

IN THE MATTER of an Adjudication  
pursuant to the Construction Contracts  
(Security of Payments) Act 2004 (NT) ("**The Act**")

BETWEEN:

[redacted] ("**Applicant**")

and

[redacted] ("**Respondent**")

### **REASONS FOR DECISION**

1. On 13 March 2019 I was appointed Adjudicator to determine a payment dispute between the Applicant and the Respondent by the Master Builders Northern Territory (**MBNT**) as a Prescribed Appointer under r.5 of the *Construction Contracts (Security of Payments) Regulations 2005 (Regulations)*. I collected the Letter of Appointment and the Application documents from the MBNT offices on 14 March 2018.
2. On 19 March 2019 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I sought submissions until 3:00pm CST on Friday, 22 March 2019, should either party object to the appointment. There were no objections to my appointment.
3. In my letter of 19 March 2019 I confirmed that the Application contained a Statutory Declaration by the Applicant dated 12 March 2019 declaring service of the Application on the Respondent at their offices that same day 12 March 2019. I confirmed that on the basis of service of the Application on 12 March 2019, which is the date the Application was made, by my calculation the Response would be due on or before 26 March 2019. I requested that the parties let me know immediately if that was not the case.

4. In my letter of 19 March 2019 I also confirmed that I would accept service of the Response by email with any attachment documents to be made available through a drop box accessible by all parties to the adjudication and that service by electronic means would comply with ss.8 and 9 of the *Electronic Transactions (Northern Territory) Act 2000*. I requested the parties confirm in writing their acceptance or otherwise of the electronic service process by 3:00pm CST on Friday, 22 March 2019.
5. On 22 March 2019 both the Applicant and the Respondent sent me an email advising that they had no objections to my appointment as Adjudicator and confirmed acceptance of service of the Response and document attachments by electronic means.
6. On 25 March 2019 and within time the Respondent served the Response, including the attachments via a drop box which was accessible by all parties to the Adjudication.
7. On 27 March 2019 the Applicant provided further and unsolicited submissions comprising an updated version of "APPENDIX 16" of the Application. The Applicant advised that the update was based on the comments in the Response and corrected errors in the initial version contained in the Application.
8. On 29 March 2019 the Respondent objected to the Applicant's further submissions claiming that the further submissions:
  - (i) contained new material in response to the Respondent's Response to the Application;
  - (ii) the material would cause prejudice to the Respondent; and
  - (iii) the information contained in the additional material was incorrect and contained mathematical errors.
9. On 4 April 2019 I wrote to the parties requesting further submissions under s.34(2) of the Act on some questions that I had in relation the further and

unsolicited submissions provided by the Applicant on 29 March 2019 and some questions that I had in relation to the Application and Response as follows:

*“.....I confirm receipt of the Response documents on 25 March 2019 and within time under s.29 of the Construction Contracts (Security of Payments) Act 2004 (the Act).*

*Having read the documents of the Application and the Response, there are several questions on which I would invite the parties to make further submissions under s.34(2) of the Act.*

*1. On 27 March 2019 the Applicant made further, unsolicited submissions of another “Appendix 16” to its Application due to an alleged error in the Application. On 29 March 2019 the Respondent objected to the further submissions on several grounds, claiming that the further submissions were new, would cause prejudice to the Respondent and that the Appendix was incorrect due to mathematical error. The issue of further submissions and the requirements for Adjudicators to fully inform themselves of the matter before them was considered by Barr J in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd and Anor [2014]NTSC 20 (Hall Contracting) at 42 and, in particular, His Honour’s conclusions at 42.*

*I invite the Respondent to provide further submissions on the grounds for its objections to the Applicant's further submissions by 3:00pm CST 9 April 2019.*

*I also invite the Applicant to provide further submissions on any new matters raised in the Respondent's further submissions by 3:00pm CST 12 April 2019. Please Note: the Applicant's submissions are to be strictly limited to any new matters raised by the Respondent.*

*2. In its Response the Respondent says, on the one hand, that there are two tax invoices which are two separate payment claims and cannot be adjudicated simultaneously without the prior consent of the parties under s.34(3)(b). The Respondent does not consent. The Respondent then says that the two tax invoices are not payment claims as they fail to comply with the Implied Provisions of s. 19 and the Schedule of the Act, due to the Memorandum of Understanding, relevantly a construction contract (MOU), not containing terms for the making of and the responding to a payment claim.*

*The Applicant has served a detailed Letter of Demand dated 4 March 2019 on the Respondent claiming payment for work done under the MOU by 8 March 2019.*

*It is not clear from either the Applicant or the Respondent whether the tax invoices are valid payment claims or if the letter of demand is a valid payment claim that would cause a payment dispute for adjudication under the Act.*

*I request that the parties provide any further submissions on this issue on or before 5.00pm CST on Tuesday 16 April 2019.*

*In calling for these further submissions, I follow the reasoning of Barr J. in Hall Contracting.*

*In the meantime, I will seek a short extension from the Construction Registrar to consider this new material and will advise the new date by which my determination will be handed down.*

*I thank you for your continued assistance in this matter”.*

10. That same day 4 April 2019 I wrote to the Construction Registrar seeking an extension of time within which to make my determination as follows:

*“Dear Registrar,*

*I refer to the above matter.*

*I have sought further submissions under s.34(2) from the parties in relation to several questions, including objections from the Respondent on unsolicited further submissions from the Applicant. I have given each party a deadline within which to provide me their submissions.*

*The last date for the further submissions is 16 April 2019 and is beyond the current date for the determination of 8 April 2019.*

*I therefore respectfully request an extension of time under s.34(3)(a) up to and inclusive of 30 April 2019 within which to make my determination.*

*Thank you for your consideration of this request and I look forward to your earliest response.”*

11. On 5 April 2019 the Construction Registrar granted the additional time for the determination to 30 April 2019.
12. On 9 April 2019, and within time, the Respondent provided further submissions on the objections raised to the Applicant's further and unsolicited submissions containing an updated version of Appendix 16 to the Application.
13. On 12 April 2019, and within time, the Applicant provided further submissions on any new matters raised by the Respondent's further submissions of 9 April 2019.
14. On 14 April 2019 the Respondent provided further submissions on the two questions I had asked about the Application and the Response. On 15 April 2019 I received an email from [NP], the director of the firm of [redacted] Lawyers, which had attached a signed copy of the Respondent's further submissions. [NP] advised that the Respondent was travelling overseas and had requested a signed copy of the further submissions be provided. I accepted those further submissions.
15. On 16 April 2019, and within time, the Applicant provided further submissions on the two questions I had asked about the Application and the Response.
16. On 18 April 2019 I again wrote to the Applicant and the Respondent as follows:

*“Dear [redacted]*

*I confirm [NP] of [redacted] Lawyers responded on behalf of [the Respondent] but has not confirmed they act for [the Respondent] in the Adjudication. I have addressed this email direct to [NP] and will presume [the Respondent] will be informed of this correspondence.*

*I also confirm receipt of both the Applicant's and the Respondent's further submissions and within time. I will deal with the two issues, on which I sought the further submissions, in my determination. I require no further information or submissions from the parties and the shutters are now closed.*

*On 4 April 2019 I wrote to the Construction Registrar and sought an extension of time under s.34(3)(a) of the Act up to and inclusive of 30 April 2019 within which to make my determination.*

*The Construction Registrar has granted the request with the extended date for my determination now 30 April 2019.*

*I thank you for your continued assistance in this matter.”*

17. On 24 April 2019 [NP] confirmed that my email had been forward to the Respondent and also advised that they did not act for the Respondent in the Adjudication but were engaged to assist the Respondent with the Response and further submissions.
18. There were no objections from the parties to the extension of time for the determination.

### ***Introduction***

19. This Adjudication arises out of a “Memorandum of Collaboration” (**MOU**), relevantly a construction contract entered into between the Applicant and the Respondent where they jointly engaged in providing a rooftop solar power installation for several buildings at [*work site details redacted*] in the Northern Territory of Australia (**Project**). The MOU required the Applicant to provide the technical and engineering expertise for the solar installations and required the Respondent to provide the service delivery of the Project under a contract the Respondent had entered into with [*the principal*] (**Contract**).
20. The MOU holds terms, including recitals of the responsibilities held by each party, such that it is a formal agreement for the “...*complete design, manufacture, supply, installation, commissioning and warranty required to complete the Project...*”.
21. The MOU also sets out the method for the financial remuneration of each party based upon principles where:
  - (i) The Respondent managed the financials for the Project through their business accounting system on a “*cost accrual*” model;

- (ii) All costs would be charged to the Project; and
  - (iii) Final Project Profit (**FPP**) would be reconciled and distributed on the basis of 66.6% to the Respondent and 33.4% to the Applicant.
22. Under the terms the FPP would only become available once all obligations had been performed under the Contract.
23. There are no payment terms in the MOU.
24. The Applicant claims that it is entitled to be paid the sum of \$48,134.21 (including GST) for the procurement of the solar equipment for the Project and the sum of \$11,330.00 (including GST) for project management, engineering and design of the solar installation. A total claim of \$59,464.21 (including GST).
25. The Applicant seeks interest on its claim at the small business rate of 12.0% per annum on the unpaid claim.
26. The Applicant seeks costs of the adjudication to be paid in full by the Respondent due to the punitive and frivolous nature of the dispute.
27. The Respondent submits that the Applicant has made two payment claims which cannot be adjudicated simultaneously without the consent of the Respondent. The Respondent does not consent to adjudicating two payment claims simultaneously.
28. The Respondent also submits that the payment claims are not a valid claim within the meaning of the Act and as such there is no payment dispute to adjudicate. The Respondent says that the first payment claim is out of time and the second payment claim is so vague and uncertain that it is not possible for the Respondent to know precisely what work has been done. The Respondent further submits that the Application has not been prepared and served in accordance with s.28 of the Act.

29. The Respondent also says that there are no payment provisions in the MOU and the implied provisions of the Act apply. The payment claims have failed to comply with the provisions implied into the MOU in that they are not signed.
30. The Respondent submits that the Application should be dismissed with costs.
31. The Respondent seeks costs of the Adjudication be paid in two limbs by the Applicant as costs of the Adjudicator and the Respondent's costs.
32. The Respondent seeks to offset the overpayment of a Tax Invoice 0045 dated 17 September 2018 in the sum of \$9,894.50 (including GST) against any sum payable to the Applicant in the Adjudication.

### ***Procedural Background***

#### The Application

- (iv) The Application is dated 12 March 2019 and comprises a general submission and 16 attachments (APPENDIX 1 to APPENDIX 16) with several exhibits in each attachment. The attachments, *inter alia*, include:
  - (a) a copy of the MOU agreement;
  - (b) a copy of the Applicant's proposal and pricing;
  - (c) a copy of the Applicant's Invoices No. INV-0060 and 14616\_rev 1;
  - (d) a letter of demand dated 4 March 2019; and
  - (e) supporting evidence, including statutory declarations, a spreadsheet report of the claim and email correspondence between the parties relied upon in the general submission.
22. The Applicant's claim was submitted to the Respondent on 3 July 2018.
23. The Application was served on 12 March 2019 pursuant to s.28 of the Act.



### The Response

24. The Response is dated 25 March 2019 and comprises a general submission and 8 attachments (APPENDIX 17 to APPENDIX 24) with exhibits in each attachment. The attachments, inter alia, include:
- (a) a copy of the head contract between the Respondent and [*the principal*];
  - (b) the Applicant's recorded hours for the Project;
  - (c) the Applicant's Invoice record and payments;
  - (d) a spreadsheet reconciliation of the Project costing; and
  - (e) additional supporting evidence, tax invoices and email correspondence between the parties relied upon in the general submission.
25. The Response was served on 25 March 2019 pursuant to s.29 of the Act.

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

26. The following sections of the Act apply to the Contract for the purposes of the Adjudicator's jurisdiction.
27. Section 4 of the Act – **Site in the Territory** – the site is a site at [*redacted*] 0820 in the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of s.4 of the Act.
28. Section 5 of the Act - **Construction Contract** - the MOU agreement is a contract agreement which sets out the agreement made between the Applicant and the Respondent for the delivery of the Project which 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 MOU. I am satisfied that the MOU is a construction contract for the purposes of the Act as prescribed under s.5(1)(a) of the Act.
29. Section 6 of the Act – **Construction Work** – the work is to design, supply and install solar power systems to buildings at the Darwin Airport. 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.

30. 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.”*

31. The Applicant says that it made a valid payment claim on 11 January 2019 which contained two revised tax invoices and clarification of the amounts claimed for the supply of goods and work done on the Project. The Applicant submits that the two tax invoices had been revised following ongoing discussions and meetings between the parties in late 2018.

32. The Applicant submits that on 18 February 2019 further clarification of the payment claim was provided to the Respondent as a “...*formal outline of demand and an offer to settle...*”. I note at this time that the offer to settle was made on a “*without prejudice*” basis , however ongoing negotiations in relation to that offer and counteroffers were in open correspondence between the parties and that correspondence is provided in the adjudication documents by both parties. It is clear that the Applicant and the Respondent waived any rights to confidentiality to the settlement negotiations and have sought to have these included and considered in this adjudication.

33. The Applicant says that a meeting with the Respondent took place on 28 February 2019 in which further discussions took place in relation to the payment claim and the settlement of that claim and the draft letter of demand tabled for a response. The Applicant also says that a settlement proposal was provided by the Respondent on 1 March 2019 and that the Applicant rejected that offer on 5 March 2019 and put forward a counteroffer of settlement together with transmittal of the letter of demand dated 4 March 2019.

34. The Respondent submits that the Applicant has made two valid and individual payment claims as two tax invoices for payment of work done on the Project and as such the Adjudicator cannot adjudicate two payment claims simultaneously unless consent is given by the Respondent. The Respondent does not consent to two payment claims being adjudicated simultaneously under s.34(3) of the Act.
35. The Respondent submits that the MOU does not contain a written provision for the making of and responding to a payment claim and absent this provision the implied provisions of s.19 of the Act and the Schedule are implied into the MOU for the making of and responding to a claim for payment. Under the implied provisions the Respondent says that the two tax invoices do not constitute valid payment claims as they do not strictly comply with s.5 of the Schedule in that they are not signed and are vague and non-specific as to the work performed in the Project. The Respondent says that, as a result, the tax invoices are invalid claims and there can be no payment dispute that would cause an adjudication.
36. The Respondent also submits that if the two tax invoices are valid payment claims, relevantly Payment Claim No.1 and Payment Claim No. 2, Payment Claim No. 1 is out of time for adjudication under the 90 days requirement for the bringing of an application under of s.28 of the Act.

#### The validity of a payment claim under the Contract

37. For there to be a valid payment claim to adjudicate, the claim must be made under the stipulations of the construction contract for the claim to comply with the provisions of s.4 of the Act. A construction contract need not be in writing (see s.5(1) of the Act), however the parties to a construction contract are required to be consistent with the agreement they have made or any agreed variation to the contract.
38. The Respondent has argued that the implied provisions of the Schedule are implied into the MOU agreement for the purposes of making and responding to a valid claim for payment for work done in the Project. I am not with the

Respondent on this point as that argument has only been advanced as a last resort in the Response to the Application. Prior to the Applicant making an application for adjudication, invoices were submitted by the Applicant for consideration and payment by the Respondent. That process was followed by both parties for some three months during which the work in the Project was performed and invoiced and payment was made within 21 days on average. The parties, by their conduct, varied the MOU and established a payment process, albeit in an ad-hoc manner, whereby the Applicant's payment claims were dealt with under the MOU.

39. The MOU also contains payment terms at clause 2 where costs are recorded and managed under the Respondent's accounting system using a unique numbering convention and costs are charged to the Project for various services at an agreed rate. Upon completion of the Project, distribution (payment) of the FPP is to occur in accordance with the rules set out in the MOU.
40. While the MOU does not necessarily follow all the conventions one normally encounters in a standard form construction contract, the Objective of the Act (see s.3 of the Act) is to "...*promote security of payments under construction contracts...*" and the Objective of adjudication (see s.26 of the Act) is to "...*determine the dispute fairly and as rapidly, informally and inexpensively as possible...*". In so doing an adjudicator is required to consider the agreement made between parties to a construction contract in a broad sense and not narrowly restrict the terms or their operation by the use of the Act, particularly where the parties have conducted themselves so as to be bound by a certain process that may not necessarily be written into the contract terms.
41. An agreed process followed by the parties to the construction contract, that can be recognised by the documentation of that process, would not allow the Act to step in and invalidate that process.
42. Neither party sought to include the provisions set out in ss.5 and 6 of the Schedule of the Act for the making of and responding to payment claims made under the MOU. I am not convinced by the Respondent's argument that

implied provisions of the Act are now introduced so they might be beneficial to the Respondent and that the prior conduct between the parties to the MOU should be set aside in favour of the implied provisions of the Act. To do so would invalidate and unwind at least eight prior payment claims that have been made, assessed and paid under the MOU by agreement between the parties.

#### Making a payment claim under the Contract

43. The parties to the MOU have followed a process of making a payment claim by way of a tax invoice for work carried out in the Project. That invoice is then assessed and issues discussed by *to* and *fro* email or meetings between the parties and payment is then made when agreement on each particular payment claim is reached. This process has taken twenty-one days on average as set out in the Response table at APPENDIX 18.
44. The Applicant made a payment claim containing two tax invoices on 11 January 2019. One of those tax invoices, number 14616\_rev 1, contained the balance of an earlier tax invoice which was carried forward due to irregularities in the earlier claim. The balance of the earlier invoice was paid by the Respondent on 19 November 2018 as set out in APPENDIX 18 of the Response.
45. The Respondent has argued that this is a repeat claim following the appellant decision of Mildren J, Southward J and Riley J in agreement in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) NTCA 4 at 16 (***Mac-Attack***) which found that the adjudicator had erred in consideration of hire invoices that had claimed the same amount for the same equipment hire as an earlier invoice.
46. That is not the case in this payment claim as the carry-over unpaid sum was not included in the earlier payment and it is clear from the email discussions between the parties in the Application at APPENDIX 6 that further reconciliation of the payment shortfall was necessary such that further and better particulars were required.

47. This process is not a repeat claim process similar to that seen in *Mac-Attack*, but follows a standard construction contract process of a rolling claim that is regularly reconciled against the work done at the time of the claim. The MOU provides for this reconciliation process.
48. In *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 29 NTLR 1 (***K & J Burns***) at 121 to 124 Kelly J dealt with the issue of ‘repeat claims’ and the adjudicator’s jurisdiction, where Her Honour said:

“...[121] As Southwood J made clear, the contract in question in ***AJ Lucas*** (*AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another* (2009) 25 NTLR 14) [my emphasis] 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. 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.*

[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.....”.*

49. The balance of invoice 14616A was reconciled by the Applicant and provided to the Respondent as a reconciled invoice 14616\_rev1 together with invoice 0060 and a reconciliation on 11 January 2019.
50. I am of the view, that together with the reconciliation, these invoices and documentation comprised a payment claim made under the process that was followed by the parties in their performance of the MOU agreement.
51. In reaching this conclusion I rely on the decision of Kelly J in *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited & Ors* [2017] NTSC 1 at 30 which compels an adjudicator to first determine “.....*whether the contractor has made a claim under the contract for payment of an amount in relation to the performance by the contractor of its obligations under the contract...*” and to then look to the terms of the construction contract and ask “....*whether what purports to be a payment claim is capable of giving rise to a liability on the part of the principal to pay.....”*. While the adjudicator’s determination in that case was ultimately set aside on appeal, the above determination of an adjudicator’s obligations when considering a claim for payment remains sound and follows a similar finding in *K & J Burns*.
52. The payment claim is not out of time to be adjudicated and I am satisfied that the Applicant’s payment claim made on 11 January 2019 complies with the stipulations of the construction contract, relevantly the MOU for making a claim for payment for work done in the Project. The parties clearly establish this process in the MOU and the Applicant’s payment claim is therefore a valid payment claim for the purposes of s.4 of the Act.

53. 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.”
54. The Applicant made a valid payment claim on 11 January 2019 in the form of two tax invoices for work that the Applicant says was carried out on the Project under the provision of the construction contract, relevantly the MOU.
55. Unlike a standard construction contract, the MOU is a collaborative agreement between two contractors to provide the construction work to the Principal under a second contract entered into by only one of the contractors, the Respondent. The MOU more relevantly resembles that of a partnership where each party provides work into the Project under the Contract. The MOU requires each party to account for its costs into the Respondent’s accounting system using a unique job number convention. Those costs are then reconciled and paid to each party according to a process agreed under the MOU, including variation by conduct to the MOU. The final profit for the Project is shared between the parties on an agreed percentage basis at the end of the Contract when all services have been provided and all obligations discharged in accordance with the Contract.
56. Following submission of the Applicant’s payment claim on 11 January 2019, the Respondent requested additional information relating to three items as follows:
- “.....
- (i) *Payment of Invoice 60 (being invoice number INV-0060) \$11,330, being the second advance on the project;*



- (ii) *Payment of the difference from the costs of the materials [the Applicant] purchased from the budget inclusion; and*
- (iii) *Final split of a 1/3rd of the profit earned on the project.....”.*

57. When the Applicant failed to respond, the Respondent sent another email on 12 February 2019 which stated: “.....*Further to our meeting on the 11 January, I would appreciate a response to the below (meaning the items in paragraph 56 above) to allow us to move to the next stage of finalising the matter....”.* The Respondent was still assessing the Applicant’s payment claim and clearly required further and better particulars in order to finalise the claim.
58. The Applicant responded by email on 18 February 2019 with detailed information setting out the various issues that needed to be resolved and put forward a proposed settlement option for the payment claim, to the Respondent.
59. A meeting was then called between the parties on 28 February 2019 with the outcome of that meeting set out in an email from the Respondent to the Applicant where the Respondent made an offer of settlement as follows:

*“.....I refer to the meeting held at our offices on 28 February 2019 at 2.30pm, attended by yourself, myself and [KR].*

*Set out below are [the Respondent’s] proposed terms of settlement, which I believe captures our discussions.*

*In full and final settlement of all claims for payment by [the Applicant] against [the Respondent] of any nature whatsoever:*

1. *[The Respondent] will pay to [the Applicant] the sum of AUD \$30,000 by 3 x \$10,000 monthly payments, the first to be paid within 7 days of acceptance, and thereafter at calendar monthly intervals.*

2. *Upon payment in accordance with paragraph 1:*

2.1. *[The Applicant] shall release and discharge [the Respondent] from all claims (of any nature whatsoever) by [the Applicant] pursuant to the Memorandum of Collaboration dated*

1 October 2018 (**MOC**), or relating in any way to the Project or the Contract referred to therein; and

2.2. [The Respondent] shall release and discharge [the Applicant] from all claims relating to the pricing of the Project and the budget for the Project prepared by [the Applicant], and any representations made by [the Applicant] in relation to such matters.

3. For the avoidance of doubt, these terms shall in no way operate to release or discharge [the Applicant] from liability to [the Respondent] in respect of any claims:

i. 3.1. In the nature of warranty or defect claims in relation to any work or materials supplied or procured by [the Applicant] in connection with the MOC or the Project; or

ii. 3.2. By [the Principal], or any other party, against [the Respondent] in relation to the Project, or any claims by [the Respondent] against [the Applicant] for indemnity or contribution in respect of any such claims

Would you please confirm your acceptance of these terms, to enable the first payment to be processed.....”.

60. The Applicant responded by email on 5 March 2019 including a letter of demand and a counteroffer as follows:

“.....[the Applicant] therefore in brief outlines here the contractual obligations of payments from

1. \$11,330 as per
2. \$48,134.21 as per
3. 33.4% Final Project Profit for projects [Redacted]
4. Design and engineering work related to [Redacted], \$ 11,300 not
5. Further entitlements, under the MOC should {redacted} progress into

*Considering commercial aspects, [the Applicant] therefore set out the following*

1. *[The Respondent] will pay to [the Applicant] the sum of AUD \$70,734.21, to be paid within 7 days of acceptance. (SUM of payments for point 1,2 and*
2. *Upon payment in accordance with paragraph 1:*
  - 2.1. *[the Applicant] shall release and discharge [the Respondent] from all claims (of any nature whatsoever) by [the Applicant] pursuant to the Memorandum of Collaboration dated 1 October 2018 (MOC), or relating in any way to the Project or the Contract referred to therein; and*
  - 2.2. *[The Respondent] shall release and discharge [the Applicant] from all claims relating to the Project (of any nature whatsoever), and any representations made by [the Applicant] in relation to such matters.*
3. *For the avoidance of doubt, these terms shall in no way operate to release or discharge [the Applicant] from liability to [the Respondent] in respect of any claims:*
  - 3.1. *In the nature of warranty or defect claims in relation to materials supplied or procured by [the Applicant] in connection with the MOC or the Project*

*For the avoidance of doubt, [the Respondent] needs to respond to these matters by 8th March 2018 (presumably this was meant to be 2019) and*

*[The Applicant] will otherwise commence legal proceedings to recover the debt without further notice.*

61. Considering the carriage of correspondence between the parties, the Respondent's requests for further and better particulars of claim and the Applicant's provision of that additional information on 18 February 2019, I am of the view that the payment dispute arose at the meeting between the parties on 28 February 2019.
62. Prior to 28 February 2019, the parties had followed the payment process they had performed throughout the remainder of their claim, assessment and

payment dealings under the MOU. While some claims were paid earlier than others, on average the process they had agreed to follow for making a payment claim and responding to a payment claim was 21 days. This time could increase depending on whether some additional information was necessary or could decrease if all the information for the claim was available.

63. The Applicant's payment claim of 11 January 2019 required some additional information and the Respondent was prompt in asking for that additional information, however the Applicant took over a month to provide the additional information necessary for the Respondent to assess the Applicant's claim.
64. The meeting of 28 February 2019 was convened to discuss the payment claim and I am of the view that the payment dispute commenced at that meeting when the Applicant's claim was rejected and an offer of settlement made by the Respondent in satisfaction of the obligations the Applicant had performed under the MOU.
65. 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 28 February 2019 under section 8(a)(ii) of the Act.
66. Section 28 of the Act – **Applying for Adjudication** – By reference to the documents of the Application dated 12 March 2019, served on the Respondent and the MBNT on 12 March 2019. 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.

#### The additional APPENDIX 16 submitted by the Applicant

67. The Applicant sent me an email on 27 March 2019 which had attached to it an updated version of "APPENDIX 16" of the Application. The Applicant advised that the update was based on the comments in the Response and corrected errors in the initial version contained in the Application.
68. On 29 March 2019 the Respondent objected to the Applicant's further submissions claiming that the further submissions:

- (iv) contained new material in response to the Respondent's Response to the Application;
  - (v) the material would cause prejudice to the Respondent; and
  - (vi) the information contained in the additional material was incorrect and contained mathematical errors.
69. On 4 April 2019 I wrote to the parties requesting further submissions under s.34(2) of the Act in relation to the unsolicited submissions of the Applicant and the objections raised by the Respondent.
70. Having now looked closely at both versions of APPENDIX 16 and having considered the further submissions of the Applicant and the Respondent I am of the view that APPENDIX 16 is in the first instance of limited probative weight and deals mainly with Tax Invoice INV-0060 for the project management, sales and engineering component of the payment claim.
71. I am therefore not with the Applicant on this issue.
72. The revised APPENDIX 16 was sent after the Application had been served and contained new material, including but not limited to costs for legal expenses, which did not form part of the Contract pricing structure to the Principal, APPENDIX 2 of the Application, and did not form part of the costs set out in the MOU.
73. I have not considered the revised APPENDIX 16 and have placed it in an envelope and isolated it from the material of the Adjudication.
74. In so doing, I was also mindful of the decision of Barr J in *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd and Anor* [2014] NTSC 20 at 42. The information contained in the revised APPENDIX 16, much of which had already been provided in the Application and the Response, did not pass the threshold requirements of information that may cause me to alter my decision in the Adjudication.

75. Section 29 of the Act – **Responding to Application for Adjudication** – By reference to the documents of the Response dated 25 March 2019, served on the Applicant and the Adjudicator on 25 March 2019. 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.
76. Having now considered the relevant sections of the Act and the Regulations and following attendance to the documents of the Application and the Response, I find that I have jurisdiction to determine the merits of the payment dispute between the Applicant and the Respondent.

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

77. The Payment Claim made by the Applicant on 11 January 2019 contains the following components:
- (i) A Tax Invoice INV-0060 for labour hours for project management, sales, engineering, drafting and procurement and logistic services for the Project in the sum of **\$11,330.009 (including GST)**; and
  - (ii) A Tax Invoice 14616\_rev1 for the purchase and supply of solar cells, cabling, digital controller, mounting equipment and materials for the Project in the sum of **\$48,134.21 (including GST)**.

A total claim of **\$59,464.21 (excluding GST)**.

78. I deal with each component of the payment claim below.

Tax Invoice INV-0060 a claim for labour hours expended on the Project in the sum of \$11,330.00 (including GST)

79. The Applicant submits that:

*“...Although the Memorandum (meaning the MOU) does not specify when “agreed Costs” (which includes Project Management expenses at the*

*agreed rate of \$105/Hr) are to be paid to someone who is entitled to claim, as costs being claimed by [the Applicant] are no different to those of any other supplier to the project (who are being paid when their invoice becomes due), payment should be made as the costs arise (both for Project management expenses and procurement margin) rather than when the FPP is distributed as [the Respondent] is asserting. That this is the case is evidenced by the fact that my initial invoice for project management fees (i.e. inv-0045) was paid without any dispute being raised by [the Respondent] ...”.*

80. The Applicant’s further submissions state that the overall budget for project management and engineering was AUD 40,000 and a portion of that budget was paid to the Applicant for Tax Invoice 0045 in the sum of \$11,330.00 (including GST) and, as such, Tax Invoice INV-0060 for further project management and engineering labour hours would be treated in the same manner for payment.
81. The Respondent submits that the initial payment for the Applicant’s project management and engineering labour was payment on account against the FPP. The Respondent says that the payment of Tax Invoice 0045 in the sum of \$11,330.00 (including GST) for project management on the Project was made entirely on the Applicant’s understanding that this “...was a draw down on the profit share...” and was shown to the Applicant as an annotation on the invoice, a copy of which is at APPENDIX 22 of the Response. The Respondent also says that at the time “...It was agreed that the Applicant could invoice 0045 for its project management and engineering fee, as an advance to be deducted from the Applicant share of the profit...” and that it was inconceivable that the Applicant could have formed a different view regarding this and future payments.
82. I am not with the Applicant on this portion of the payment claim.
83. In the Applicant’s further submissions of 12 April 2019, the Applicant says in relation to payment of Tax Invoice 0045 for the project management and engineering fees that “...The respondent argues that this was paid on account against the final project profit. The applicant agrees that this is the case...”.

The Applicant then sets out the context under which the cost structure should be treated by the MOU, however the Applicant had a clear understanding of the advance that had been made by the Respondent when Tax Invoice 0045 was paid by the Respondent on 2 October 2018.

84. I value this portion of the payment claim at “**NIL**”.

Tax Invoice 14616\_rev1 a claim for equipment procurement and supply to the Project in the sum of \$48,134.21 (including GST)

85. The Applicant submits that:

*“...Clause 2.b. of the Memorandum provides that the "agreed Costs" to be charged to the project includes "Materials at cost, plus 10% margin to the Buying Party". In this regard, it is clear that the agreed procurement margin is 10% and there is nothing in the agreement to suggest that [the Respondent] has any sort of entitlement to unilaterally reduce this to a lower amount regardless of whether it believes that doing so will make the end profit of the of the project better....”.*

86. The Applicant also submits that:

*“...[The Respondent] processed payments for Invoice 14614 and parts of 14616 from Mid-November to 12 December 2019 [this should read 2018], with the remainder for 10% for procurement services remaining unpaid. [The Respondent] has purported this payment is only due when the final project payments are calculated and paid under the clause 2c under the MOC. This is was [sic] never agreed to nor standard commercial practice....”.*

87. The Applicant has also shown at APPENDIX 11 of the Application procurement invoices from suppliers for the equipment sourced and supplied to the Project by the Applicant. The Applicant shows invoicing for that equipment in Tax Invoices 14616 and 14614 totaling \$424,444.48 (including GST).

88. The Respondent did not submit any real challenge to the merits of this component of the Applicant’s payment claim. Correspondence between the parties at APPENDIX 6 of the Application shows a reconciliation of the costs



incurred by the Applicant in procurement of the equipment and materials for the project as follows:

“.....

I have reconciled the account as follows

1. *[The Applicant's]* invoices from suppliers
 

a. Invoice cost from <i>[redacted]</i> for the Clenergy rail	\$38,059.00
b. Invoice cost from <i>[redacted]</i> inv DD121712	\$331,817.85
c. Invoice cost from <i>[redacted]</i> inv 10352	\$75,930.60
d. Invoice Misc SMA	\$2,906.30
Total Cost incurred by <i>[the Applicant]</i>	<b>\$448,713.75,</b>
  
2. *[The Respondent's]* Paid *[Applicant's]* Invoices
 

a. Invoice cost from <i>[redacted]</i> for the Clenergy rail	\$39,770.25 (Inv430)
b. Invoice cost from <i>[redacted]</i> inv DD121712	\$231,407.19 (inv 14614)
c. Invoice cost from <i>[redacted]</i> inv 10352	\$0
d. Invoice Misc SMA	\$2,906.30 (46)
e. Deposit inv 14616A	\$23,390.68,
f. Deposit inv 14614A	\$19,509.26
Total cost incurred by <i>[the Applicant]</i>	\$316,983.68

Amount currently due to *[the Applicant]* is equal to \$448,713.75 - \$316,983.68 = \$131,730.07 plus GST

.....”

89. While the reconciliation does not clearly identify a sum consistent with the Applicant's claim for the equipment component of the payment claim, the Respondent has accepted that there is a sum due to be paid to the Applicant for the equipment procured for the Project.
  
90. The Respondent's offer of 1 March 2019 of \$30,000 to be paid to the Applicant for its claims also indicates that there is an outstanding liability for the equipment supplied by the Applicant to the Project.
  
91. On a balance of probabilities, I am of the view that the Applicant's equipment component of the payment claim in the sum of \$48,134.21 (inclusive of GST) stands.

92. I award the sum of \$48,134.21 the equipment component of the payment claim for the procurement and supply of materials and equipment to the Project.

Tax Invoice INV-0045 the Respondent's counterclaim for overpayment of the invoice in the sum of \$9,894.50 (including GST)

93. The Respondent seeks the repayment of the sum of \$9,894.50 (including GST) due work done in the Project by the Applicant prior to signing the MOU.
94. Under the process that the Applicant and the Respondent adopted to vary the MOU for making, assessing and paying payment claims, Tax Invoice INV-0045 is a valid payment claim. The Respondent has treated this payment claim as a valid payment claim for the purposes of arguing for the non-payment of the Applicant's project management and engineering costs in the Adjudication.
95. The Respondent has claimed that payment of Tax Invoice INV-0045 was paid to the Applicant as an advance against the FPP for the Project. It cannot now be recharacterised to be an overpayment.
96. I am not with the Respondent on this counterclaim and value the claim at "**NIL**".

***Interest on the claim***

97. I have determined that the payment dispute commenced on 28 February 2019 and the Applicant bought the Application 12 days later on 12 March 2019, consistent with the Applicant's letter of demand dated 4 March 2019.
98. There are no interest terms in the MOU and the parties have not considered interest or adopted any interest component on the other 8 claims made by the Applicant.
99. Interest, if it were to be awarded, 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.
100. I award no interest in this determination.

## **Summary**

101. In summary of the material findings, I determine:
- (a) The contract to be a construction contract under the Act;
  - (b) The work to be construction work under the Act;
  - (c) The site to be a site in the Northern Territory under the Act;
  - (d) The claim to be a valid payment claim under the Act;
  - (e) The dispute to be a payment dispute under the Act;
  - (f) The Application to be a valid application under the Act;
  - (g) The Response to be a valid Response under the Act;
  - (h) The Applicant's project management and engineering claim to fall;
  - (a) The Applicant's equipment and materials procurement claim to stand in the sum of \$48,134.21 (including GST);
  - (b) The Respondent's counterclaim to fall;
  - (a) There is no award of Interest.
102. I determine that the amount to be paid by the Respondent to the Applicant in relation to the Applicant's Payment Claim is **\$48,134.21 (including GST)**.
103. This sum is to be paid to the Applicant by the Respondent on or before **21 May 2019**.

## **Costs**

104. 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.
105. 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...”*

106. 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.

107. The test for determining whether a proceeding is vexatious 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.”*

108. 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.

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

110. 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***

111. The following information is confidential:

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

***Closing Remarks***

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

DATED: 30 April 2019

Reference: 080

Rod Perkins  
Adjudicator No. 26