Construction Contracts (Security of Payments) Act

DETERMINATION

Adjudication Identification Number:	**66.18.01**
Adjudicator:	**Deon Baddock**
Adjudicator Registration Number:	**66**
ABN:	34 813 601 643
Address:	25 Atoll Court Mullaloo WA 6027
Phone Number:	0411 267899
Email:	dbaddock@bigpond.com
Applicant's Name:	**Redacted**
ABN:	
Address:	
Phone Number:	
Fax Number:	
Email:	
Respondents' Name:	**Redacted**
ABN:	
Address:	
Phone Number:	
Fax Number:	
Email:	
Date of Adjudication Application:	**21 March 2018**

In respect of the Applicant's adjudication claim dated 21 March 2018, I make the following determination:

1 the Respondent pay the Applicant $1,026,805.31 plus GST together with interest thereon of $21,341.80; and

2 payment is to be made on or before 27 April 2018, being seven days from the date of this determination.

The reasons for my determination are annexed as Schedule 1.

A list of information that, because of its confidential nature, is not suitable for publication by the Registrar is annexed as Schedule 2.

Date: 20 April 2018[1]

_____

Deon Baddock
Registered Adjudicator No 66

[1] Date of corrected determination is 2 May 2018

Schedule 1: Reasons for Determination

Summary

1 The Applicant seeks payment of $1,838,365.00 exclusive of GST in connection with civil works at [*site details redacted*] in the Northern Territory, carried out by it under a subcontract entered into between the parties on or about 12 April 2017 ("Subcontract"). The Applicant relies on a payment claim, which included this amount, dated 11 December 2017 ("Payment Claim").

2 The Applicant also seeks payment of interest on the sum of $1,838,365.00 exclusive of GST, to be calculated at a rate not greater than that prescribed by regulation 9 of the Construction Contracts (Security of Payments) Regulations, being the rate prescribed from time to time by section 85 of the Supreme Court Act (NT), currently 7.5% per annum, from the date the payment dispute arose until and including the date of the determination.

3 I find that the Respondent is liable to pay the Applicant $1,026,805.31 plus GST together with interest thereon of $21,341.80.

Preliminary and procedural matters

4 I was appointed adjudicator in respect of the application by the Institute of Arbitrators and Mediators Australia by letter dated 23 March 2018 (IAMA Matter Number 81117).

5 The application comprised:

(a) Covering Letter dated 21 March 2018;

(b) Index;

(c) Application for Adjudication;

(d) Attachments 1 to 4 inclusive (at Tabs 2 to 5 inclusive); and

(e) Annexures to Statutory Declaration of [A] (at Tabs [A]-01A, [A]-01 to 45 inclusive and [A]-27A to [A]-27D inclusive).

("Application")

6 I wrote to the parties on 25 March 2018 advising of my appointment and outlining several matters with regard to the adjudication.

7 On 28 March 2018, the Applicant provided me a copy of its Remittance advice regarding payment of the deposit.

8 On 3 April 2018, I received an email from [*the respondent's solicitors*] advising that [they] *"... act for [the Respondent] in the above adjudication*." [The Solicitor] also asked whether I will "*accept service of [the Respondent's] response by a Sharefile link sent by email"*.

9 On 3 April 2018, in response, I advised that "*Subsection 29(1) of the Act requires service on both the Applicant and the appointed adjudicator"* and *"As such, I bring to your attention that I cannot give consent on behalf of the Applicant"*. I then asked *"Can you please advise if the Applicant has consented to service of the response by Sharefile link sent by email?"* I also brought to their attention *"the requirements of the Electronic Transactions (Northern Territory) Act"*.

10 On 4 April 2018, I emailed the Respondent's solicitors again requesting confirmation *"...if the Applicant has consented to service of the response by Sharefile link sent by email"* and asked *"...if the Applicant has not consented, can you please advise if you still will be requesting my consent to accept service of the response by Sharefile link sent by email"*.

11 On 4 April 2018, in response, the Respondent's solicitors advised that they had *"...asked the applicant's solicitor ... if it would accept service (on behalf of the applicant) by Sharefile link sent by email"* and noted that they had *"...not yet received a response"*.

12 On 4 April 2018, in response, I confirmed that I would *"...accept service by a Sharefile link sent by email on the condition that all information that is transmitted on the Sharefile link sent by email, is sent to my email address and that the information is readily accessible"*. I also brought to the Respondent's solicitor's again *"...that I cannot give consent on behalf of the Applicant"*.

13 On 5 April 2018, in response, the Respondent's solicitor's confirmed that they would "*email the Sharefile link before 5pm WST*" and that "*all relevant documents will be easily accessible within the folders once you access the link*". They further confirmed that they had *"received the Applicant's consent for that approach"*. They also confirmed their client would make payment on my deposit. A follow-up email was then received, again, confirming that their client would make payment on my deposit.

14 On 6 April 2018, the Respondent's solicitors emailed a pdf and word version of the Respondent's adjudication response, as well as the respective letters of service. They also confirmed that the Sharefile link would be issued shortly and asked if I would like a hardcopy, which could be delivered on the following Monday.

15 The Respondent's solicitors provided its Response electronically on 6 April 2018 via a Sharefile link by email, within the time limit required by the Act. The Response comprised:

(a) Letter of Service of Adjudication Response - Deon Baddock (also received by email);

(b) Letter of Service of Adjudication Response – [Applicant's solicitors] (also received by email);

(c) Adjudication Response (also received by email in both pdf and native MS Word format);

(d) Statutory Declaration of [B] dated 5 April 2018;

(e) Statutory Declaration of [C] dated 3 April 2018;

(f) Attachment 1 – [D] Civil Claims Review Report;

(g) Attachment 2 – List of approved variations;

(h) Attachment 3 – Site Layout Plan (GRO-KWC-10-00-CV-DWG-0001 0);

(i) Attachment 4 - Template Payment Claim;

(j) Attachment 5 – [E] Report Geotechnical Report; and

(k) Attachment 6 - Guide to Pavement Technology Part 6: Unsealed Pavements.

("Response")

16 In response, I confirmed that I was able to access the documents through the Sharefile link and that a I would like a hardcopy. In response, the Respondent's solicitors confirmed a hardcopy would be delivered on Monday.

17 Also on 6 April 2018, the Applicant's solicitors, in response to a request in my correspondence of 25 March 2018, provided a MS Word native version of the Application. I responded on 7 April 2018 thanking the Applicant's solicitors for the native version.

18 I wrote to the parties via email on 7 April 2018 confirming I received the Response and also asking the Applicant to advise if it did not receive the Response on 6 April 2018 or if it had any concerns with service, otherwise I would assume the Application was served in accordance with the Act.

19 I wrote to the parties via email on 11 April 2018 noting that "*Within its response the Respondent asserts that Payment Claim No 08 is not a valid payment claim, and at paragraph 13.1.7 states that '[the Applicant] had one opportunity to serve a payment claim in December 2017, being on 20 December 2017'*" and "*Within the Application, the Applicant asserts at paragraph 5.3 of its Application, that it '…has complied with the requirements of clause 2.12 by issuing Payment Claim No 08 to [the Respondent]…'*". I then noted that "*In order to obtain sufficient information to make a determination, subsection 34(2)(a) of the Act allows me to request a party to make a, or a further, written submission or to provide information or documents*" and requested the Applicant, if it wished, "*to make a submission regarding the validity of Payment Claim No 08 under the Subcontract with respect to time for submission of payment claims under clause 12.2(a) of the Subcontract and the Subcontract Particulars*" and noted that "*the requested submission must be limited to this request*", that "*I require that the Applicant makes this submission by 9:00am(WST) Thursday 12 April 2018 (or earlier)*" and that the "*submission can be transmitted by email*". I also then requested "*the Respondent, if it wishes, to make submissions in response to the Applicant's submission by 9:00am (WST) Friday 13 April 2018 (or earlier)*" and that the "*submission can be transmitted by email*".

20 Before receipt of the requested submission by the Applicant, on 12 April 2018 at 7:37am(WST), the Respondent's solicitors wrote to me advising that "*We refer to your email of 11 April 2018*", "*We have received subsequent instructions from [the Respondent] that it requested [the Applicant] submit its December 2017 payment claim early in order to avoid any delay over the Christmas period*" and "*As such, [the Respondent] does not press its submission at paragraph 13.1.7 of its Adjudication Response.*"

21 At 8:01am (WST) on 12 April 2018, the Applicant's solicitors provided its submission, in response to my request of 11 April 2018. Within this submission, the Applicant included submissions outside of the scope of my request of 11 April 2018. As such, these unsolicited submissions have not been considered.

22 At 9:52am (WST) on 12 April 2018, the Respondent's solicitors wrote to me, in response to the Applicant's submission, advising:

"*We refer to:*

1. our letter to you dated 12 April 2018 (sent 9.37am AEST); and

2. [the Respondent's solicitors'] letter to you of 12 April 2018 (received 10.01am AEST).

"*As outlined in our letter, [the Respondent] does not press its submission in relation to the timing of [the Applicant's] Payment Claim. "Subsequent to your email, we received instructions from [the Respondent] that it had in fact requested that the December payment claim be delivered at an earlier date and as such, we wrote to you immediately to withdraw the submission.*

"*As to the remainder of [the Respondent's solicitors'] letter, the unsolicited submissions go beyond the information requested in your email of 11 April 2018 and as such should be disregarded.*

"*The Construction Contracts (Security of Payments) Act (NT) does not permit responsive submissions, as the Applicant has made and requested, and unless you require any further specific information, we request that you proceed to make your determination based on the material that has been provided by the parties*".

23 On 12 April 2018, I wrote to the parties acknowledging receipt of the correspondence on 12 April 2018, as outlined in paragraphs 20 to 22 inclusive, and advised that:

"*Within my request of 11 April 2018, I stated 'Please note that the requested submission must be limited to this request'.* "*Contained within the Applicant's response were submissions going beyond my request of 11 April 2018.* "*As such, I will not consider those unsolicited submissions made by the Applicant*".

24 On 16 April 2018, the Respondent's solicitors confirmed payment of the deposit.

Jurisdiction

25 At paragraphs 4.5 to 8.6 inclusive of the Application, the Applicant argues that I have jurisdiction by proposing that:

(a) "*...the subcontract is a 'construction contact' as defined in section 5 of the Act*";

(b) "*The Payment Claim to which this Adjudication Application relates is a claim made under a construction contract by a subcontractor to a contractor for payment of an amount in relation to the performance by the subcontractor of its obligations under the contract*";

(c) "*A 'payment dispute' within the meaning of section 8 of the Act has arisen as [the Respondent] has failed to include the items the subject of the Payment Claim in its Payment Statement under clause 12.4 of the Subcontract and has issued a Notice of Dispute partly disputing [the Applicant's] Payment Claim...*" and "*[The Respondent] has also failed to pay [the Applicant] the amounts in the Payment Claim*";

(d) "*Pursuant to section 28(1)(a) of the Act, [the Applicant] has 90 days from the date a payment dispute arises to lodge this Adjudication Application*";

(e) "*The Payment Claim the subject of this Adjudication Application:*

(a) has not already been made by the Applicant (or any other party); and

(b) is not a dispute the subject of any other order, judgment or finding of an arbitrator: section 27 of the Act"; and

(f) "*The Applicant is entitled to make this Application and is not otherwise aware of any reason, falling within section 27 of the Act which would prevent it from making this Application*".

26 With respect to jurisdiction, at paragraphs 10.1.1 to 17.1.8 inclusive of the Response, the Respondent submits that:

(a) It "*accepts that the work under the Subcontract is work to which the Construction Contracts (Security of Payments) Act 2004 (NT) (the Act) applies*";

(b) "*The subcontract between [the Applicant] and [the Respondent] is a 'construction contract' which obliges [the Applicant] to carry out construction work pursuant to section 5(1)(a) of the Act*";

(c) "*The works performed under the Subcontract by [the Applicant] is 'construction work' carried out on site in the Northern Territory and falls within the following provisions of section 6:*

> "*(a) section 6(1)(a) – 'reclaiming land, draining land or preventing the subsidence, movement or erosion of land';*
>
> "*(b) section 6(1)(b) – 'installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing any works, apparatus, fittings, machinery or plant associated with any work mentioned in paragraph (a);*
>
> "*(c) section 6(1)(c) – 'constructing the whole or a part of any civil works, or a building or structure, that forms or will form (whether permanently or not and whether or not in the Territory) part of land…;*
>
> "*(d) section 6(1)(f) – 'any work that is preparatory to, necessary for, an integral part of or for the completion of any work mentioned in paragraph (a) (b) (c) (d) or (e), including:*
>
> "*(i) site or earthworks, excavating, earthmoving, tunnelling or boring; and*
>
> "*(ii) laying foundations; and*
>
> "*(iii) erecting, maintaining or dismantling temporary works, a temporary building or a temporary structure…; and*
>
> "*(iv) site restoration or landscaping'.*

(d) "*the work under the Subcontract does not fall within any of the exceptions contained in section 6(2) of the Act*";

(e) "*[The Respondent] submits that the works being carried out by [the Applicant], under the Subcontract, constitute 'construction work' within the definition in the Act*";

(f) "*In circumstances where [the Respondent] has disputed the amount payable under [the Applicant's] Payment Claim of 11 December 2017 in relation to the*

Oversized Payment Claims, a 'payment dispute' for the purposes of section 8 of the Act has arisen";

(g) "*there is a 'construction contract' entered into after section 9 of the Act came into force*";

(h) "*The Subcontract is not a contract of employment relating to construction work or related goods and services supplied under a construction contract"*;

(i) "*The Subcontract is not an excluded contract under the Act or Regulations*";

(j) "*[The Respondent] is not aware of any other application for adjudication in relation to the claims the subject of [the Applicant's] Payment Claim or Application*";

(k) "*[The Respondent] is not aware of any order, judgment or other finding by an arbitrator other person or a court or other body in relation to the claims the subject of [the Applicant's] Payment Claim or Application*";

(l) "*To the best of [the Respondent's] knowledge, [the Applicant] has complied with the service requirements of the Act"*;

(m) "*the payment claim did not comply with the Subcontract, and is therefore not a payment claim under the Act*" and "*…it is invalid under section 28 of the Act and the Adjudicator must 'dismiss the application without making a determination of its merits' in accordance with section 33(1) of the Act*"; and

(n) "*[The Respondent] submits that the claims the subject of this adjudication are factually and legally complex" and "[The Respondent] maintains that the matter before the Adjudicator is of a greater complexity than matters intended to be addressed under the Act*".

27 Accordingly, with regard to jurisdiction, in its Response, the Respondent has asserted that:

(a) "*the payment claim did not comply with the Subcontract, and is therefore not a payment claim under the Act*";

(b) The payment claim "*...is invalid under section 28 of the Act and [I] must 'dismiss the application without making a determination of its merits' in accordance with section 33(1) of the Act*"; and

(c) "*...the matter before [me] is of a greater complexity than matters intended to be addressed under the Act*".

28 I will now consider jurisdiction.

Does the contract require the contractor to undertake one or more of the obligations outlined in section 5 of the Act?

29 Section 5 of the Act sets out one or more obligations required to be satisfied to be a construction contract and Section 6 of the Act sets out what constitutes construction work.

30 Within its Application, at paragraphs 4.6 to 4.9 inclusive, the Applicant describes the type of work being undertaken.

31 Within its Response, at paragraphs 11.2.1 to 11.2.5 inclusive, the Respondent describes the type of work being undertaken and at paragraph 11.2.6, the Respondent "*submits that the works being carried out by [the Applicant], under the Subcontract, constitute 'construction work' within the definition in the Act*".

32 Within the Subcontract, Annexure 4 describes the type of work being undertaken.

33 By reference to the work being undertaken by the Applicant, as described in the Application, the Response and also the Scope of Work at Annexure 4, I find that the work being undertaken under the Subcontract is construction work as defined by the Act.

Is the subcontract a construction contract?

34 Section 5 of the Act sets out what constitutes a construction contract.

35 At paragraphs 4.5 of its Application, the Applicant asserts that "*The Adjudicator has jurisdiction to determine this Adjudication Application because the Subcontract is a 'construction contract' as defined in section 5 of the Act*" and provides reasons at paragraphs 4.6 to 4.11 inclusive of its Application.

36 At paragraph 11.1.2 of its Response, the Respondent asserts also that the "*subcontract between [the Applicant] and [the Respondent] is a 'construction contract' which obliges [the Applicant] to carry out construction work pursuant to section 5(1)(a) of the Act*" and provides reasons at paragraphs 11.1.1 to 11.2.6 inclusive of its Response.

37 By reference to paragraph 33, I found that the work is construction work and be reference to the Subcontract, there is a construction contract as defined under the Act.

Was the Application prepared and served in accordance with section 28 of the Act?

38 Within paragraph 11.7.2 of the Response, the Respondent states "*To the best of [the Respondent's] knowledge, [the Applicant] has complied with the service requirements of the Act*".

39 By reference to the Application, I find that:

(a) A written application for adjudication was prepared and validly served on both the Respondent and IAMA (the prescribed appointer); and

(b) The application was prepared in accordance with and contained the information prescribed by, the Regulations; and

(c) The application stated and/or attached a copy of the construction contract, the payment claim and information, documents and submissions relied upon by the Applicant.

Has a payment dispute arisen under a construction contract and was there a payment claim under the Subcontract?

40 Section 27 of the Act sets out who can apply for adjudication as follows:

"***If a payment dispute arises under a construction contract**, any party to the contract may apply to have the dispute adjudicated under this Part unless:*

(a) an application for adjudication has already been made by a party (whether or not a determination has been made) but subject to sections 31(6A) and 39(2); or

(b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under the contract". [***emphasis added***]

41 By virtue of section 27 of the Act, a requirement of being able to apply for adjudication is that a "***payment dispute** arises **under a construction contract***" [***emphasis added***]. It is therefore necessary that there is a construction contract and that a payment dispute arises under a construction contract.

42 By reference to paragraph 37, I have found that the Subcontract is a construction contract as defined under the Act.

43 At paragraph 6.1 and 6.2 of its Application, the Applicant asserts that "*A 'payment dispute' within the meaning of section 8 of the Act has arisen as [the Respondent] has failed to include the items the subject of the Payment Claim in its Payment Statement under clause 12.4 of the Subcontract and has issued a Notice of Dispute partly disputing [the Applicant's] Payment Claim 08, including I[n] respect of $1,838,365 claimed by the [Applicant] for secondary processing costs: Section 8(a) of the Act*", "*[the Respondent] has also failed to pay [the Applicant] the amounts in the Payment Claim*" and "*As at the date of this Adjudication Application the payment dispute is still in existence*".

44 At paragraph 11.3.2 of its Response, the Respondent states "*In circumstances where [the Respondent] has disputed the amount payable under [the Applicant's] Payment Claim of 11 December 2017 in relation to the Oversized Payment Claims, a 'payment dispute' for the purposes of section 8 of the Act has arisen*".

45 Relevantly, section 8 of the Act provides that:

"*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."

[***emphasis added***]

46 For a payment dispute to arise, as defined within the Act, it is necessary that "*a payment claim has been made under a contract* ***and*** *the claim has been rejected or wholly or partly disputed*" [***emphasis added***]. There is no disagreement between that parties that the Applicant's '*Payment Claim No 08'* was partly disputed, nor is there any disagreement between the parties that it has not been paid. Therefore, for a payment dispute to arise, '*Payment Claim No 08'* needs to be a payment claim, as defined within the Act.

47 At paragraph 5.1 of its Application, the Applicant asserts that the "*Payment Claim to which this Adjudication Application relates is a claim made under a construction contract by a subcontractor to a contractor for payment of an amount in relation to the performance by the subcontractor of its obligations under the contract*" and provides its basis within paragraphs 5.2 to 5.9 inclusive of its Application.

48 At paragraphs 15.1.1 of its Response, the Respondent argues that:

"*the payment claim is not valid payment claims pursuant to the Subcontract or the Act because:*

(a) the payment claim was not made in accordance with the time requirements under the Subcontract (see section 13.1 above)

(b) the payment claim was not in the format required by clause 12.2 of the Subcontract (see section 14.2.1 above); and

(c) the payment claim does not set out sufficient details, calculations, supporting documentation and other information as required by clause 12.2(f) of the Subcontract 14.2.2 above)",

and provides its basis within paragraphs 12.1.1 to 14.3.2 inclusive of its Response.

49 Similarly, at paragraph 12.1.3 of its Response, the Respondent notes "*For the reasons set out below, the payment claim did not comply with the Subcontract, and is therefore not a payment claim under the Act*". Below, paragraph 12.1.3, at paragraphs 14.1.1 to 14.3.2 of the Response, the Respondent sets out its reasons as to why it argues that "*The payment claim did not comply with the contractual requirements or conditions precedent*".

50 Section 4 of the Act defines '*payment claim*' as follows:

"***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 under the contract; 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."

51 In considering whether Payment Claim No 08 was made 'under the contract', I now turn to the Subcontract.

52 In considering the terms of the Subcontract, consideration must be given to what terms relating to a payment claims, if any, are implied into the Subcontract.

53 Sections 16 to 25 inclusive of the Act, imply certain provisions into a Subcontract in circumstances where the contract "…*does not have a written provision*…". In relation to payment, the Act may imply the following provisions:

"*Contractor's entitlement to be paid*

"*The provisions in the Schedule, Division 2 are implied in a construction contract that* ***does not have a written provision*** *about the amount, or a way of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs*". [***emphasis added***]

"*Contractor's entitlement to claim progress payments*

"*The provisions in the Schedule, Division 3 are implied in a construction contract that* ***does not have a written provision*** *about whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations under the contract the contractor has performed*". [***emphasis added***]

"*Making payment claims*

"*The provisions in the Schedule, Division 4 are implied in a construction contract that* ***does not have a written provision*** *about how a party must make a claim to another party for payment*". [***emphasis added***]

"*Responding to payment claims and time for payment*

The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that ***does not have a written provision*** *about the matter:*

(a) when and how a party must respond to a payment claim made by another party;

(b) by when a payment must be made".

[***emphasis added***]

54 By reference to the Subcontract, at Attachment No 2 of the Application, the Subcontract has written provisions for:

(a) "*Contractor's entitlement to be paid*", at clause 12.1

(b) "*Contractor's entitlement to claim progress payments*", at clause 12.2

(c) "*Making payment claims*", at clause 12.2

(d) "*Responding to payment claims and time for payment*", at clauses 12.4 and 12.5

As such, the Acts implied terms regarding payment are not implied into the Subcontract.

55 Clause 12.2 of the Subcontract states:

"*Subject to clause 12.3, the Subcontractor must give the Contractor's Representative claims for payment on account of the Subcontract Price and all other amounts then payable by the Contractor to the Subcontractor under the Subcontract:*

(a) at the time stated in the Subcontract Particulars until Completion or termination of the Subcontract (whichever is the earlier);

(b) unless terminated earlier, after Completion or the Defects Liability Period (as the case may be), within the time required by clause 12.9 or 12.11 (as the case may be);

(c) in the format set out in the Schedule of Collateral Documents or in any other format which the Contractor's Representative reasonably requires;

(d) Which are based on the Table of Variation Rates and Prices or the Schedule of Rates to the extent these are relevant;

(e) which show separately the amounts (if any) claimed on account of:

(i) the Subcontract Price; and

(ii) all other amounts then payable by the Contractor to the Subcontractor under the Subcontract; and

(f) which set out or attach sufficient details, calculations, supporting documentation and other information in respect of all amounts claimed by the Subcontractor:

(i) to enable the Contractor's Representative to fully and accurately determine (without needing to refer to any other documentation or information) the amounts then payable by the Contractor to the Subcontractor under the Subcontract; and

(ii) including any such documentation or information which the Contractor's Representative may by written notice from time to time

require the Subcontractor to set out or attach, whether in relation to a specific payment claim or all payment claims generally."

56 Clause 1.1 of the Subcontract contains a "*Glossary of Terms*" and includes:

"*Schedule of Collateral Documents*

"*The schedule of pro forma documents to the Defence Major Works Subcontract (MASC-1 2004):*

(a) Posted on the Defence Estate Quality Management System website located at www.defence.gov.au/im/ (or any alternative location notified by the Commonwealth), as amended from time to time by the Commonwealth; and

(b) *Which as at the Award Date include the documents referred to in the Subcontract Particulars.*"

"*Subcontract Particulars*

"*The particulars annexed to these Conditions of Subcontract and entitled 'Subcontract Particulars'*".

57 The Subcontract Particulars includes the following:

(a) "*Schedule of Collateral Documents: (clause 1.1) ...9. Payment Claim*"

(b) "*Times for submission of payment claims by the Subcontractor to Contractor's Representative: (Clause 12.2) Monthly on the 20th day of each month*"

58 Clause 12.3 of the Subcontract states:

"*(a) The Subcontractor's entitlement to submit a payment claim under clause 12.2 is conditional upon the Subcontractor having:*

(i) *provided any related company guarantee required under clause 4.4;*

(ii) *obtained the insurance required by clause 5.5 and (if requested) provided evidence of this to the Contractor's Representative;*

(iii) *complied with its programming obligations under clause 10.2;*

(iv) *complied with clause 12.16;*

(v) *complied with clause 12.22;*

(vi) *complied with clause 12.23;*

(vii) *complied with clause 12.24;*

(viii) *provided the Contractor's Representative with duly executed copies of:*

(A) any Subcontractor Deed of Covenant or Consultant Deed of Covenant (as the case may be) that the Subcontractor is required to obtain under the Subcontract; and

(B) the certificates (if any) required under clause 6.13;

(ix) *provided an accurately completed Emissions Report:*

(A) immediately prior to the first payment claim;

(B) for each subsequent payment claim, as updated since the last payment claim;

(x) *if clause 14.5(b), 14.8(b)(ii), or 14.10(b)(ii) applies – complied with clause 14.5(b), 14.8(b)(ii), or 14.10(b)(ii) (as the case may be); and*

(xi) *provided all relevant information as required under the WHS Legislation or under this Subcontract arising out of or in connection with work health and safety."*

(b) If the Subcontractor has not satisfied the conditions in paragraph (a) at the time of submitting a payment claim, then:

(i) *the payment claim is deemed to have been invalidly submitted under clause 12.2;*

(ii) *the Contractor's Representative will not be obliged to include in any payment statement under clause 12.4 any amount included in the payment claim; and*

(iii) *the Contractor will not be liable to pay any amount included in the payment claim.*

(c) If the Subcontractor:

(i) *Submits a payment claim; and*

(ii) *Has failed to comply with the requirements of clause 12.2(f) in relation to any amount (or portion of any amount) claimed in the payment claim, then:*

(iii) *The Subcontractor will not be entitled to payment of;*

(iv) *The Contractor's Representative will not be obliged to include in any payment statement under clause 12.4; and*

(v) *The Contractor will not be liable to pay, the amount (or the portion of the amount) claimed in the payment claim in relation to which the Subcontractor has failed to comply with the requirements of clause 12.2(f), unless:*

(vi) *The Contractor's Representative (in its absolute discretion and without being under any obligation to exercise this discretion for the benefit of the Subcontractor) issues a written notice to the Subcontractor identifying the documentation or information which the Subcontractor has failed to provide under clause 12.2(f); and*

(vii) *The Subcontractor provides that documentation or information to the Contractor's Representative within the time required in the Contractor's Representative's notice.*

(d) *Notwithstanding any other provision of this Subcontract and the Construction Contracts Act 2004 (WA), where applicable, a claim for payment will be deemed not to have been made until all the requirements of this clause have been satisfied and any information requested by the Contractor has been provided*".

59 By reference to paragraphs 13.1.1 to 13.1.7 inclusive of its Response, the Respondent submitted that the Subcontract required payment claims to be submitted on a particular day of the month, being "*monthly on the 20th day of each month*", however the Applicant submitted Payment Claim No 08 on 11 December 2017.

60 On 11 April 2018 I wrote to the parties requesting submissions on the validity of the Payment Claim No 08 "*with respect to time for submission of payment claims under clause 12.2(a) of the Subcontract and the Subcontract Particulars*", as set-out in paragraph 19.

61 On 12 April 2018, the Respondent's solicitor's withdrew the Respondent's submission with regard to "*Time for Making a Payment Claim*" as set-out in paragraph 13.1.7 of its Response and advised that the Respondent "*requested [the Applicant] submit its December 2017 payment claim early in order to avoid any delay over the Christmas period*". As such I find that the Applicant complied with the time for making a payment claim under the Subcontract.

62 By reference to paragraph 14.3.2 of its Response, the Respondent is asserting that "*no payment claim has been made for the purposes of the Subcontract or the Act*", given that:

"(a) the payment claim was not in the format required by clause 12.2 of the Subcontract; and

(b) the payment claim does not set out sufficient details, calculations, supporting documentation and other information as required by clause 12.2(f) of the Subcontract".

The Respondent then sets out the details that it relies upon at paragraphs 14.1.1 to 14.3.1 inclusive of its Response.

63 I will consider firstly as to whether the payment claim was in the format required by clause 12.2 of the Subcontract.

64 At paragraph 117 of the [A's] Statutory Declaration, at Attachment 4 of the Application, [A] states "*As with all payment claims made and assessed under the Subcontract, Payment Claim No 8, and [the Applicant's] letters referred to in paragraphs 83 and 104 above were submitted to [the Respondent] by being uploaded onto the Aconex system.* "*[the Respondent] provided [the Applicant] with the Payment Statement referred to in paragraphs 90 and 111 above in the same manner*".

65 At paragraphs 14.2.1 of its Response, the Respondent asserts that the payment claim is not in the format set out in the Schedule of Collateral documents and attaches a copy of the template payment claim at Attachment 4 of its Response.

66 The template payment claim at Attachment 4 of the Response is headed with "*[the Principal] - Payment Claim (for use with [the Principal's contract])*". I find that the template payment claim provided is not appropriate nor applicable to the Subcontract for the following reasons:

(a) It states "*This is a payment claim under clause 10.2 of the Subcontract*" - the relevant clause under the Subcontract is clause 12.2, not clause 10.2; and

(b) It is a claim being made by "*the Consultant*" – the other party to the Subcontract is the Subcontractor, not the Consultant.

67 Relevantly, clause 12.2 allows the payment claim to be "*...in any other format which the Contractor's Representative reasonably requires*".

68 Within its Application, the Applicant provides a copy of Payment Claim No 08 at Attachment No 2. Payment Claim No 08 comprised:

(a) A covering letter referencing clause 12.2 and 12.3;

(b) A Statutory Declaration;

(c) An emissions report;

(d) A payment schedule summary page with [the respondent's] logo;

(e) A summary page "*Contractor Monthly Progress Claim for Contract # 253978-DWP103*" with [the Applicant's], [the Respondent's] and [Principal's] logos;

(f) A detailed "*Payment Schedule*" with [the respondent's] logo;

(g) A copy of a letter from the Applicant regarding the "*Oversize General Fill Claim*"; and

(h) A copy of a letter from the Applicant regarding the "*Oversize Pavement Claim*".

69 Within its Application, the Applicant also provides a copy of the Respondent's payment schedule in response to Payment Claim No 08 at Attachment No 4. The payment schedule comprised:

(a) A covering letter which also provides reasons for the rejection of the "*Oversize General Fill Claim*" and the "*Oversize Pavement Claim*";

(b) A payment schedule summary page with [the Respondent's] logo;

(c) A summary page "*Payment Schedule for Contract # 253978-DWP103*" with [the Applicant's], the respondent's] and [the Principal's] logos;

(d) A detailed "*Payment Schedule*" with [the Respondent's] logo; and

(e) A "*Notice of Dispute*".

70 The format of both the Applicant's payment claim and the Respondent's payment schedule are both consistent in terms of format and logos and there is no evidence to suggest that this was not the format reasonably required by the Contractor's Representative, particularly in circumstances where I have found that the template provided by the Respondent at Attachment 4 of its Response was not appropriate or applicable to the Subcontract (refer paragraph 66).

71 I find that the format of Payment Claim No 08 met the requirements of clause 12.2(c) of the Subcontract.

72 I will now consider as to whether the payment claim set out sufficient details, calculations, supporting documentation and other information as required by clause 12.2(f) of the Subcontract.

73 At paragraphs 5.4 to 5.6 inclusive of its Application, the Applicant states that Payment Claim No 08 was provided to the Respondent and "…*included a breakdown of the amounts claimed*".

74 At paragraphs 14.2.2 of the Response, the Respondent asserts that the payment claim does not set out sufficient details, calculations, supporting documentation and other information.

75 At paragraph 14.2.2(b) of the Response, the Respondent states *"[the Respondent] has repeatedly requested further information in respect of its Oversized Fill Claims*" and at 14.2.2(c) references the written request of 14 December 2018 and at 14.2.2(d) notes that "*[the Applicant] did not provide this information as requested by [the Respondent]*".

76 At paragraphs 14.2.2(e), 14.2.2(f) and 14.2.2(i) of its Response, the Respondent refers to a meeting and further correspondence on 16 March 2018. With respect to whether Payment Claim No 08 was a valid payment claim, as these events occurred after the Respondent's payment certificate of 22 December 2018, these need not be considered in relation to jurisdiction.

77 Clause 12.2(f) of the Subcontract requires a payment certificate:

> *(f) which set out or attach sufficient details, calculations, supporting documentation and other information in respect of all amounts claimed by the Subcontractor:*
>
> *(i) to enable the Contractor's Representative to fully and accurately determine (without needing to refer to any other documentation or information) the amounts then payable by the Contractor to the Subcontractor under the Subcontract; and*
>
> *(ii) including any such documentation or information which the Contractor's Representative* ***may by written notice from time to time require the Subcontractor to set out or attach****, whether in relation to a specific payment claim or all payment claims generally.*" [***emphasis added***]

78 Clause 12.3(c) states:

> *(c) If the Subcontractor:*
>
> (i) *Submits a payment claim; and*

(ii) *Has failed to comply with the requirements of clause 12.2(f) in relation to any amount (or portion of any amount) claimed in the payment claim, then:*

(iii) *The Subcontractor will not be entitled to payment of;*

(iv) *The Contractor's Representative will not be obliged to include in any payment statement under clause 12.4; and*

(v) *The Contractor will not be liable to pay, the amount (or the portion of the amount) claimed in the payment claim in relation to which the Subcontractor has failed to comply with the requirements of clause 12.2(f), unless:*

(vi) *The Contractor's Representative (in its absolute discretion and without being under any obligation to exercise this discretion for the benefit of the Subcontractor) issues a written notice to the Subcontractor identifying the documentation or information which the Subcontractor has failed to provide under clause 12.2(f); and*

(vii) *The Subcontractor provides that documentation or information to the Contractor's Representative within the time required in the Contractor's Representative's notice.*

95 Under clause 12.3(c), any failure to comply with clause 12.2(f) does not invalidate the payment claim. Parts (iii) to (v) of clause 12.3(c) removes entitlement to payment for "*any amount (or portion of any amount) claimed in the payment claim*". Parts (vi) and (vii) provides the Contractor's Representative a discretionary right to identify "*documentation or information which the Subcontractor has failed to provide*" and then allows the Subcontractor to provide that "*documentation or information*".

96 As such under clause 12.3(c), any failure to comply with clause 12.2(f) does not invalidate the payment claim.

97 Clause 12.3(d) deems a payment claim to have not been made if "*all the requirements of this clause have been satisfied and any information requested by the Contractor has been provided*", as follows:

(d) *Notwithstanding any other provision of this Subcontract and the Construction Contracts Act 2004 (WA), where applicable, a claim for payment will be deemed not to have been made until all the requirements of this clause have*

been satisfied ***and any information requested by the Contractor has been provided***". [***emphasis added***]

99 On 11 December 2017, the Applicant submitted Payment Claim No 08, which included and attached two claims relating to:

(a) The "*Oversize General Fill Claim*"; and

(b) The "*Oversize Pavement Claim*".

100 Also on 11 December 2017, under separate correspondence, the Applicant submitted two letters, being:

(a) "*Oversize General Fill Claim*" ("*[Applicant] Ref: 22049-[redacted]-LET-115*"); and

(b) "*Oversize Pavement Claim*" ("*[Applicant] Ref: 22049-[redacted]-LET-116*").

101 Included at Annexure [A]-29 of the Application is a letter from the Respondent to the Applicant dated 14 December 2017, where the Respondent responded to the Applicant's letter "*Oversize General Fill Claim*" ("*[Applicant] Ref: 22049-[redacted]-LET-115*"). Similarly, at paragraph 14.2.2(c) of the Response, the Respondent sets-out the details of the request.

102 By reference to the Respondent's correspondence headed "*Re: 22149-[redacted]-LET-115 – Oversize General Fill Claim*" (contained at Annexure [A]-29), this correspondence is a direct response to the Applicant's letter of 11 December 2017 and not a response to Payment Claim No 08. I consider that the Respondent's correspondence was not a request for information in relation to Payment Claim No 08 and as such the Respondent cannot rely on clause 12.3(d). Similarly, by reference to the Respondent's correspondence headed "*Re: 22149-[redacted]-LET-116 – Oversize Pavement Claim*" (contained at Annexure [A]-44), this correspondence is a direct response to the Applicant's letter of 11 December 2017 and not a response to Payment Claim No 08 and again the Respondent cannot rely on clause 12.3(d).

103 Also within the Response, the Respondent asserts at paragraphs 13.2.6 that "*the basis of [the Applicant's] Payment Claim is flawed*" as it "*included in it work up to 20 December 2017, which had not yet been undertaken*" and "*those amounts were not payable by [the Respondent]*". I do not consider that this will invalidate payment Claim No 08, particularly in circumstances where the Respondent requested the Applicant to submit its payment claim early.

104 I therefore find that Payment Claim No 08 was a valid payment claim under the Subcontract.

105 Having found that "*a payment claim has been made under a contract*", I find that a payment dispute has arisen as the claim has been "*partly disputed*" by the Respondent and that the payment dispute arose on 22 December 2017.

Was the Application served in time?

106 Section 28(1) of the Act requires a party to prepare and serve a written application for adjudication "…*within 90 days after the dispute arises*…".

107 At paragraph 3.33 of its Application, the Application asserts that "*The Payment Dispute in respect of the Payment Claim therefore arose at midnight on 22 December 2017*".

108 At paragraph 11.3.2 of its Response, the Respondent states "*In circumstances where [the Respondent] has disputed the amount payable under [the Applicant's] Payment Claim of 11 December 2017 in relation to the Oversized Payment Claims, a 'payment dispute' for the purposes of section 8 of the Act has arisen*".

109 At paragraph 105 I have found that the payment dispute arose on 22 December 2017.

110 By reference to the Application, the Application was served on 21 March 2018 within 90 days after the dispute arose. As such, the Application was served in time.

Has an Application already been made or is the dispute the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body?

111 Section 27 of the Act sets out who can apply for adjudication as follows:

"***If a payment dispute arises under a construction contract****, any party to the contract may apply to have the dispute adjudicated under this Part unless:*

(a) an application for adjudication has already been made by a party (whether or not a determination has been made) but subject to sections 31(6A) and 39(2); or

(b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under the contract". [***emphasis added***]

112 On 25 March 2018, I wrote to the parties and within that correspondence, I asked:

"*Pursuant to section 27 of the Act, I request that both the Respondent and the Applicant confirm to me before 5pm on Thursday 29 March 2018 whether:*

a) an application for adjudication has already been made by a party (whether or not a determination has been made), and if so, whether it is subject to subsections 31(6A) and 39(2) of the Act; or

b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under the contract.

"*In the absence of any response, this adjudication will proceed*".

113 Neither party directly responded to that request, however both parties did provide confirmation within their Application and their Response, respectively, as follows:

(a) Within its Application, at paragraph 7.2, the Applicant states:

"*The Payment Claim the subject of this Adjudication Application:*

(a) has not already been made by the Applicant (or any other party); and

(b) is not a dispute the subject of any other order, judgment or finding of an arbitrator: section 27 of the Act".

(b) Within its Response the Responded states:

At paragraph 6.2, "*[The Respondent] is not aware of any other application for adjudication in relation to the claims the subject of [the Applicant's] Payment Claim or Application*"; and

At paragraph 6.3, "*[The Respondent] is not aware of any order, judgment or other finding by an arbitrator other person or a court or other body in relation to the claims the subject of [the Applicant's] Payment Claim or Application*".

114 I am therefore unaware of:

(a) an application for adjudication having already been made by a party; or

(b) any arbitrator or other person or a court or other body dealing with a matter arising under a construction contract making an order, judgment or other finding about the dispute that is the subject of the Application.

Complexity

115 At paragraph 4.1.3 of its Response, the Respondent submits that "*…the claims the subject of this Adjudication Application are factually and legally complex and that the Adjudicator would need considerably more than 10 working days to request further clarification and consider all of the material before him in order to make a just and fair determination*" and "*Accordingly [the Respondent] contends that the Adjudicator may not have jurisdiction to determine the matter and should conclude that the Application should be dismissed*". The Respondent then provides its reasons at paragraphs 17.1.1 to 17.1.8 inclusive.

116 I have considered the Respondent's submission, however I do not consider that the claims are factually or legally complex. As such, I am satisfied that both the matter is not complex and that there is sufficient time to make a determination.

117 In considering jurisdiction:

(a) I find that the work concerned is "*construction work*" as defined under the Act;

(b) I find that there is a "*construction contract*" as defined by section 5 of the Act;

(c) I find that the Application has been prepared and served in accordance with section 28 of the Act;

(d) I find that there was a "*payment claim*" under the Subcontract;

(e) I find that a "*payment dispute*" has arisen;

(f) I find that the Application was made within 90 days after the dispute arose;

(g) I am unaware of an application for adjudication having already been made by a party;

(h) I am unaware of any arbitrator or other person or a court or other body dealing with a matter arising under a construction contract making an order, judgment or other finding about the dispute that is the subject of the Application; and

(i) I confirm that the matter is not too complex and that I have had sufficient time to make a determination.

118 Accordingly, I find that I have jurisdiction to deal with the matter and will proceed to make a determination under section 33(1)(b) of the Act.

The matters in dispute (or the Issues)

119 From the Application and the Response, two matters are in dispute, as follows:

(a) **ISSUE 1**: Oversize General Fill Claim; and

(b) **ISSUE 2**: Oversize Pavement Claim.

Although there is similarity between the two issues, I will deal with each issue separately.

ISSUE 1: Oversize General Fill Claim

120 Within its payment claim, the Applicant included a claim for "*Oversize General Fill Claim*" and attached correspondence (Ref: 22049-[redacted]-LET-115) ("LET-115").

121 The details of the claimed amount were provided in LET-115 and also referred to the following previous correspondence:

(a) Letter reference [redacted]-LET-034 dated 21 August 2017;

(b) Letter reference [redacted]-LET-051 dated 4 September 2017;

(c) Letter reference [redacted]-LET-091 dated 3 November 2017; and

(d) Letter reference [redacted]-LET-103 dated 24 November 2017.

122 Within its Application, at paragraph 3.8, the Applicant relies upon:

(a) Section 3.12.4 of Annexure 4

"*Subcontractor has assumed that sufficient quantity and quality of fill and necessary for any secondary processing or importation of suitable materials, this will be administered in accordance with Clause 11 of the conditions of Subcontract*".

(b) Section 3.12.5 of Annexure 4

"*Subcontractor has allowed for works pertaining to the winning of suitable materials from borrow to meet the specifications and in accordance with Borrow Pit Responsibility Matrix below:*

"*3.12.5.1 Borrow Pit Responsibility Matrix*

	Service(s) provided by			
Description	**Contractor**	**Sub-Contractor**	**Geotechnical Engineering – (Provided by Contractor)**	**Notes/Comments/Detail**
Environmental Clearance Certificate (ECC)	☒	☐	☐	Contractor to provide ECC for Subcontractor to gain access to work areas. Subcontractor to provide notice (2) weeks prior to access intended work areas
Geotechnical Engineer	☒	☐	☒	Subcontractor to submit minimum 24 hours' notice to Contractor to coordinate works
Borrow Pit Management Plan	☐	☒	☐	To be submitted for Contractor approval, including but not limited to borrow pit location, haul roads etc.
Borrow Pit Investigations	☒	☒	☒	~~Subcontractor to collaborate with~~ Geotechnical Engineer to undertake investigations to assess areas viable to establish borrow pits for winning suitable materials. Subcontractor to provide presence during site investigation.
Exploratory Test Pits	☒	☐	☒	Consist of digging test pits with backhoe at borrow pit locations including visual inspection, sampling materials and testing.
Establishment of Borrow Pits	☐	☒	☐	Includes clearing of vegetation and stripping of topsoil to win suitable materials in accordance with Civil Specifications (Excluding secondary processing)
Restoration / Rehabilitation of Borrow Pits	☐	☒	☐	As per Civil Specifications
Access	☐	☒	☐	Includes establishing and maintaining suitable haul roads from work site to borrow pits
Approval / Redesign to use In-situ Fill and Pavement Materials from Borrow Pits	☒	☐	☐	Required if in-situ fill and pavement materials from borrow pits do not meet Civil Specifications

123 At paragraphs 3.10 to 3.17 of its Application, the Applicant sets out its interpretation, in summary being:

(a) At paragraph 3.10, "*Clause 3.12.4 of the Scope of Works states that if the material in borrow pits approved by [the Respondent] is insufficient or is not suitable for use by [the Applicant] as earthworks and pavement fill and requires secondary processing, [the Applicant] is entitled to a variation of the Subcontract*";

(b) At paragraph 3.13, "*...[the Respondent] could approve material that did not meet Specification, provided that the material was suitable for use by [the Applicant] as earthworks and pavement fill and did not require secondary processing*";

(c) At paragraph 3.14, "*...if it eventuated that the material was not suitable and required secondary processing, the costs (and risk) of that secondary processing, (including [the Applicant's] costs and expenses associated with the secondary processing delaying the Subcontractor's Works), would be borne by [the Respondent]*";

(d) At paragraph 3.17(d), "*In the event that the materials were in fact not suitable for use as earthworks and pavement fill and required secondary processing, [the Applicant] would be entitled to recover the costs and expenses associated with that secondary processing as a variation under clause 11 of the Subcontract*";

(e) At paragraph 3.23, "*...[the Applicant] had an express entitlement to recover these costs as Variations under clause 11 of the Subcontract as provided for in clause 3.12.4 of the Scope of Works in Annexure 4 to the Subcontract*".

124 In its Response, the Respondent asserts that the Applicant has no entitlement to the Oversized Fill Claims and asserts at paragraph 3.1.1 of its Response that:

"*[the Applicant] has failed to establish:*

(a) any contractual entitlement to the Oversize Fill Claims; and

(b) even if it has established a contractual entitlement (which is denied), the quantum claimed has not been calculated in accordance with the Subcontract and is clearly overinflated".

125 At paragraph 3.1.2 of its Response, the Respondent states:

"*In relation to both its Oversized General Fill Claim and Oversized Pavement Fill Claim, [the Respondent] says that:*

(a) [the Applicant's] own decision to change its methodology and approach to the work caused inefficiencies and this is what ultimately led to [the Applicant] requiring the use of a stabiliser. This is evidenced by:

(i) [the Applicant] departing from the methodology set down in the Borrow Pit Management Plan;

(ii) [the Applicant] being late in sourcing scrapers to undertake work on site; and

(iii) [the Applicant] pre-emptively sourcing stabilisers to undertake work on the site without approval from [the Respondent];

(b) even on [the Applicant's] own evidence, it changed its methodology and commenced using a stabiliser (without the agreement or authority from [the Respondent]) to address its own lack of productivity, not as a result the material encountered;

(c) the use of a stabiliser is part of normal construction activity and does not constitute secondary processing;

(d) [the Applicant] was involved in the investigation and selection of the location of the borrow pits;

(e) [the Applicant] requested that the borrow pits be placed at locations of no greater than 1 to 2 kilometre intervals, which required extensive testing of the site by [the Respondent's] geotechnical expert [F];

(f) [the Respondent] obtained independent geotechnical testing of the site (the [E] Geotechnical Report and testing by [F]) confirming the suitability of the borrow pit material;

(g) [the Applicant] has failed to provide any independent evidence that the quality of the material was insufficient, particularly in circumstances where it failed to follow the methodology set out in the Borrow Pit Management Plan;

(h) [the Applicant] has not valued its claim in accordance with the requirements of clause 11 of the Conditions of Subcontract - [the Applicant] is not entitled to simply recover its actual costs;

(i) [the Applicant] has brought this claim without basis to recover its losses from under-pricing the Subcontract; and

(j) [the Applicant's] Oversized General Fill Claim and Oversized Pavement Fill Claim are time barred".

126 I will now deal with each of these assertions individually, looking firstly at the asserted time bar.

Is the claim time barred?

127 At paragraph 3.1.2 of its Response, the Respondent asserts that "*[the Applicant's] Oversized General Fill Claim and Oversized Pavement Fill Claim are time barred*" and also at paragraphs 22.1.16 to 22.1.19 inclusive and paragraph 24.1.3(j).

128 The Respondent then sets-out its reasons at paragraphs 22.1.20 to 22.1.22 inclusive and 30.1.1 to 30.1.6 inclusive of its Response.

129 The relevant provisions of the Subcontract to be considered are outlined in the following paragraphs.

130 Clauses 11.1 to 11.3 inclusive deal with Variations. Relevantly, the definition of Variation at clause 1.1 is "*Unless otherwise stated in the Subcontract, means any change to the Subcontract Works including any addition, increase, decrease, omission, deletion, demolition or removal to or from the Subcontract Works*".

131 Clause 11.1 "*Variation Price Request*" states:

"*At any time prior to the Date of Completion of the Subcontract Works or a Stage…, the Contractor's Representative may… issue a document titled* ***'Variation Price Request'*** *to the Subcontractor which will set out details of a* ***proposed Variation*** *which the* ***Contractor is considering*** *with respect to the Subcontract Works or a Stage…*" [***emphasis added***]

132 Clause 11.2 "*Variation Order*" states:

"*Whether or not the Contractor's Representative has issued a 'Variation Price Request' under clause 11.1,* ***the Contractor's Representative may*** *…at any time prior to the Date of Completion of the Subcontract Works or a Stage…* ***instruct the Subcontractor to carry out a Variation by a written document titled 'Variation Order'*** *in which the Contractor's Representative will state one of the following:*

(a) the proposed adjustment to the Subcontract Price as set out in the Subcontractor's notice under clause 11.1 (if any) is agreed and the Subcontract Price will be adjusted accordingly;

(b) any adjustment to the Subcontract Price will be determined under clauses 11.3(b) and 11.3(c); or

(c) the Variation is to be carried out as daywork and any adjustment to the Subcontract Price will be determined under clause 11.3(d).

"*No Variation will invalidate the Subcontract irrespective of the nature, extent or value of the work the subject of the Variation*". [***emphasis added***]

133 Clause 11.3 "*Cost of Variation*" states:

"*…the Subcontract Price will be increased or decreased for all* ***Variations which have been the subject of a direction by the Contractor's Representative****:*

(a) As agreed under clause 11.2(a);

(b) if paragraph (a) does not apply, in accordance with the rates or prices included in the Table of Variation Rates and Prices, if and insofar as the Contractor's Representative determines that those rates or prices are applicable to or it is reasonable to use them for valuing, the Variation, to which will be added:

(i) *the following percentage or percentages of the amount determined:*

A. where the adjustment to the Subcontract Price is to be an increase, those percentages specified in the Subcontract Particulars for non-time related on-site overheads and preliminaries and off-site overheads and profit; or

B. where the adjustment to the Subcontract Price is to be a decrease, the percentage specified in the Subcontract Particular for off-site overheads and profit; and

(ii) *any reasonable costs and expenses incurred by the Subcontractor arising from the Variation delaying the Subcontractor;*

(c) to the extent that paragraph (b) does not apply, by a reasonable amount:

(i) *to be agreed between the parties; or*

(ii) *failing agreement to be determined by the Contractor's Representative, to which will be added:*

(iii) *the following percentage or percentages of the amount determined:*

A. where the adjustment to the Subcontract Price is to be an increase, those percentages specified in the Subcontract Particulars for non-time related on-site overheads and preliminaries and off-site overheads and profit; or

B. where the adjustment of the Subcontract Price is to be a decrease, the percentage specified in the Subcontract Particulars for off-site overheads and profit and

(iv) *any reasonable delay costs and expenses incurred by the Subcontractor arising from the Variation delaying the Subcontractor; or*

(d) *by the amount determined by the Contractor's Representative under 11.6*". [***emphasis added***]

134 The provisions of clauses 11.1 to 11.3 relate to a Variation (as defined) either **requested** or **instructed** by the Contractor's Representative.

135 Clauses 16.1 and 16.2 deal with notices relating to a direction constituting or involving a Variation (clause 16.1) or if the Subcontractor wishes to make a Claim (clause 16.2). The definition of Claim at clause 1.1 is:

"***Claim***

"*Includes any claim for an increase in the Subcontract Price, for payment of money (including damages) or for an extension of time:*

(a) under, arising out of, or in any way in connection with, the Subcontract, including any direction of the Contractor's Representative;

(b) arising out of, or in any way in connection with, the Subcontractor's Activities, the Subcontract Works or either party's conduct before the Subcontract; or

(c) otherwise at law or in equity including:

(i) *by statute;*

(ii) *in tort for negligence or otherwise, including negligent misrepresentation; or*

(iii) *for restitution*".

136 Clause 16.1 "*Notice of Variation*" provides:

"*If a direction by the Contractor's Representative, other than a 'Variation Order' under clause 11.2, constitutes or involves a Variation, the Subcontractor must, if it wishes to make a Claim against the Contractor arising out of, or in any way in connection with, the direction:*

(a) within 7 days of receiving the direction and before commencing work on the subject matter of the direction, give notice to the Contractor's Representative that it considers the direction involves a Variation;

(b) within 14 days after giving the notice under paragraph (a), submit a written claim to the Contactor's representative within includes the details required by clause 16.3(b); and

(c) continue to carry out the Subcontractor's Activities in accordance with the Subcontract and all directions of the Contractor's Representative, including any direction in respect of which notice has been given under this clause 16.1".

137 Clause 16.2 "*Notice of Other Claims*" provides:

"*Except for claims for:*

(a) an extension of time under clause 10.6;

(b) payment under clause 12.2 of the original Subcontract Price specified in the Subcontract Particulars; or

(c) a Variation instructed in accordance with clause 11.2 or to which clause 16.1 applies,

the Subcontractor must give the Contractor's Representative the notices required by clause 16.3 if it wishes to make a Claim against the Contractor in respect of any direction by the Contractor's Representative or any other fact, matter or thing (including a breach of the Subcontract by the Contractor) under, arising out of, or in any way in connection with, the Subcontractor's Activities or the Subcontract, including anything in respect of which:

(d) it is otherwise given an express entitlement under the Subcontract; or

(e) the Subcontract expressly provides that:

(i) specified costs are to be added to the Subcontract Price; or

(ii) the Subcontract Price will be otherwise increased or adjusted,

as determined by the Contractor's Representative".

138 Clause 16.3 "*Prescribed Notices*" provides:

"*The notices referred to in clause 16.2 are:*

(a) a written notice within 14 days of the first occurrence of the direction or other fact, matter or thing upon which the Claim is based, expressly specifying:

(i) that the Subcontractor proposes to make a Claim; and

(ii) the direction or other fact, matter or thing upon which the Claim will be based; and

(b) a written Claim within 14 days of giving the written notice under paragraph (a), which must include:

(i) detailed particulars concerning the direction or other fact, matter or thing upon which the Claim is based;

(ii) the legal basis for the Claim, whether based on a term of the Subcontract or otherwise, and if based on a term of the Subcontract, clearly identifying the specific term;

(iii) the facts relied upon in support of the Claim in sufficient detail to permit verification; and

(iv) details of the amount claimed and how it has been calculated".

139 Clause 16.4 "*Continuing Events*" provides:

"*If the direction or fact, matter or thing upon which the Claim under clause 16.1(b) or 16.2 is based or the consequences of the direction or fact, matter or thing are continuing, the Subcontractor must continue to give the information required by clause 16.3(b) every 28 days after the written claim under clause 16.1(b) or 16.3(b) (as the case may be) was submitted or given to the Contractor's Representative, until after the direction or fact, matter or thing upon which the Claim is based has, or the consequences thereof have, ceased*".

140 Clause 16.5 "*Time Bar*" provides:

"*If the Subcontractor fails to comply with clause 16.1, 16.2, 16.3 or 16.4:*

(a) the Contractor will not be liable (insofar as possible to exclude such liability) upon any Claim by the Subcontractor; and

(b) the Subcontractor will be absolutely barred from making any Claim against the Contractor;

arising out of, or in any way in connection with, the relevant direction or fact, matter or thing (as the case may be) to which clause 16.1 or 16.2 applies".

141 Therefore, in circumstances where the Contractor's Representative does not request or instruct a Variation, clause 16.1 or clause 16.2 allows the Subcontractor to submit a Claim (as defined).

142 In considering whether clause 11.1 or clause 11.2 or clause 16.1 or clause 16.2 (and 16.3) applies, I will now consider the facts and relevant provisions of the Subcontract.

143 Clause 3.12.4 of Annexure 4 provides:

"*Subcontractor has assumed that sufficient quantity and quality of fill and pavement materials can be sourced from borrow pits at the site. "Should it be necessary for any secondary processing or importation of suitable materials, this will be* ***administered in accordance with Clause 11*** *of the conditions of Subcontract*". [***emphasis added***]

144 Clause 3.12.5 of Annexure 4 provides:

"*Subcontractor has allowed for works pertaining to the winning of suitable material from borrow to meet the specifications and in accordance with Borrow Pit Responsibility Matrix below:*"

145 Contained within the last row of 3.12.5.1 "*Borrow Pit Responsibility Matrix*" it provides:

Approval / Redesign to use In-situ Fill and Pavement Materials from Borrow Pits	☒	☐	☐	Required if in-situ fill and pavement materials from borrow pits do not meet Civil Specifications

146 In considering the provisions of Annexure 4 of the Subcontract in relation to suitability of material, it provides the Contractor's Representative with options to either:

(a) Approve or redesign in-situ fill and pavement materials from borrow pits if in-situ fill and pavement materials do not meet the civil specifications; or

(b) If it becomes necessary for any secondary processing or importation of suitable materials (two options available here), then this would "*be* ***administered*** *in accordance with Clause 11 of the conditions of Subcontract*". [***emphasis added***].

147 With regard to approval or redesign, there is no evidence of any approval or redesign by the Contractor's Representative.

148 By reference to paragraph 134, to administer in accordance with clause 11, the Contractor's Representative must either:

(a) Request a Variation - "*issue a document titled 'Variation Price Request'*"; and/or

(b) Instruct a Variation – "*by a written document titled 'Variation Order'*".

There is no evidence that the Contractor's Representative requested or instructed a Variation and at paragraph 22.1.8 of its Response, the Respondent states "*To be clear, no direction was issued by [the Respondent] to [the Applicant] under clause 11 of the Subcontract to perform secondary processing.* "*No Variation Order under clause 11.2 of the Subcontract was ever issued by [the Respondent] to perform secondary processing*".

149 As the 'secondary processing', as claimed by the Applicant, was not requested or instructed by the Contractor, the secondary processing was not "*administered in in accordance with clause 11*".

150 As such, the Applicant must make a claim under either clause 16.1 or 16.2 (and 16.3).

151 At paragraphs 22.1.10 to 22.1.11 of its Response, the Respondent provides its interpretation of the Subcontract as it applies to section 3.12.4 of Annexure 4 by "*treating the satisfaction of the two preconditions in section 3.12.4 as a* ***deemed direction*** *by the Contractor's Representative under clause 11.2 of the Subcontract, which is then valued under clause 11.3 of the Subcontract*" [***emphasis added***] and "*once it is clear that secondary processing is required to be carried out as a result of an insufficient quantity or quality of fill and pavement materials in the borrow pits, it is as if the [the Respondent] has directed [the Applicant] to carry out the secondary processing under clause 11.2, to be valued under clause 11.3 of the Subcontract*".

152 At paragraphs 22.1.12 to 22.1.15 of its Response, the Respondent then considers that "*the notice requirements under clause 16.1 of the Subcontract applies*".

153 At paragraphs 30.1.1 to 30.1.6 of its Response (and at paragraphs 108 to 113 of [B]'s Statutory Declaration), the Respondent asserts that the claim is time barred and relies upon the necessity of any secondary processing being a deemed direction, thus triggering clause 16.1.

154 By reference to clause 16.1, clause 16.1 provides "

"*If a* ***direction by the Contractor's Representative****, other than a 'Variation Order' under clause 11.2, constitutes or involves a Variation, the Subcontractor must, if it wishes to make a Claim against the Contractor arising out of, or in any way in connection with, the direction:*

(a) within 7 days of receiving the direction and before commencing work on the subject matter of the direction, give notice to the Contractor's Representative that it considers the direction involves a Variation;

(b) within 14 days after giving the notice under paragraph (a), submit a written claim to the Contactor's representative within includes the details required by clause 16.3(b); and

(c) continue to carry out the Subcontractor's Activities in accordance with the Subcontract and all directions of the Contractor's Representative, including any direction in respect of which notice has been given under this clause 16.1".

[***emphasis added***]

155 The Respondent's argument is based upon a deemed direction arising from "*the satisfaction of the two preconditions in section 3.12.4*".

156 I do not consider that a deemed direction arises under section 3.12.4 of Annexure 4, as proposed by the Respondent for the following reason:

(a) There are various options available if the material does not conform to the requirements of the specification:

(i) The last row of "*Section 3.12.5.1 Borrow Pit Responsibility Matrix*" allows for the Contractor to approve or redesign in-situ fill and pavement materials if in-situ materials did not meet the civil specifications; and

(ii) Section 3.12.4 provides for two options, being "*secondary processing*" or "*importation of suitable materials*".

As such, a clear direction by the Contractor's Representative as to what option is required is necessary. The requirement for secondary processing as a deemed direction could only arise if the Contractor's Representative chooses not to adopt any of the other available options. Therefore, I do not consider that there was a deemed direction, thus clause 16.1 is not triggered.

157 Given that no direction was given by the Contractor's Representative, clause 16.2 provides the Subcontractor the mechanism to make a claim and clause 16.3 sets out the prescribed notice requirements.

158 At paragraph 22.1.18, the Respondent asserts that "*[the Applicant] has failed to comply with clause 16.1 of the Conditions of Subcontract*". By reference to paragraph

156, I have found that clause 16.1 is not triggered and as such there is no failure by the Applicant to comply with clause 16.1. I will however consider the Applicant's compliance with the timeframes under clause 16.3.

159 By reference to paragraph 157, I consider that the Applicant was required to submit a notice under clause 16.2 in the format prescribed by clause 16.3.

160 I note that although clause 16.1 and 16.3 contain similar provisions outlining the requirements for notification, the timeframes for the first notice differ, being seven days under clause 16.1 and fourteen days under clause 16.3.

161 By reference to paragraph 68 of [A's] Statutory Declaration, [A] states that "*On or about 8 August 2017, during [his] site visit to the Project site, [he] noticed that the material being won in accordance with the BPMP and carted out of borrow pit 14 contained a large amounts of oversized material*".

162 Also by reference to paragraph 30.1.4 of its Response (and at paragraph 112 of [B's] Statutory Declaration), the Respondent notes that "*[the Applicant] alleges it first became aware of this issue on 8 August 2017*". As there is no evidence to suggest otherwise I consider that the Applicant first became aware on 8 August 2017.

163 Clause 16.3 requires "*a written notice within 14 days of the first occurrence of the direction or other fact, matter or thing upon which the Claim is based…*". As such, the Applicant was required to provide a written notice on or before 22 August 2017.

164 At paragraph 30.1.5 of its Response, the Respondent states "*The initial notice was given on **21 August 2017** and was followed by a claim on **4 September 2017***". [***emphasis added***]

165 At Annexure [A]-18 of its Application, the Applicant provides a copy of its letter dated 21 August 2017 (ref: 22049-[*redacted*]-LET-034) with subject "*Notice of Other Claim*" which has been submitted prior to 22 August 2017.

166 Clause 16.3 then requires "*a written Claim within 14 days of giving the written notice under paragraph (a)…*". As such, the Applicant was required to provide its second written notice on or before 4 September 2017, being 14 days from 21 August 2017.

167 At Annexure [A]-21 of its Application, the Applicant provides a copy of its letter dated 4 September 2017 (ref: 22049-[*redacted*]-LET-051) with the subject "*Other Claim – Oversized Material*" which was submitted on time.

168 I find that the Applicant has complied with the time requirements of Clause 16.3 and as such the Applicant's claim is not time barred.

Change in Methodology

169 At paragraphs 3.1.2(a) and 24.1.3(a) of its Response, the Respondent asserts that:

"*[the Applicant's] own decision to change its methodology and approach to the work caused inefficiencies and this is what ultimately led to [the Applicant] requiring the use of a stabiliser. This is evidenced by:*

(i) *[the Applicant] departing from the methodology set down in the Borrow Pit Management Plan;*

(ii) *[the Applicant] being late in sourcing scrapers to undertake work on site; and*

(iii) *[the Applicant] pre-emptively sourcing stabilisers to undertake work on the site without approval from [the Respondent]*".

170 Further at paragraphs 26.1.1 to 26.1.15, the Respondent outlines why it asserts and concludes (at paragraph 26.1.15) that:

"*Any secondary processing that [the Applicant] alleges was required was a direct result of:*

(a) it changing its methodology from what was outlined in the Management Plan; and

(b) its failure to undertake appropriate primary processing of the borrow pit material".

171 Under the Borrow Pit Responsibility Matric, the Applicant was required to prepare a Borrow Pit Management Plan, as below

Borrow Pit Management Plan	☐	☒	☐	To be submitted for Contractor approval, including but not limited to borrow pit location, haul roads etc.

172 At paragraphs 3.15 of its Application and paragraphs 44 to 50 inclusive of [A's] Statutory Declaration, the Applicant sets-out the submission, review and approval process that took place regarding the Borrow Pit Management Plan and attaches the relevant versions at Annexures [A]-03, [A]-04, [A]-05 and [A]-06.

173 Sections 10.1 and 10.3 of the Borrow Pit Management Plan outline how the Applicant intended to win and load materials as follows:

"*General Fill*

- *Winning directly with 623 scrapers; or*
- *Ripping with a D9 sized bulldozer and winning with 623 scrapers; or*
- *Ripping &/or pushing with a D9 sized bulldozer into stockpile for loading into haul trucks such as double road trains*

Pavement Material

- *Ripping &/or pushing with a D9 sized bulldozer into stockpile for loading into haul trucks such as double road trains*"

And, loading of materials with the following methods:

- "*Winning with 623 scrapers which are self-loading; or*
- *Loading of haul trucks from a stockpile with a 980 sized loader*".

In addition, an alternative for using a 36-40 tonne excavator was included which allowed for winning and loading the material into haul trucks at the same time.

174 At paragraphs 63 to 67 of [A's] Statutory Declaration, [A] outlines the process employed for winning and loading of materials.

175 At paragraphs 26.1.5, 26.1.6, 26.1.7, 26.1.8 and 26.1.11 of its Response, the Respondent asserts:

(a) "*26.1.5 If [the Applicant] had undertaken the work in the borrow pits as it planned to do (i.e. using a 623 scrapers and suitably sized dozers) [the Applicant] would have been able to extract material from the borrow pits that met the Civil Specifications, without the need for any secondary processing*".

(b) "*26.1.6 In a meeting on 23 July 2017, [the Applicant] advised that that it was unable to obtain scrapers as originally planned because they had been committed to another project. This resulted in [the Applicant] having to change its methodology on the Project*".

(c) "*26.1.7This change in methodology was directly observed by [the Respondent] representatives at borrow pits CH14, CH16, CH18 and CH22. "Instead of using a scraper or dozer, [the Applicant] used an excavator. "The effect using*

an excavator is that it pulls up large slabs of laterite material, which is then loaded on to a truck. "It is not pushed into a stock pile or ripped, the excavator just picks up the material as it is found without any further refinement or the refinement that would be achieved if a scraper or dozer had been used".

(d) "*26.1.8 …Using an excavator and directly placing the borrow pit material on to a truck, does not constitute working the material*".

(e) "*26.1.11 It should also have been aware that simply digging up the borrow pit material using an excavator and loading it on to a truck would not ensure that the material met the Civil Specifications*".

176 With regard to the Respondent's statements that the excavator just picks up the material as it is found without any further refinement or the refinement that would be achieved if a scraper or dozer had been used, I have reviewed the correspondence provided and the attached photographs (which is the only evidence before me) and the material in all cases appears to have been ripped and has not been excavated directly without ripping.

177 As such I consider that the Applicant's methodology employed was consistent with the various options contemplated in the Borrow Pit Management Plan and in my experience are all standard industry practice.

178 As such I do not consider that the Applicant changed its methodology from that outlined in the Borrow Pit Management Plan.

179 I do not accept that secondary processing was a direct result of the Applicant "*changing its methodology*" or any "*failure to undertake appropriate primary processing*".

180 At paragraph 26.1.13 of its Response, the Respondent states "*When scrapers were used at the borrow pits at CH 32A, CH 30 and CH 27, the material won using this methodology resulted in maximum particle sizes of 100mm, which complied with the Civil Specifications for general fill*".

181 At paragraphs 24.1.5, 24.1.6 and 28.1.1 to 28.1.3 of its Response, the Respondent notes that material was successfully won from borrow pits at chainages 0-13 without undertaking any form of secondary processing or bringing in any form of special equipment. The Respondent also relies upon [C]'s Statutory Declaration, at paragraphs 62 to 65 inclusive that notes another part of the Project and another subcontractor

nearby successfully won material without undertaking any form of secondary processing or bringing in any form of special equipment.

182 And at paragraph 28.1.4 of its Response, the Respondent notes that the [F] Report does not identify any fundamental differences.

183 Having considered the argument and evidence put forward by the Respondent, I must note that borrow pits contain naturally occurring materials that by nature will vary not only within a borrow pit but also between borrow pits and that it is common in construction that the material will have differing properties. Although the Applicant and other subcontractors may have been able to successfully win material in some locations without any processing, this will not mean that this will be the case in all other areas.

184 **Change in Methodology and use of a stabiliser**

185 At paragraphs 3.1.2(b) and 24.1.3(b) of its Response, the Respondent asserts that:

"*even on [the Applicant's] own evidence, it changed its methodology and commenced using a stabiliser (without the agreement or authority from [the Respondent]) to address its own lack of productivity, not as a result the material encountered*".

186 At paragraph 26.1.14 of its Response, the Respondent states "*At paragraph 76 of the Statutory Declaration of [A], he states that [the Applicant] adopted a change in methodology in relation to general fill material on or about 16 September 2017*. "*It was around this date that [the Applicant] began using a stabiliser on the general fill it won from the borrow pits*. "*This change in methodology was not approved by [the Respondent]*".

187 From the evidence provided, it is clear that the Applicant began using a stabiliser to process the material. I see no evidence that this was done to address any lack of productivity. From the evidence provided I consider that the use of the stabiliser was primarily to process the material to achieve the required grading.

The use of a stabiliser is part of normal construction activity and does not constitute secondary processing

188 At paragraph 3.1.2(c) of its Response, the Respondent asserts that "*the use of a stabiliser is part of normal construction activity and does not constitute secondary processing*". Similarly, at paragraph 24.1.3(c) of its Response, the Respondent asserts "*the use of a stabiliser does not constitute secondary processing*".

189 At paragraphs 27.1.1 to 27.1.10 of its Response, the Respondents outlines the basis of its argument.

190 I agree with the Respondent that 'secondary processing' is not a common industry term, nor is it defined in the Subcontract. However, it is not uncommon for earthwork contractors to refer to processing at a borrow pit (in general) to mean any additional work such as screening, crushing, blending or cement stabilisation necessary to achieve the specified material properties. By reference to paragraphs 27.1.3 and 27.1.4 of the Response, this is consistent with the options put forward by the Applicant at the time of tender and included within the Borrow Pit Management Plan.

191 I also agree with the Respondent's Letter of 25 September 2017 (refer paragraph 27.1.5 of the Response) where it made the point that "… *'secondary processing' is generally considered to include 'the utilisation of specialist machinery / equipment to 'size knockdown / reduce' oversize material". This can be one aspect of secondary processing*".

192 With regard to paragraph 27.1.7 of the Response, whilst I generally agree with the Respondent that these sorts of activities will generally be performed at, or close to, the material source using specialised machines, this is not always the case.

193 When considering the non-conformity associated with the material, as argued by the Applicant, one must be mindful that it relates only to oversize material, which is a failure to meet the specified grading requirements. With regard to general fill, the location where the material is processed will depend upon the extraction method. For example, if material is ripped and pushed-up into a stockpile for later loading, large oversize material can be removed through the use of a skeleton bucket at the borrow pit. Alternatively, the material can be ripped and directly loaded, by an excavator or scraper, with the oversize material removed at the point of delivery.

194 Within its Borrow Pit Management Plan, the Applicant sets-out three options for winning of material, as follows:

(a) "*Winning directly with 623 Scrapers; or*

(b) *Ripping with a D9 sized bulldozer and winning with 623 scrapers; or*

(c) *Ripping &/or pushing with a D9 sized bulldozer into stockpile for loading into haul trucks such as double road trains*".

I consider that the options proposed are consistent with standard industry practice. I would also consider that ripping and conditioning (with water) then directly loading without pushing into stockpile is another acceptable method.

195 As such, I consider that processing can also be done at the point of delivery.

196 In its Response, at paragraph 27.1.10, the Respondent asserts that "*The use of a stabiliser does not involve 'crushing, screening or blending' as contemplated in the Management Plan as being necessary for secondary processing*. "*The use of a stabiliser is part of ordinary construction activity and was not a necessary addition to the process of winning material from the borrow pits*"

197 Whilst I agree that the use of a stabiliser was not specified as a specific piece of equipment for secondary processing, I disagree that the use of a stabiliser is part of ordinary construction activity.

198 As noted by the Respondent at paragraph 27.1.9 of its Response, a stabiliser involves injecting water through the material. In my experience, stabilisers are primarily used in circumstances where granular materials are sensitive to water. The stabiliser therefore allows for better control of the moisture content of the material. In addition though, a stabiliser does breakdown material and as such is a form of processing.

199 I therefore do not agree that "*the use of a stabiliser is part of normal construction activity and does not constitute secondary processing*".

The Applicant was involved in the investigation and selection of the location of the borrow pits

200 At paragraphs 3.1.2(d) and 24.1.3(d) of its Response, the Respondent notes that *"[the Applicant] was involved in the investigation and selection of the location of the borrow pits*".

201 At paragraphs 25.1.2 to 25.1.3 of its Response, the Respondent notes the responsibilities and also references the Borrow Pit Responsibility Matrix.

202 By reference to the Borrow Pit Responsibility Matrix, the Applicant's responsibility was to "*provide presence during investigation*". Although I agree that the Applicant was involved, the Applicant was not responsible for the Borrow Pit Investigations, nor was it responsible for the approval or redesign of the material.

The Applicant requested that the borrow pits be placed at locations of no greater than 1 to 2 kilometre intervals, which required extensive testing of the site by the Respondent's geotechnical expert [F]

203 Within its Response, at paragraphs 3.1.2(e) and 24.1.3(e), the Respondent states that "*[the Applicant] requested that the borrow pits be placed at locations of no greater than 1 to 2 kilometre intervals, which required extensive testing of the site by [the Respondent's] geotechnical expert [F]*".

204 At paragraphs 25.1.8 to 25.1.10 of its Response, the Respondent sets-out how the borrow pit locations were determined.

205 I consider that the requests made by the Applicant would have been solely based on reducing haul distances to either reduce costs by reducing the number of trucks or scrapers required to haul the material longer distances or maintain production (where additional trucks or scrapers were unavailable). It was acknowledged by the Respondent in its Response at paragraph 25.1.8 that the Respondent fulfilled these requests "*…to ensure that there were no long haul distances on site, thereby assisting [the Applicant's] production rates*" and also similarly noted by [B] in his Statutory Declaration at paragraph 24.

206 Although I acknowledge that the locations were requested by the Applicant, and that extensive testing was undertaken, I do not consider that the Applicant's input into the location of borrow pits reduces the Respondent's responsibilities under the Borrow Pit Responsibility Matrix.

The Respondent obtained independent geotechnical testing of the site (the [E] Geotechnical Report and testing by [F]) confirming the suitability of the borrow pit material

207 At paragraphs 3.1.2(f) and 24.1.3(f) of its Response, the Respondent bases its position on the fact that *"[the Respondent] obtained independent geotechnical testing of the site (the [E] Geotechnical Report and testing by [F]) confirming the suitability of the borrow pit material*".

208 Within the detailed correspondence provided as Attachments to [A's] Statutory Declaration and the Respondent's submissions at paragraphs 25.1.6, 25.1.7, 25.1.11 and 25.1.13 of its Response, it is clearly evident that extensive independent

geotechnical testing was undertaken and that each borrow pit was approved on the basis of the results of the geotechnical testing.

209 At paragraphs 25.1.14 of its Response, the Respondent notes that "*In its Adjudication Application, [the Applicant] has criticised the testing undertaken by [F], however, has provided no corroborating evidence of its allegations regarding poor sampling techniques*".

210 Also at paragraph 25.1.12 of its Response, the Respondent notes that "*The Borrow Pit Responsibility Matrix also required [the Applicant] to be on site when [F] was carrying out the testing of the borrow pit locations*. "*At no time during this process did [the Applicant] question or challenge [D's] sampling methodology*".

211 In its letter of 2 October 2017 at Annexure [A]-23, the Applicant provides comment on the sampling and testing methodology employed by [F] by providing its views on "*limited test carried out*", "*testing methodology*" and "*samples…[taken] by hand*".

212 It is evident that there is no contention that the testing undertaken by [F] did not identify oversized materials, however in my experience the sampling methods employed by material testing organisations would not identify materials greater than 100mm as part of that testing.

213 As such sampling and testing as part of a borrow pit investigation would not typically identify materials greater than 100mm as part of the reported test results.

The Applicant has failed to provide any independent evidence

214 At paragraphs 3.1.2(g) and 24.1.3(g) of its Response, the Respondent states that *"[the Applicant] has failed to provide any independent evidence that the quality of the material was insufficient, particularly in circumstances where it failed to follow the methodology set out in the Borrow Pit Management Plan*".

215 Whether or not a party to a payment dispute provides independent evidence is for the party to decide.

216 I have considered the evidence as provided and given it the necessary weight.

The Applicant has brought this claim without basis to recover its losses from under-pricing the Subcontract

217 At paragraphs 3.1.2(i) of its Response, the Respondent asserts that *"[the Applicant] has brought this claim without basis to recover its losses from under-pricing the Subcontract*" and similarly at paragraph 24.1.3(i) *"[the Applicant] has manufactured a claim to recover its losses from under-pricing the Subcontract*".

218 At paragraphs 29.1.1 to 28.1.7 inclusive, the Respondent provides the basis of its assertion, which refers to the tender pricing and in particular Item 1.1.3.16, which relates to "…*processing onsite materials*…".

219 Whilst the Respondent may have formed this view, whether or not the Applicant under-priced the Subcontract bears no relevance on whether the Applicant is or is not entitled to addition monies under the Subcontract.

Entitlement

220 Having considered the submissions and evidence provided by both the Applicant and the Respondent I find that the Applicant has demonstrated that it has entitlement under the Subcontract for the following reasons:

(a) Section 3.11.4 of Attachment 4 provides an entitlement when any secondary processing is necessary.

(b) The Applicant has sufficiently demonstrated that its process for winning materials (without secondary processing) was in accordance with the Borrow Pit Management Plan, the Subcontract requirements and standard industry practice and that, at times, this process did not produce fully compliant material and secondary processing of the general fill was necessary.

(c) The Applicant submitted the required notices in time and is not time barred.

Quantum

221 At paragraphs 3.1.2(h) and 24.1.3(h) the Respondent asserts that *"[the Applicant] has not valued its claim in accordance with the requirements of clause 11 of the Conditions of Subcontract*" and that it "*is not expressly entitled to its actual costs*".

222 Also at paragraphs 3.2.1 to 3.2.4 of its Response (and similarly at paragraph 37.1.2), the Respondent submits that, if I decide that the Applicant is entitled to any part of its claim, that the Respondent submits that the Applicant has:

(a) "f*ailed to value the increase in the Subcontract Price in accordance with clause 11.3 of the Subcontract – [the Applicant] is entitled to recover its reasonable costs, not its actual costs*";

(b) "*overinflated the quantum of any possible claim it might have for the following reasons:*

(i) *it has included costs that go beyond the use of a stabiliser;*

(ii) *it has included additional scraping costs, which should form part of its primary processing work;*

(iii) *it has not substantiated or explained the rates it has adopted; and*

(iv) *it has provided no substantiation or evidence as to the quantity of general and pavement fill on which its claims are based*".

And, at paragraph 3.2.2 that it has engaged [D] and that if I decide that *"[the Applicant] is entitled to an adjustment to the Subcontract Price, a reasonable amount in accordance with clause 11.3 is:*"

Claim	Aquenta Assessment		
	Quantity of Fill	Rate	Revised Value
General Fill	65,607m³	$3.47m³	$227,656.29
Pavement Fill	70,434m³	$11.35m³	$799,149.02
TOTAL			$1,076,805.31

[2]

Note that although table shows both General Fill and Pavement Fill, I am only considering the General Fill Quantum here.

223 Within its Application, at paragraphs 3.22, 3.26 and 3.27, the Applicant sets out its claim value of $786,566.67, being "*actual costs*".

[2] Amount in Response incorrectly totalled $1,076,805.31 but should have totalled $1,026,805.31

224 The Applicant also includes a copy of the Payment claim at Attachment 3 and the supporting information at Annexure [A]-27.

225 I have undertaken a review of the quantum being claimed and note that it generally includes costs under the following groups:

(a) Provision of Stabilisers (16 September to 22 September 2017)

(b) Provision of Stabilisers (23 September to 22 October 2017)

(c) Fuel for Stabilisers (16 September to 27 November 2017)

(d) Support Crew for Stabiliser No 1 (Grader, Grader Operator, Fuel for Grader, Roller, Roller Operator, Fuel for Roller)

(e) Support Crew for Stabiliser No 2 (Grader, Grader Operator, Fuel for Grader, Roller, Roller Operator, Fuel for Roller)

(f) Additional Scraping Costs (Ripper Attachment)

(g) Compactor plus mobilisation and demobilisation

(h) Non time related on site overheads and preliminaries

(i) Off-site overheads and profit

226 When considering the quantum and the costs being claimed, I agree with the Respondent that, the Applicant has:

(a) "*included costs that go beyond the use of a stabiliser*"; and

(b) "*included additional scraping costs, which should form part of its primary processing work*".

227 I consider that the support crews and the compactor being claimed are resources that were necessary for the compaction, shaping and trimming of the fill, which were included within the Applicant's scope of work. As such I do not consider that these costs form part of secondary processing.

228 I consider that the additional scraping does not constitute secondary processing. As such I do not consider that these costs form part of secondary processing.

229 I find that the costs for the stabiliser form part of secondary processing.

230 Although I agree with the Respondent that there is no substantiation or evidence as to the quantity of general fill on which the claims are based, similarly no evidence to the contrary has been provided.

231 At paragraphs 38.1.1 to 38.1.5, the Respondent sets out its interpretation of how the claim should be valued at a 'reasonable amount' and not recovery of 'actual costs'. I agree with the Respondent's interpretation, however there is nothing preventing the Respondent (or myself for that matter) reviewing the actual costs and then determining if they are in fact a 'reasonable amount'.

232 I have considered the [D] report, submitted by the Respondent and note also paragraph 39.1.2 of the Response that "*In respect to the Oversized General Fill Claim, [D] has assessed a reasonable amount as follows:*"

BGC Claim	Aquenta Assessment		
	Quantity of Fill	Rate	Revised Value
$786,566.67	65,607m^3	$3.47m^3	$227,656.29

233 At paragraph 39.1.9 of its Response, the Respondent "*submits that should the Adjudicator determine that [the Applicant] has established an entitlement to recover additional costs as a result of the Oversized General Fill Claim, the amount to be awarded by the Adjudicator should be $227,656.29*".

234 By reference to my earlier paragraphs, I have considered that the applicable 'actual costs' in relation to the Oversize General Fill Claim are as follows:

(a)	Provision of Stabilisers (16 September to 22 September 2017)	**$44,292.50**
(b)	Provision of Stabilisers (23 September to 22 October 2017)	**$324,190.00**
(c)	Fuel for Stabilisers (16 September to 27 November 2017)	**$64,502.88**
(d)	Non time related on site overheads and preliminaries (2.5%)	**$10,824.63**
(e)	Off-site overheads and profit (2.5%)	**$10,824.63**
(f)	**TOTAL**	**$454,634.65**

235 I will later consider what constitutes a 'reasonable amount'.

ISSUE 2: Oversize Pavement Claim

236 Within its payment claim, the Applicant included a claim for "*Oversize Pavement Claim*" and attached correspondence (Ref: 22049-[redacted]-LET-116) ("LET-16").

237 The details of the claimed amount were provided in LET-116 and also referred to the following previous correspondence:

(a) Letter reference [redacted]-LET-071 dated 12 October 2017;

(b) Letter reference [redacted]-LET-091 dated 3 November 2017; and

(c) Letter reference [redacted]-LET-103 dated 24 November 2017.

238 Within its Application, the Applicant generally relies upon the same provisions that it relied upon in the Oversize General Fill Claim, as I have outlined in paragraphs 122 and 123.

239 Within its Response, the Respondent asserts that the Applicant has no valid claim states at paragraph 31.1.2 of its Response (with a similar position outlined at paragraph 3.1.2 of its Response) that:

"*[the Respondent's] position is that [the Applicant] has no valid claim in relation to secondary processing for pavement fill because:*

(a) [the Applicant's] change in methodology and approach to the work caused inefficiencies and this is what ultimately led to [the Applicant] requiring the use of a stabiliser. This is evidenced by:

(i) [the Applicant] departing from the methodology set down in the Borrow Pit Management Plan;

(ii) [the Applicant] being late in sourcing scrapers to undertake work on site; and

(iii) [the Applicant] pre-emptively sourcing stabilisers to undertake work on the site without approval from [the Respondent];

(b) [the Applicant] changed its methodology and commenced using a stabiliser without agreement or authority from [the Respondent];

(c) the use of a stabiliser does not constitute secondary processing;

(d) [the Applicant] was involved in the investigation and selection of the location of the borrow pits;

(e) [the Applicant] requested that the borrow pits be placed at locations of no greater than 1 to 2 kilometre intervals, which required extensive testing of the site by [the Respondent's] geotechnical expert [F];

(f) [the Respondent] obtained independent geotechnical testing of the site (the [E] Geotechnical Report and testing by [F]) confirming the suitability of the borrow pit material;

(g) [the Applicant] has failed to provide any independent evidence that the quality of the material was insufficient, particularly in circumstances where it failed to follow the methodology set out in the Borrow Pit Management Plan;

(h) [the Applicant] has not valued its claim in accordance with the requirements of clause 11 of the Conditions of Subcontract. "[the Applicant] is not expressly entitled to its actual costs;

(i) [the Applicant] has manufactured a claim to recover its losses from under-pricing the Subcontract; and

(j) [the Applicant's] Oversized Pavement Fill Claim is time barred, as [the Applicant] has not complied with the notice provision under section 16.1 of the Subcontract".

240 It is noted that the position with regard to the Oversized Pavement Claim is similar to the position with regard to the Oversized General Fill Claim in many aspects. As such, where appropriate, I make references to my earlier comments and findings regarding the Oversize General Fill Claim.

241 I will now deal with each of these assertions individually, looking firstly at the asserted time bar.

Is the claim time barred?

242 At paragraph 3.1.2 of its Response, the Respondent asserts that "*[the Applicant's] Oversized General Fill Claim and Oversized Pavement Fill Claim are time barred*" and also at paragraphs 22.1.16 to 22.1.19 inclusive and paragraph 24.1.3(j) of its Response.

243 At paragraphs 36.1.1 to 36.1.10 of its Response (and at paragraphs 130 to 135 of [B]'s Statutory Declaration), the Respondent asserts that the claim is time barred and, similar

to the oversize fill claim, relies upon the necessity of any secondary processing being a deemed direction, thus triggering clause 16.1.

244 By reference to paragraphs 129 to 146 inclusive, similar to the Oversize General Fill Claim, in general terms, clause 16.1 only applies in circumstances where there is a direction, clause 11.1 applies where there is a request, clause 11.2 applies where there is an instruction and clause 16.2 (and 16.3) applies where the Subcontractor makes a claim.

245 By reference to both the Application and the Response, I see no evidence of a Variation Price Request by the Contractor's Representative. As such clause 11.1 is not triggered.

246 By reference to both the Application and the Response, I see no evidence of a Variation Order by the Contractor's Representative. As such clause 11.2 is not triggered.

247 By reference to both the Application and the Response, I see no evidence that a direction was given by the Contractor's Representative and by reference to my earlier comments in relation to the Oversize General Fill Claim, I do not consider that there is a deemed direction. As such, clause 16.1 is not triggered and clause 16.2 provides the Subcontractor the mechanism to make a claim and clause 16.3 sets out the prescribed notice requirements.

248 Within its Response, the Respondent sets out the times it considers that the Applicant should have submitted its first notice and its written claim under clause 16.1 of the Subcontract and compares that with the actual dates of the Applicant's notice and subsequent claim. By reference to paragraph 247, I have found that clause 16.1 is not triggered and as such there is no failure by the Applicant to comply with clause 16.1. I will however consider the Applicant's compliance with the timeframes under clause 16.3.

249 By reference to paragraph 247, I consider that the Applicant was required to submit a notice under clause 16.2 in the format prescribed by clause 16.3.

250 I note again that although clause 16.1 and 16.3 contain similar provisions outlining the requirements for notification, the timeframes for the first notice differ, being seven days under clause 16.1 and fourteen days under clause 16.3.

251 By reference to paragraphs 36.1.4 to 36.1.7 of its Response, the Respondent references paragraphs 69 and 100 of [A's] Statutory Declaration and adopts a date of 2 September

2017 (noting that it was most likely earlier), being the date it considers the Applicant became aware.

252 At paragraph 69 of [A's] Statutory Declaration, [A] states:

"*I also discovered that there was oversized materials in borrow pits CH 15, 16, 17, 18, 19, 20, 21, 24, 27, 29, 30 and 32 when materials were won from those borrow pits in the period between about 8 August 2017 and 2 September 2017*".

253 By reference to paragraph 69 of [A's] Statutory Declaration, [A] does not specifically state what material it relates to - general fill material or pavement material. In the context of the heading above paragraph 61 and the preceding and subsequent paragraphs, it is clear to me that this reference was being made to general fill material, not pavement material.

254 At paragraph 100 of [A's] Statutory Declaration, [A] states:

"*On or about 13 August 2017, immediately following the commencement of the pavement trials, [the Applicant's] borrow pit team noticed that the pavement material being won in accordance with the BPMP contained oversize material. "The oversized material did not meet the Civil Specification for pavement materials (as they were larger than 19mm) and [the Applicant's] borrow pit team determined the material was not suitable for use as pavement fill material and would require secondary processing*"

255 Although not noted by the Respondent, paragraph 97 of [A's] Statutory Declaration states "*On or about 6 October 2017, [the Applicant's] borrow pit team commenced winning the pavement materials from the approved borrow pits in accordance with the BPMP*".

256 Similarly, paragraphs 95 and 96 of [A's] Statutory Declaration outlines the approval of borrow pits for both the pavement trials (refer paragraph 95 of [A's] Statutory Declaration) and constructed pavement (refer paragraph 96 of [A's] Statutory Declaration).

257 Within paragraphs 72, 73 and 74 of the [B] Statutory Declaration, [B] declares:

"*72. I do not agree with what [A] has said in paragraph 95*. "*On 13 August 2017, I approved the borrow pit CH 19 West for pavement material, not pavement trials as [A] suggests*".

"*73. In the Aconex communication GRO-LL-PROJCOM-025195 dated 13 August 2017…I suggested that [the Applicant] prepare a trial pad for the sub-base and base pavement types*. "*I made this suggestion so that [the Applicant] had the opportunity to see how the material would break down, however, the pit was approved for use from 13 August 2017*. "*I also attached a drawing to assist [the Applicant] locate where it should draw the borrow pit material from*".

"*74. On 5 September 2017, [the Applicant] prepared a trial pad for the materials from CH 19 West. "The material extracted by [the Applicant] on this date, however, was not from the area specified in the drawing provided to it on 13 August 2017*. "*The material was from the wrong location, was dense and unable to be processed to meet the Project requirements*. "*I was on site when [the Applicant] attempted to place this material and realised that the material was not breaking down underneath the pad foot roller being used by t[the Applicant]*. "*I directed the [Applicant's] Engineer on site to stop the works on the trial pavement*. "*I then went to CH19 West borrow pit to see where [the Applicant] had extracted the material*. "*I discovered that [the Applicant] had extracted material from the wrong location away from the designated CH19 West borrow pit area*. *"[The Applicant] failed to selectively win the material as required*. "*When [the Applicant] went back to the correct location for borrow pit CH19 West in October 2017, it was able to extract material without the same difficulties*."

258 Importantly, it is necessary to determine the first occurrence.

259 With regard to the pavement trials, I refer to the correspondence from the Respondent, included within the Application at Annexure [A]-33, which provides an instruction to commence development of the borrow pit, notes some "*minor non-conformances*" but notes it is suitable material "*…for the extraction of sub-base and base pavement material*". The correspondence then states "*In order to validate the material will be suitable in situ, [the Respondent] suggests that [the Applicant] prepare a trial pad for both pavement types*". The correspondence then goes on to say "*Once the material is stockpiled, [the Respondent] will take material samples for compliance testing*" then "*On completion of the trial pad, [the Respondent] will take further material samples of the placed material*" and that "*This will indicate how the material is performing from the time of the initial test pits excavated to stockpiled material to placed material*".

260 I also refer to the [B] Statutory Declaration at paragraphs 72 to 74 inclusive, where [B] notes that the "*material, extracted from the wrong location, was dense and unable to be processed…*" and that "*When [the Applicant] went back to the correct location for borrow pit CH19 West in* ***October 2017****, it was able to extract material without the same difficulties*" [***emphasis added***].

261 I therefore consider that the pavement trials were simply that, a trial, and that they were undertaken to provide an indication of how the material would perform. I also note that the wrong material was used and that when the correct location was used in October 2017, the material was extracted without the same difficulties. In these circumstances, I do not consider that this constitutes the "first occurrence".

262 I consider that, by reference to paragraph 97 of [A's] Statutory Declaration, the "first occurrence" was likely to be 6 October 2017.

263 Clause 16.3 requires "*a written notice within 14 days of the first occurrence of the direction or other fact, matter or thing upon which the Claim is based…*". As such, the Applicant was required to provide a written notice on or before 20 October 2017.

264 At Annexure [A]-41 of its Application, the Applicant provides a copy of its letter dated 12 October 2017 (ref: 22049-[redacted]-LET-071) with subject "*Notice of Other Claim – Oversized Pavement Material*" which was submitted prior to 20 October 2017.

265 At paragraph 36.1.19 of its Response, the Respondent states "*[the Applicant] did not deliver its notice and subsequent claim in relation to the Oversized Pavement Fill Claim until* ***12 October 2017*** *and* ***26 October 2017***". [***emphasis added***]

266 Clause 16.3 then requires "*a written Claim within 14 days of giving the written notice under paragraph (a)…*".

267 As such the Applicant was required to provide its second written notice on or before 26 October 2017, being 14 days from 12 October 2017.

268 At Annexure [A]-42 of its Application, the Applicant provides a copy of its letter dated 26 October 2017 (ref: 22049-[redacted]-LET-085) with the subject "*Other Claim – Oversized Material*" which was submitted on time.

269 I find that the Applicant has complied with the time requirements of Clause 16.3 and as such the Applicant's claim is not time barred.

Change in Methodology

270 At paragraphs 31.1.3(a) of its Response with similar wording at paragraph 3.1.2(a)), the Respondent asserts that:

"*[the Applicant's] change in methodology and approach to the work caused inefficiencies and this is what ultimately led to [the Applicant] requiring the use of a stabiliser. This is evidenced by:*

(i) *[the Applicant] departing from the methodology set down in the Borrow Pit Management Plan;*

(ii) *[the Applicant] being late in sourcing scrapers to undertake work on site; and*

(iii) *[the Applicant] pre-emptively sourcing stabilisers to undertake work on the site without approval from [the Respondent]*".

271 Further at paragraphs 33.1.1 and 33.1.2, the Respondent notes:

"*33.1.1At paragraph 102 of [A's] Statutory Declaration, he states that:*

'[the Applicant's] site team revised the methodology by which pavement materials would be won from the borrow pits to account for the secondary processing required".

"*33.1.2This revised methodology was not approved by [the Respondent]*". I note from [A's] Statutory Declaration that this is prefaced with "*To avoid any further delay…on account of the oversized material*".

272 From the evidence provided by the Applicant and the Respondent, I accept that the Applicant changed the methodology and that this was not approved by the Respondent, however I note that [A], in his Statutory Declaration, states that this was done "*to account for the secondary processing required*".

273 At paragraphs 33.2.1 to 33.2.10 of its Response, the Respondent refers to a proposed alternative design for construction of the pavement layers, which the Respondent notes "*Importantly, both alternative designs required the use of a stabiliser*". The Respondent further notes, at paragraph 33.2.6 of its Response that the Respondent would consider the alternative design, and that it ultimately rejected the alternative design due to concerns raised by the design engineer, being:

(a) "risk of pavement cracking as a result of cement stabilisation;

(b) "risk of damage to road due to the introduction of a perched water layer between general fill and proposed modified pavement layer; and

(c) *"risk of damage to general fill layer as a result of the stiffer pavement layer*".

274 Also, within its Response, at paragraph 33.2.5 the Respondent relies upon a verbal conversation. Although the Applicant has not had an opportunity to respond, I consider that this verbal conversation simply outlined the benefits to both parties, including "*the risk of any non-conforming material would be alleviated*".

275 The Respondent then notes, at paragraphs 33.2.7, 33.2.8 and 33.2.10, when the stabilisers arrived and when they began working, as follows:

"*33.2.7 On or around 16 September 2017 (while [the Respondent] was still reviewing [the Applicant's] alternative designs which involved the use of a stabiliser), a stabiliser arrived on site*".

"*33.2.8 On or around 17 September 2017, [the Applicant] began using the stabiliser that it brought to site (to use in carrying out the alternative designs) to place and process the general fill that it had won from the borrow pits*. "*It is this use for which [the Applicant] is now claiming as part of this adjudication*".

"*33.2.10 After [the Respondent] rejected [the Applicant's] alternative designs, [the Applicant] began using the stabilisers to place and process the pavement material (in accordance with the original design of 2 x 150 mm layers)*. "*It is also claiming for this use of the stabilisers as part of the Adjudication Application*".

276 With regard to the arguments put forward by the Respondent, I provide my views as follows:

(a) The Respondent refers to alternative design for construction of the pavement layers – I am of the view that this proposal sought to address both the oversize material but to also reduce costs by placing in one layer.

(b) From my experience I am of the view that the design engineer's concerns were related to cement stabilisation only.

277 With regard to the Respondent's assertions regarding the Applicant "*departing from the methodology set down in the Borrow Pit Management Plan*" and "*being late in sourcing scrapers to undertake work on site*" as outlined in paragraph 31.1.3(a) of the

Response, I refer to my comments and findings with regard to the Oversize General Fill claim and find that they also apply to the Oversize Pavement Claim.

278 I therefore do not accept that secondary processing was a direct result of the Applicant "*changing its methodology*" or "*being late in sourcing scrapers to undertake work on site*".

279 **Change in Methodology and use of a stabiliser**

280 At paragraphs 33.1.3(b) of its Response (and similarly worded at 3.1.2(b)), the Respondent asserts that:

"*[the Applicant] changed its methodology and commenced using a stabiliser without agreement or authority from [the Respondent]*".

281 At paragraphs 33.3.1 and 33.3.2 of its Response, the Respondent notes that:

"*33.3.1At no stage was there an agreement between [the Respondent] and [the Applicant] to utilise the stabilisers in the processing of the general fill or pavement material…*"; and

"*33.3.2[the Applicant] started using the stabilisers to process the general fill and pavement material without approval from [the Respondent] and then issued [the Respondent] with a notice that it was going to make a claim for 'secondary processing' of the allegedly oversized general fill and pavement material*".

282 Whilst I accept that there is no evidence of any agreement to use the stabilisers, from the photographs attached to the letters within the Application, I am of the view that the Applicant began using the stabiliser to process the material. I also see no evidence that this was done to address any lack of productivity. From the evidence provided I consider that the use of the stabiliser was to process the material to achieve the required grading.

283 With regard to the Applicant not seeking approval, I do not consider that this prevents the Applicant from making a claim nor does it prevent the Applicant from any entitlement. Clause 16.2 allows the Applicant "*to make a Claim against the Contractor in respect of any direction by the Contractor's Representative or any other fact, matter or thing (including a breach of the Subcontract by the Contractor) under, arising out of, or in any way in connection with, the Subcontractor's Activities or the Subcontract*".

The use of a stabiliser does not constitute secondary processing

284 At paragraph 3.1.2(c) of its Response, the Respondent asserts that "*the use of a stabiliser is part of normal construction activity and does not constitute secondary processing*". Similarly, at paragraph 24.1.3(c) of its Response, the Respondent asserts "*the use of a stabiliser does not constitute secondary processing*".

285 At paragraphs 34.1.1 and 34.1.2 of its Response, the Respondents refers to its previous arguments with regard to the Oversize General Fill Claim and states:

"*34.1.1 As outlined in section 27 above, the use of a stabiliser does not constitute secondary processing and forms part of the general construction process*".

"*34.1.2[the Applicant] has not demonstrated that using a stabiliser was necessary*".

286 By reference to paragraphs 188 to 199, I consider that the comments and findings that applied to the Oversize General Fill Claim also apply to the Oversize Pavement Claim.

287 With regard to the Oversize Pavement Claim, I do not agree that "*the use of a stabiliser is part of normal construction activity and does not constitute secondary processing*".

288 I consider that the Applicant has demonstrated that a form of secondary processing was necessary.

The Applicant was involved in the investigation and selection of the location of the borrow pits

289 At paragraphs 3.1.2(d) and 31.1.3(d) of its Response, the Respondent notes that *"[the Applicant] was involved in the investigation and selection of the location of the borrow pits*".

290 At paragraphs 32.1.2 to 32.1.3 of its Response, the Respondent refers to the same arguments put forward with regard to the Oversize General Fill Claim and states:

"*32.1.1As with the borrow pits used to win general fill material, [the Applicant] was also involved in the identification and investigation of the borrow pits for pavement fil[l]".*

"*32.1.2[the Applicant] investigated and put forward potential locations for pavement borrow pit materials*".

"*32.1.3The arguments outlined in section 24 apply in relation to the Oversized Pavement Fill Claim*".

291 By reference to my findings with regard to the Oversize General Fill Claim, I note that under the Borrow Pit Responsibility Matrix, the Applicant's responsibility was to '*provide presence during investigation*"' and "*The Applicant was not responsible for the Borrow Pit Investigations, nor was it responsible for the approval or redesign of the material*".

The Applicant requested that the borrow pits be placed at locations of no greater than 1 to 2 kilometre intervals, which required extensive testing of the site by The Respondent's geotechnical expert [F]

292 Within its Response, at paragraphs 3.1.2(e) and 31.1.3(e), the Respondent states that "*[the Applicant] requested that the borrow pits be placed at locations of no greater than 1 to 2 kilometre intervals, which required extensive testing of the site by [the Respondent's] geotechnical expert [F]*".

293 By reference to my findings with regard to the Oversize General Fill Claim, with respect to the Oversize Pavement Claim, I do not consider that the Applicant's input into the location of borrow pits reduces the Respondent's responsibilities under the Borrow Pit Responsibility Matrix.

The Respondent obtained independent geotechnical testing of the site (the [E] Geotechnical Report and testing by [d]) confirming the suitability of the borrow pit material

294 At paragraphs 3.1.2(f) and 31.1.3(f) of its Response, the Respondent bases its position on the fact that *"[the Respondent] obtained independent geotechnical testing of the site (the [E] Geotechnical Report and testing by [F]) confirming the suitability of the borrow pit material*".

295 By reference to my findings with regard to the Oversize General Fill Claim, with respect to the Oversize Pavement Claim, I consider that sampling and testing as part of a borrow pit investigation would not typically identify oversize materials as part of the reported test results.

The Applicant has failed to provide any independent evidence

296 At paragraphs 3.1.2(g) and 31.1.3(g) of its Response, the Respondent bases its position on the fact that *"[the Applicant] has failed to provide any independent evidence that the quality of the material was insufficient, particularly in circumstances where it failed to follow the methodology set out in the Borrow Pit Management Plan*".

297 I reiterate my comment at paragraph 215, that "*whether or not a party to a payment dispute provides independent evidence is for the party to decide*.

298 As with the Oversize General Fill Claim, I have considered the evidence as provided with respect to the Oversize Pavement Claim and given it the necessary weight.

The Applicant has brought this claim without basis to recover its losses from under-pricing the Subcontract

299 At paragraphs 3.1.2(i) of its Response, the Respondent asserts that *"[the Applicant] has brought this claim without basis to recover its losses from under-pricing the Subcontract*" and similarly at paragraph 31.1.3(i) *"[the Applicant] has manufactured a claim to recover its losses from under-pricing the Subcontract*".

300 At paragraph 35.1.1, the Respondent refers to its submissions regarding the oversize General Fill Claim and states "*As outlined in section 28 above, has manufactured both the Oversized General Fill Claim and the Oversized Pavement Fill Claim in order to recovery losses from under-pricing the Subcontract*".

301 By reference to my earlier comment at paragraph 219, in relation to the Respondent's submission regarding the Oversize Pavement Claim, I again note the same comment applies to the Oversize Pavement Claim as follows:

"*Whilst the Respondent may have formed this view, whether or not the Applicant under-priced the Subcontract bears no relevance on whether the Applicant is or is not entitled to addition monies under the Subcontract*".

Entitlement

302 Having considered the submissions and evidence provided by both the Applicant and the Respondent I find that the Applicant has demonstrated that it has entitlement under the Subcontract for the following reasons:

(a) Section 3.11.4 of Attachment 4 provides an entitlement when any secondary processing is necessary.

(b) The Applicant has sufficiently demonstrated that its process for winning materials (without secondary processing) was in accordance with the Borrow Pit Management Plan, the Subcontract requirements and standard industry practice and that, at times, this process did not produce fully compliant material and secondary processing of the pavement material was necessary.

(c) The Applicant submitted the required notices in time and is not time barred.

Quantum

303 At paragraphs 3.1.2(h) and 24.1.3(h) the Respondent asserts that *"[the Applicant] has not valued its claim in accordance with the requirements of clause 11 of the Conditions of Subcontract*" and that it "*is not expressly entitled to its actual costs*".

304 Also at paragraphs 3.2.1 to 3.2.4 of its Response (and similarly at paragraph 37.1.2), the Respondent submits that, if I decide that the Applicant is entitled to any part of its claim, that the Respondent submits that the Applicant has:

(a) "*failed to value the increase in the Subcontract Price in accordance with clause 11.3 of the Subcontract – [the Applicant] is entitled to recover its reasonable costs, not its actual costs*";

(b) "*overinflated the quantum of any possible claim it might have for the following reasons:*

(i) *it has included costs that go beyond the use of a stabiliser;*

(ii) *it has included additional scraping costs, which should form part of its primary processing work;*

(iii) *it has not substantiated or explained the rates it has adopted; and*

(iv) *it has provided no substantiation or evidence as to the quantity of general and pavement fill on which its claims are based*".

And, at paragraph 3.2.2 that it has engaged [D] and that if I decide that *"[the Applicant] is entitled to an adjustment to the Subcontract Price, a reasonable amount in accordance with clause 11.3 is:*"

Claim	Aquenta Assessment		
	Quantity of Fill	Rate	Revised Value
General Fill	65,607m³	$3.47m³	$227,656.29
Pavement Fill	70,434m³	$11.35m³	$799,149.02
TOTAL			$1,076,805.31

[3]

Note that although table shows both General Fill and Pavement Fill, I am only considering the Pavement Quantum here.

[3] Amount in Response incorrectly totalled $1,076,805.31 but should have totalled $1,026,805.31

305 Within its Application, the Applicant sets out at paragraphs 3.22, 3.26 and 3.27 its claim value of $1,051,798, being "*actual costs*".

306 The Applicant also includes a copy of the Payment claim at Attachment 3 and the supporting information at Annexure [A]-27.

307 Similar to the Oversize General Fil Material Claim, I have undertaken a review of the quantum being claimed and note that it generally includes costs under the following groups:

(a) Provision of Stabilisers (23 October to 22 November 2017)

(b) Provision of Stabilisers (23 November to 18 December 2017)

(c) Fuel for Stabilisers (24 November to 18 December 2017)

(d) Support Crew for Stabiliser No 1 (Grader, Grader Operator, Fuel for Grader, Roller, Roller Operator, Fuel for Roller)

(e) Support Crew for Stabiliser No 2 (Grader, Grader Operator, Fuel for Grader, Roller, Roller Operator, Fuel for Roller)

(f) Additional Scraping Costs (Ripper Attachment)

(g) Non time related on site overheads and preliminaries (2.5%)

(h) Off-site overheads and profit (2.5%)

308 As with the Oversize General Fill Claim, when considering the quantum and the costs being claimed, I agree with the Respondent that, the Applicant has:

(a) "*included costs that go beyond the use of a stabiliser*"; and

(b) "*included additional scraping costs, which should form part of its primary processing work*".

309 I consider that the support crews claimed are resources that were necessary for the compaction, shaping and trimming of the fill, which were included within the Applicant's scope of work. As such I do not consider that the Applicant is entitled to these costs.

310 I consider that the additional scraping does not constitute secondary processing. As such I do not consider that the Applicant is entitled to these costs.

311 I find that the costs for the stabiliser form part of secondary processing.

312 Again, although I agree with the Respondent that there is no substantiation or evidence as to the quantity of general fill on which the claims are based, similarly no evidence to the contrary has been provided.

313 As I stated at paragraph 232, the Respondent sets out its interpretation of how the claim should be valued at a 'reasonable amount' and not recovery of 'actual costs' and that I agree with the Respondent's interpretation, however there is nothing preventing the Respondent (or myself for that matter) reviewing the actual costs and then determining if they are in fact a 'reasonable amount'

314 Again, I have considered the [D] report, submitted by the Respondent and note also paragraph 40.1.2 of the Response that "*In respect to the Oversized Pavement Fill Claim, [D] has assessed the claim as follows:*"

BGC Claim	Aquenta Assessment		
	Quantity of Fill	Rate	Revised Value
$1,051,798.00	70,434m^3	$11.35m^3	$799,149.02

315 At paragraph 40.1.10 of its Response, the Respondent "*submits that should the Adjudicator determine that [the Applicant] has established an entitlement to recover additional costs as a result of the Oversized Pavement Fill Claim, the amount to be awarded by the Adjudicator should be $799,149.02*".

316 By reference to my earlier paragraphs, I have considered that the applicable 'actual costs' in relation to the Oversize Pavement Claim are as follows:

317 By reference to my earlier paragraphs, I have considered that the applicable 'actual costs' in relation to the Oversize General Fill Claim are as follows:

(a)	Provision of Stabilisers (23 October to 22 November 2017)	**$295,837.00**
(b)	Provision of Stabilisers (23 November to 18 December 2017)	**$324,190.00**
(c)	Fuel for Stabilisers (24 November to 18 December 2017)	**$22,765.72**
(d)	Non time related on site overheads and preliminaries (2.5%)	**$14,128.34**
(e)	Off-site overheads and profit (2.5%)	**$14,128.34**
(f)	**TOTAL**	**$593,390.14**

318 I note that some of the costs have been forecast for the period 23/24 November 2014 to 18 December 2014, therefore these cannot be considered as 'actual costs', but merely estimated costs.

319 I will now consider what constitutes a 'reasonable amount' in conjunction with the Oversize General Fill Claim.

Quantum – 'Reasonable Amount'

320 By reference to my earlier findings, I find that the 'actual costs' for secondary processing was:

(a)	Oversize General Fill:	$454,634.65
(b)	Pavement:	$593,390.14
(c)	**TOTAL:**	**$1,048,024.79**

321 By reference to the [D] Report and the Response, the Respondent considers that the following is a 'reasonable amount':

(a)	Oversize General Fill:	$227,656.29
(b)	Pavement:	$799,149.02
(c)	**TOTAL:**	**$1,026,805.31**[4]

322 In comparison, the total 'actual costs' are similar to [D's] 'reasonable amount', however the 'split' is different. It was noted within the Application that there may have been some overlap between the general fill and pavement activities, which may possibly be the reason for the difference. In addition, I note that some of the Pavement Claim costs have been forecasted up to 18 December 2017, therefore will not be as reliable.

323 In considering what is a 'reasonable amount' I turn to the Subcontract. The valuation under clause 11.3(c) states:

> "(c) to the extent that paragraph (b) does not apply, by a reasonable amount:
>
> (i) to be agreed by the parties; or
>
> (ii) failing agreement, determined by the Contractor's Representative."

[4] Amount in original Response incorrectly totalled $1,076,805.31 but should have totalled $1,026,805.31

324 I am persuaded by the Respondent's expert, [D], which is supported by the total of the 'actual costs' (albeit some are forecasted) and as such I consider that the valuation of $1,026,805.31 by [D] is a 'reasonable amount'.

Entitlement to Payment

325 In considering my findings, in the previous paragraphs, I find that the Applicant is entitled to payment of the following:

(a) Oversize General Fill: $227,656.29

(b) Pavement: $799,149.02

totalling $1,026,805.31 (plus GST)

Interest

326 At paragraphs 2.2 and 11.1 to 11.3 of its Application, the Applicant seeks payment of interest on the determined amount "*in accordance with section 35(1)(b) of the Act*" at 7.5%.

327 At paragraphs 43.1.1 to 43.1.5 of its Response, the Respondent submits that *"[the Applicant] should be entitled to interest in accordance with the Subcontract*", being "*the greater of:*

(a) the Australian Taxation Office sourced General Interest Charge Rate current at the due date for payment or such other rate nominated in writing from time to time by the Contractor's Representative; or

(b) *the rate of interest prescribed under the applicable Security of Payment Legislation, specifically*".

And then notes the greater amount of 8.72% per annum.

328 I find that the implied term under the Act is not implied into the Subcontract.

329 I find that the Applicant is entitled to interest in accordance with the Subcontract, from the date the amount became payable being, 23 January 2018, 28 business days from the date of the payment claim (11 December 2017) at a rate of 8.72% per annum up to the date of this determination.

Costs of parties to payment disputes

330 At paragraphs 10.2 of its Application, the Applicant submits that I "*should determine that [the Respondent] is liable to contribute to 100% of the adjudicator's fees and*

expenses and the fees of the prescribed appointer and if such fees have been paid by [the Applicant] to fully reimburse [the Applicant]"

331 At paragraphs 44.1.2 and 45.1.1 of its response, the Respondent submits two alternatives:

(a) "*44.1.2In circumstances where the Adjudicator finds that [the Applicant] is not entitled to any amount, [the Respondent] submits that [the Applicant] be responsible for 100% of the Adjudicator's fees*"; or

(b) "*45.1.1In the alternative, if the Adjudicator finds that [the Applicant] is entitled to any payment, [the Respondent] submits the Adjudicator should find the parties equally liable for the costs of the Adjudication*".

332 I do not find any basis for a decision that either party pay any part of the other's costs.

Conclusion

333 I find that the Respondent is liable to pay the Applicant:

(a) $1,026,805.31 plus GST; and

(b) Interest of $21,341.80,

with payment to be made on or before 27 April 2018.

334 I find that there is no basis for a decision that either party pay any part of the other's costs. The costs must be borne in accordance with the usual requirements of sections 46(4) and 46(5) of the Act.

Date: 20 April 2018[5]

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Deon Baddock
Registered Adjudicator No 66

[5] Date of corrected determination is 2 May 2018

Schedule 2: Confidential Information

The parties have not advised that any information is confidential.

Date: 20 April 2018[6]

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Deon Baddock
Registered Adjudicator No 66

[6] Date of corrected determination is 2 May 2018