in the absence [of] a payment dispute, the adjudicator did not have jurisdiction. The adjudicator determined the merits of the application for adjudication when he did not have jurisdiction.*
>
> *Given that the Application involves both claim in respect of PC10 and the Retention Fund Claims, it is necessary to consider these broad categories of claims in turn, so as to ascertain whether any amounts were "due to be paid" under the Subcontract, as at the date of the Application."*

61. The absence of a payment dispute in *Northern Territory of Australia v Urban and Rural Contracting Pty Ltd* came about not as a result of an amount "*due to be paid*" under the contract, but rather the Northern Territory of Australia testing and overturning of the then held interpretation of s8 on the Act. In that matter the Adjudicator reasoned he had jurisdiction under the authorities of *A.J. Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd & Anor (2009) 25 NTLR 14* and *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor (2011) 29 NTLR* where a payment dispute arose under s8 of the Act as soon as a payment claim was rejected. In *Northern Territory of Australia v Urban and Rural Contracting Pty Ltd*, however, Justice Barr held that s8 of the Act read that, despite a rejection of a claim might be made on day 2 of a 30 day payment cycle under a contract, the parties would then have to 'mark time' for the remaining 28 days until payment was not made in whole or part before the payment dispute arose. The Northern Territory of Australia was successful and this is the current authority for interpreting s8 of the Act.

62. A payment dispute arises when an amount to be paid under the contract has not been paid or has only been part paid, and not when one of the parties to the contract determines the entitlement to be paid a claim. To support the Respondent's view would be to deny any contractor the right to make a payment claim. This is a view I neither share nor support. For there to be a payment dispute, a claim must be validly made; that is, following the process for making a claim under the provisions of the contract and where that claim has not been paid or only part paid by the due date for payment.

63. Prior to the decision in *Northern Territory of Australia v Urban and Rural Contracting Pty Ltd,* the Respondent's letter of 29 November 2013 would have commenced the payment dispute on that date. Following that decision the parties had to 'mark time' until 9 December 2013 at which time the payment dispute arose under s8 of the Act.

64. I am satisfied that the Progress Claim 10 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.

65. 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.

66. The Applicant made a valid payment claim titled Progress Claim 10 on 25 November 2013. The Respondent subsequently rejected that claim in its entirety on 29 November 2013. Progress Claim 10 was to be paid under the contract provisions by 9 December 2013.

67. As I have reasoned in paragraphs 60 to 63 of this determination, the contract payment requirement of s8 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 determined:

> *"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."*

68. In this matter a payment dispute arose between the Respondent and the Applicant on 9 December 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.

69. Section 28 of the Act – **Applying for Adjudication** – by reference to the Applicant's documents of the Application dated 23 December 2013, served on the Respondent and the Prescribed Appointer MBANT on 6 January 2013. 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.

70. Section 29 of the Act – **Responding to Application for Adjudication** – by reference to the Respondent's documents in the Response dated 17 January 2014, served on the Applicant and the Adjudicator on 17 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.

71. 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

72. The claims made by the Applicant in its PC10 Application are works, variational and retention return claims as follows:

Part A

(a) Contract Works claim – Item 2.01(C) demobilisation costs - $427,748.10 (including GST);

Part B

(b) Variation 11 – delay time associated with lay-down areas - $33,139.70 (including GST);

(c) Variation 17 – delay time for damaged [materials] - $44,286.00 (including GST);

(d) Variation 18 – revised variation 18 (initially EOT Days, Ongoings in Progress Claim 9 at tab 11 of the Application) now renamed and claimed as additional [materials] - $1,145.10 (including GST);

(e) Variation 20 – additional costs for fire break at lay-down area - $957.00 (including GST);

(f) Variation 21 – delay time for unavailability of NATA approved concrete testing personnel - $17,215.00 (including GST); and

Retention Return – hereinafter referred to as Part C

(g) Contract Retention – return of one half of the $382,828.66 retention under the contract - $191,414.33 (including GST).

73. 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.

74. The Respondent has no counter claims in its Response.

The assessment of construction contract claims generally

75. When reading the PC10 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.

76. 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.

77. 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.

78. 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.

79. 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.

80. 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 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. The contract is readily available for re-measure of the actual quantity of work done by the Contractor.

PART A

Contract Works claim – Item2.01(C) Demobilisation $427,748.10 (including GST)

81. The Applicant claims circa 70% of its demobilisation entitlement in the contract for suspension of the works and demobilisation from site on or about 24 October 2013 at [13] of the PC10 Application. The Applicant states that the Respondent agreed to the suspension on 8 November 2013.

82. In its PC10 Application the Applicant argues at [63] an increase in quantities of the works that are over the 15% threshold for re-measure of the bill of quantities of the works. Attendance to the Applicant's Progress Claim 9 shows that these claims have already been made by the Applicant and subsequently paid by the Respondent in Progress Claim 9. The quantities and values are repeated in the Applicant's Progress Claim 10 as what is normally part of the cumulative recording of the quantity of work completed under a bill of quantities. The claim made by the Applicant in Progress Claim 10 was for demobilisation at item 2.01(C) in the sum of $630,000.00. Of that sum the Applicant has claimed circa 63% or $427,748.10 in its PC10 Application. I found the Application unhelpful when determining this claim.

83. In its Response the Respondent similarly addresses the claims as set out in [63] of the PC10 Application and states: "*As to the claims in PC10 under the SOR generally, it is unclear from PC10 what work these claims are said to relate and the quantum of them*". While I agree with the Respondent to some degree, a careful reading of the schedule Part A and a simple calculation shows that the quantum claimed is $630,000.00 for demobilisation. I also found the Response unhelpful in determining this claim.

84. At Tab 9 of the PC10 Application, the Applicant notified the Respondent of its *"…intention to cease work and demobilise.*"

85. The Applicant then submits at [13] that "*The said suspension was agreed to by [the Respondent] by email dated 8 November 2013…*". Attendance to that email at Tab 10 of the PC10 Application shows it is, in fact, a notice from the Respondent advising that a meeting had taken place with their client the Principal and that the Principal had offered the Respondent a variation to their contract "*…to exclude the unfinished work on or around the 20th December and give practical completion.*" It is unclear from the remaining evidence in the PC10 Application and the Response as to whether or not the Respondent agreed to the variation proposed by the Principal or if that offer was extended to the Applicant.

86. In any event, the email at Tab 10 of the PC10 Application in is not an acceptance by the Respondent of the suspension of the works and demobilisation by the Applicant, nor could it be construed to mean that. It is an offer only to the Respondent and not to the Applicant.

87. The Applicant ceased work and demobilised from the works of its own volition and in dealing with the Part C Retention claim at [71] the Respondent states:

> *"It would appear from the documents relied upon by [the Applicant] and cited in paragraph 13, that [the Applicant's] argument is predicated upon a suspension of the work by it, under clause 34.3. There is certainly no evidence advanced by [the Applicant] capable of satisfying the Adjudicator that the suspension was at [the Respondent's] direction."*

88. I concur with the Respondent's analysis of the Applicant's suspension and demobilisation and, as such, the demobilisation claim must fail in its entirety for lack of evidence.

89. On balance, I am satisfied that the Applicant's demobilisation claim fails for lack of evidence.

PART C

Retention Return – One half retention $191,414.33

90. The Applicant claims it is entitled to the return of one half of the retention monies held in the contract by the Respondent in the sum of $191,414.33. The basis of the Applicant's argument is that, because the Respondent accepted the Applicant's suspension and demobilisation from the works, *"…[the Respondent] has "taken over" the works within the meaning contained in the Subcontract, and as such one half of the retention sum is due to be released.*" [19]. I do not share the Applicant's view and, for the reasons in this determination at paragraphs 84 to 88 above, the Applicant's claim must fail for lack of evidence. The Applicant has ceased work and demobilised without direction from the Respondent. In its Response at [77] and [78] the Respondent states:

> *"The long and short of the foregoing is that the Suspension notice could not result in any valid suspension of the works and [the Applicant], in demobilising from the site was in breach of its obligations under the Subcontract.*
>
> *The Adjudicator may be asking himself at this juncture* ***"What has any of this to do with the Retention Funds Claim?****"*

91. I concur with the Respondent. There is no valid evidence that the Respondent "*took over*" the works and one may wonder why, in the circumstances, the Respondent had not notified the Applicant of its breach of contract. In any event, retention, rather than a convertible instrument, is held by the Respondent as security for the Applicant's completion of the work under the contract. The Applicant has stopped work and demobilised from site and no entitlement could arise over the return of any security in such circumstances.

92. On balance, I am satisfied that the Applicant's retention return claim fails for lack of evidence.

PART B

Variation 11 – Lay down area delay - $33,139.70 (including GST)

93. The Applicant claims 2 days delay costs for the delay in the issue of the Northern Land Council "NLC" permit. The delay resulted in continual changes and relocations of the lay-down area until around August 2013 (Tab 20 of the PC10 Application). The Applicant's claim has arisen as a result of relocating to the 4600004257 – [site details omotted] – Lay down Area. The price the Applicant gave the Respondent for its claim on 30 August 2013 was $18,760.00 plus GST and two (2) days EOT (Tab 20 of the PC10 Application).

94. The Applicant now claims $33,139.70, including GST, and two (2) days EOT for the claim.

95. When dealing with time related claims, it is well established that an Arbitrator or Adjudicator may step into the shoes of the Contract Administrator or Superintendent 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.

96. The Respondent submits that the Applicant has failed to show how the delay in moving the lay down area has caused a delay to the critical path of the Project. At [114 (c)] the Respondent states:

> *"[the Applicant] advances no evidence that the Construction Program will be delayed by the events about which it complains, by a two (2) day period or at all…"*

97. In this instance, it is unnecessary to prove the critical path, as it will be extended by necessity alone. If the Applicant relocated its lay down area (a task it had not planned into the Construction Program Gantt Chart), and during that move used its equipment, particularly its 100 tonne crane, usually available for the works under contract, then the critical path must be delayed by the time taken to finalise the relocation. In the event that there is a float in the Construction Program and the Respondent wishes to avail itself of that float, it would be at a cost of two (2) days of liquidated damages. The Respondent did not advance this position, so I can only conclude that the critical path has been delayed by two (2) days and that has been indicated and fully evidenced to the Respondent by the Applicant at Tab 20 of the PC10 Application and provided contemporaneously with the works.

98. The Respondent cannot say it did not know about the claim as it also advanced a claim to the Principal, and then sought a breakdown of the Applicant's claim to satisfy the Principal's request for further particulars. This much can be seen from the evidence and the Applicant's claim stands for two (2) days EOT, but is conditional on the quantum.

99. As to the quantum of the Applicant's claim, the Applicant advanced the claim sum of $20,636.00, including GST, on 30 August 2013 and then amended and increased its claim in the PC10 Application to $33,139.70 including GST without any additional evidence of the claim to support the increased amount claimed.

100. I am satisfied that I may stand in the shoes of the Respondent to extend time to complete the contract for 2 additional days with the costs originally claimed by the Applicant on 30 August 2013. I am also satisfied that the cost of this time is **$20,636.00, including GST**, and I award this claim to the Applicant.

Variation 17 – Delay damaged [materials] - $44,286.00 (including GST)

101. The Applicant claims five (5) days of delay and costs in the sum of $44,286.00 for damage to [materials due to site conditions]. The Applicant has calculated the cost per day to be $8,857.20 and a breakdown is provided at [133] of the PC10 Application. The total calculated in the table at [133] is indicated as $15,063.50 which is incorrect and should read $8,8052.00, excluding GST ($8,857.20 including GST).

102. The Respondent submits that the claim fails because the Geotech Report cannot be relied upon as part of the contract and that in any event, the Applicant has not provided any evidence to support its claim. The Respondent says at [122]:

> *"….there is no evidence in the Application that the clauses of the Subcontract dealing with delay and EoT's have been complied with, nor is there any evidence that these events led to any delay in the Construction programme as alleged, or at all."*

103. Turning to Tab 23 of the PC10 Application, the Applicant provides an email, which is duplicated at Tab V17 of the PC10 Application, and which is a notice to claim an EOT of one (1) day and costs of $8,857.20 per [item of material]. The Applicant advances no further evidence.

104. The Applicant's variation 1 at Tab V1 of the PC10 Application has been approved for: *"All costs involved in [work and site details omitted]…".* The Applicant's variation at Tab V12 of the PC10 Application claims

costs, delays and ongoing costs associated with [the conditions experienced at the project site]

105. Absent any additional evidence that the Applicant incurred the delays and costs of its variation 17 claim, other than a self-serving email, I concur with the Respondent at [122] and this claim must fail for lack of evidence. In any event, I am of the view that the delay and costs associated with the [site conditions] and [materials] has already been captured in variation 1 and variation 12 and that this variation 17 is a duplicated claim in another form.

106. On balance, I am satisfied that the Applicant's claim fails for lack of evidence.

Variation 18 – Delay damaged [materials] - $44,286.00 (including GST)

107. The Applicant claims $1,145.10 including GST for additional [materials] brought about by an amended drawing received on 27 March 2013. In particular, the Applicant says that drawing R12-1723 at [139] and *provided at Tab 24 of the PC10 Application shows added detail to all* hold down bolts, 24mm and 36mm. The Applicant states that "*Additional costs were incurred based on the revised drawings.*"

108. The Respondent submits that the Applicant has provided no evidence that the amended drawings required something other than what was provided for in the initial scope of works and therefore the claim must fail.

109. The drawings provided at Tab 24 of the PC10 Application do not contain an amended drawing R12-1723 as indicated at [139]. The email at Tab V18 then identifies the amended drawings as R12-1711 and R12-1726 and neither drawing is provided in the Tab 24 drawings.

110. Attendance to the drawings at Tab 4 of the PC10 Application shows drawing R12-1711 as the hold down bolt detail and R12-1726 as the deck concrete details. Both drawings, in their amended form of 27 March 2013, have not been provided in the PC10 Application documents.

111. I concur with the Respondent in this claim, that the Applicant has not provided any credible evidence in support of their variation.

112. On balance, I am satisfied that the Applicant's claim fails for lack of evidence.

Variation 20 – Fire break - $957.00 (including GST)

113. The Applicant claims costs of $957.00 including GST to create a firebreak on 30 September 2013 around its lay down area. The Applicant also states that it received a verbal direction from the Respondent to build the firebreak. The Applicant relies on an email sent to the Respondent on 19 October 2013 giving notice of its intention to claim an EOT of one half day and costs of $957, including GST.

114. The Respondent says that it gave no such verbal direction and that the Applicant undertook the work of its own volition.

115. A careful reading of the Applicant's email of 19 October 2013 shows that it used an excavator to build the fire break to protect its own crib room, timber storage area and fuel storage. These costs are captured in item 2.01 Establishment under sub-section (A) Mobilisation and a competent contractor familiar with remote works such as these would have made an adequate allowance in that item for such costs and any ongoing costs associated with the safety and fire protection of its personnel and plant and equipment.

116. I am of the view that this claim lacks merit and is not evidenced other than by a self-serving email sent by the Applicant to the Respondent.

117. On balance, I am satisfied that the Applicant's claim fails for lack of evidence.

Variation 21 – NATA Tester - $17,215.00 (including GST)

118. The Applicant claims one (1) day delay and costs of $17,215.00 including GST for lack of availability of a NATA concrete tester for the [work details omitted]. The Applicant states that it required a tester on the 20 September 2013 and none was available.

119. The Respondent submits that, while the EOT provisions were complied with on this occasion, the Applicant's claim must fail for lack of evidence.

120. Turning to the evidence provided by the Applicant at Tab V21 there is an email notifying the Respondent of their intention to claim one (1) day and costs of $15,650.00, excluding GST ($17,215.00, including GST). There is also an email from Highway Quality Assurance, presumably the Principal's contractor for testing and certification, showing that the tester missed his flight from Brisbane. I am of the view that the Applicant has preliminary grounds for this claim, however the Applicant has not fully evidenced the claim in the PC10 Application and the claim has been made prematurely and without the relevant evidence that would make out the claim.

121. On balance, I am satisfied that the Applicant's claim fails for the lack of relevant evidence to support the claim.

Interest on the claims

122. In reconciling the claims, the amount the Respondent is to pay the Applicant is **$20,636.00 (including GST)**.

123. The interest rate payable under GC 42.1 amended by AmdGC 2.15 is 2.8% PA as set out in the PC10 Application at [162].

124. 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*.

125. I award interest of **$106.06** on the sum payable, excluding GST, from 9 December 2013, the date of due payment, to 14 February 2014, the date of determination, pursuant to section 35 of the Act.

Summary

126. 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 Part A demobilisation claim to fail;

(g) the Part C retention return claim to fail;

(h) Variation 11 to stand in the sum of **$20,636.00, including GST**;

(i) Variation 17 to fail;

(j) Variation 18 to fail;

(k) Variation 20 to fail;

(l) Variation 21 to fail; and

(m) Interest awarded in the sum of **$106.06**.

127. Accordingly, I determine that the amount to be paid by the Respondent, the Respondent, to the Applicant, the Applicant, is **$20,742.06 (including Interest and GST)**.

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

Costs

129. I have not found either the PC10 Application or the Response to be without merit and I do not consider the Applicant's conduct in bringing the PC10 Application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.

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

Confidential Information

131. 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: 14 February 2014

Rod Perkins
Adjudicator No. 26