Matter No. NT42.23.01

Adjudicator's Reasons for Decision
Pursuant to the
Construction Contracts (Security of Payments) Act 2004 (NT)

Applicant	[Redacted]
Respondent:	[Redacted]
Adjudicator:	Nicholas Floreani KC 24 Flinders Street Adelaide SA 5000 Email: nfloreani@jeffcott.com.au
Nominating Authority:	RICS DRS
Adjudication Case Number:	NT 42.23.01
Claimed Amount:	$5,344,831.94 (ex GST)
Amount in Dispute:	$4,418,406.96 (ex GST)
Adjudicated Amount:	$2,265,417.20 (ex GST)
Applicable Interest Rate:	8 percent per annum
% of ANA and Adjudicator's fees payable by claimant:	50 percent
% of ANA and Adjudicator's fees payable by respondent:	50 percent

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A. BACKGROUND

1. The Parties

1. The Applicant, [redacted], is a construction contractor specialising in agricultural, mining and civil infrastructure projects throughout Australia, based in Brisbane, Queensland.

2. The Respondent, [redacted] operates as a design and construct contractor on predominantly infrastructural projects in Australia and Papua New Guinea. The Respondent is also based in Brisbane, Queensland.

3. [Redacted]

2. The Project

4. [Redacted]

5. [Redacted]

6. There is a dispute between the parties as to the nature of the Applicant's engagement on the project and the Respondent raises this is a jurisdictional issue in this adjudication which is dealt with later. For present purposes, it is sufficient to simply note that the nature of the Applicant's engagement (if any) is contested.

7. However, it is common ground that on:

    7.1. 23 December 2021, the Respondent issued to the Applicant a notice of suspension, suspending the works for the wet season until 31 March 2022.[1]

    7.2. 10 March 2022, the Respondent issued further notice of suspension, extending the wet season to 30 April 2022.[2]

    7.3. 28 April 2022, the Respondent issued to the Applicant a notice of termination, terminating The Applicant's engagement for convenience on 1 May 2022 (**Notice of Termination**).

8. There is no dispute with regards to the Respondent's method or process of termination.

[1] Application [7.1]; Response [3.20].
[2] Application [7.2]; Response [3.21].

9. The Applicant states that at the time of the termination, [project infrastructure details redacted] at varying stages of completion had been built by it.[3]

3. Summary of the payment dispute

10. On 15 December 2022, the Applicant submitted progress claim 17 (**PC17**) for $5,344,831.94 (excluding GST) for demobilisation, suspension, and stand-down costs it incurred as a result of the Respondent's termination.

11. On 23 December 2022, the Respondent submitted progress certificate 17 (**Certificate 17**) in response disputing a significant portion of PC17. In total, Certificate 17 certified an amount of $53,760.74 (excluding GST) as payable.[4]

12. On 13 January 2023, in accordance with Certificate 17, the amount of $53,760.74 (excl. GST) (a total of $59,136.81) was paid by the Respondent to the Applicant.[5]

13. The Respondent's primary submission is that there is no jurisdiction to determine the Application, but in the event that jurisdiction is found, asserts that the Applicant is entitled to no more than has already been paid to it in accordance with Certificate 17.[6] Specifically, the Respondent summarises the dispute as follows:

Description	**The Applicant's claimed amount**	**The Respondent's claimed amount**	**Difference**
Demobilisation costs for W01	$699,519.98	$40,729.85	$658,790.13
Demobilisation costs for W03	$50,924.49	$13,030.89	$37/893.60
W01 plant & equipment stand down costs May 2022	$1,688.427.66	$0	$1,688,427.66
Stand down suspension costs (preliminaries) May 2022	$2,305.407.62	$0	$2,305,407.62
Risk money	$600,552.19	$0	$600,552.19
The Applicant's Revision of claims	-	-	($926.424.98)
Subtotal:	**$5,344,831.94**	**$53,760.74**	**$4,364,646.22**

[3] Application [7.8].
[4] Response [1.5], Tab 2.
[5] Response [1.6], Tab 2A.
[6] Response [2.2] to [2.4].

B. JURISDICTION

14. The Applicant says I have jurisdiction to determine the Application on the basis that:

    14.1. the agreement between the parties is a "construction contract" for the purposes of sections 5 and 9 of the Act;

    14.2. PC17 is a payment claim for the purposes of section 7A of the Act;

    14.3. a payment dispute, as defined by section 8 of the Act, has arisen;

    14.4. the matter has not already been the subject of a valid determination;

    14.5. the dispute is not 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; and

    14.6. the Application has been prepared in accordance with section 28.

15. The Respondent challenges jurisdiction on the following basis:

    15.1. the Applicant has not submitted a payment claim for the purposes of the Act;

    15.2. PC17 is a re-agitation of earlier claims which is not permissible;

    15.3. there is no construction construct as defined under the Act;

    15.4. PC17 is not compliant with the requirements of the Subcontract;

    15.5. a complete copy of the payment claim has not been provided with the Application.

16. The Respondent says that the effect of these issues (in relation to which the Respondent elaborates in Part B of its Response), is that the payment claim, and the Application are invalid for the purposes of the Act.

4. Not a payment claim for the purpose of the Act

17. The Respondent says that:

    17.1. section 7A of the Act should be interpreted with direct reference to the Explanatory Statement to the *Construction Contracts (Security of Payments) Legislation Amendment Bill 2019* consistently with section 62B of the *Interpretation Act 1978* (NT) and authorities that have applied that section.

17.2. the Explanatory Statement to the *Construction Contracts (Security of Payments) Legislation Amendment Bill* provides at clause 8 in respect to section 7A of the Act that the insertion of section 7A "clarifies that a payment claim may only be made in relation to a right accrued under a contract while that contract was in operation".[7]

17.3. section 7A of the Act should be interpreted such that a payment claim may only be made by a contractor to the principal for payment of an amount in relation to an accrued right under a contract while that contract was in operation.[8]

17.4. accrued rights are rights that have accrued unconditionally either before the contract has terminated or accrue at the moment of termination, as reflected in the definitive statement by Dixon J in the High Court Decision in *McDonald v Dennys, Lascelles Ltd* (1933) 48 CLR 457 at [476] to [477].[9]

17.5. in section 7A(1)(c), Parliament has used the phrase "*accrued right for the contract*" when dealing with terminated contracts, not a wider phrase such as a "*right for the contract*".[10]

18. Based on the construction of section 7A that the Respondent advances, it says that the Applicant has claimed for amounts that are not related to accrued rights that crystalised either before the Subcontract was terminated or accrued at the moment of termination and relate entirely to post-termination claims. It says that as such, the claims made by the Applicant do not fall within section 7A(1)(c) of the Act and accordingly, PC17 is not a valid payment claim under the Act.[11]

19. Specifically, the Respondent says that the Applicant's claims for:

19.1. 'suspension costs' made up of:

[7] Response [5.5] to [5.9].
[8] Response [5.10].
[9] Response [5.11].
[10] Response [5.12].
[11] Response [5.13].

19.1.1. stand down costs that the Applicant claims it incurred from the date the Respondent issued the Applicant with its termination notice on 28 April 2022 until it was directed by the Respondent on 31 May 2022 to remove its plant, equipment and personnel from the Site;

19.1.2. stand down preliminaries cost that the Applicant claims it incurred from the date the Respondent issued the Applicant with its termination notice on the 28 April 2022 until it was directed by the Respondent on 31 May 2022 to remove its plant, equipment and personnel from the Site;

19.2. 'termination costs' made up of the following:

19.2.1. demobilisation costs W01 which the Applicant claims it incurred by complying with a direction given by the Respondent following termination of the Subcontract;

19.2.2. demobilisation costs for W03 which the Applicant claims it incurred by complying with a direction given by the Respondent following termination of the Subcontract;

19.3. Risk Money that the Applicant claims it is entitled to under a purported agreement that it claims forms part of the Subcontract;

all relate to work performed following the termination of the Subcontract and therefore the Payment Claim is not one that falls within section 7A(1)(c) of the Act.[12]

Consideration: PC17 is a payment claim for the purpose of the Act

20. There is no difficulty in accepting that section 7A of the Act should be interpreted such that a payment claim may only be made by a contractor to the principal for payment of an amount in relation to a right under a contract which accrues either before the contract is terminated or at the moment of termination. Such an interpretation is evident in the wording of the provision itself, without recourse to extrinsic material.

21. However, I do not accept the Respondent's assertions as to the operation of the provision, nor do I accept its characterisation of the Applicant's claims.

[12] Response [5.16] and [5.17].

22. Properly construed, section 7A permits claims to be made in respect of 'rights' that have accrued either before the contract is terminated or at the moment of termination. Section 7A(1)(c) is similar to a chose in action, it operates so as to create a right to which a party may or may not have a present entitlement. For example, the termination of the Subcontract might trigger a right to claim for demobilisation costs which have not actually been incurred yet. The Respondent seeks to construe section 7A(1)(c) such that it would read "payment of an amount in relation to an accrued *entitlement* for the contract". That is not what Parliament intended.

23. Further, the Respondent characterisation of the Applicant's claims ignores the fact that (other than the Risk Money Claim) the claims rely on clause 45A.3 of the Subcontract which defines the parties' rights on termination. So, whilst it may be correct that the entitlement to claim only arose after termination, the *right* to claim arose specifically at the time of termination. In relation to the Risk Money Claim, that appears to relate to a purported right which arose prior to termination.

24. I do not accept this challenge to jurisdiction.

5. The Payment Claim is a re-agitation of earlier claims which is not permissible

25. The Respondent submits that there is no jurisdiction to determine the Application pursuant to section 33(1)(a)(ii) of the Act as the Application is a re-agitation of earlier payment claims which have not been lodged within 65 working days after a payment dispute arose pursuant to section 28(1) of the Act.[13]

26. The Respondent submits that the time limit in section 28 of the Act operates in respect of a payment claim such that if a payment claim is made that includes an amount from an earlier payment claim that has not been adjudicated, the payment dispute arises when the amount claimed in the earlier payment claim was not paid when due and the time limit in section 28 runs from the date the earlier payment claim was due.[14]

27. The Respondent refers to Brownhill J in *Costojic Pty Ltd v Whatareya Pty Ltd & Anor* [2023] NTSC 32, in particular at [59] in support of a submission that:[15]

[13] Response [6.2].
[14] Response [6.8].
[15] Response [6.9] to [6.10].

27.1. the ability for a party to re-agitate a payment claim will be dependent upon the wording of the relevant construction contract;

27.2. if the construction contract does not permit a party to re-agitate a payment claim, the Act will preclude an adjudication application in respect of the subsequent payment claim because the payment dispute in respect of the previous payment claim arose over 65 working days before the application was made.

28. The Respondent says that clauses 45A.3(b)(i) to (v) provides:

28.1. what the Applicant is entitled to claim for in the circumstances where the Subcontract has been terminated for convenience.

28.2. for a requirement for the Respondent to pay the Subcontractor in accordance with clause 42.1; and

28.3. does not provide for any express terms with respect to how the Subcontractor can claim for payment in the circumstances where the Subcontract has been terminated for convenience.

28.4. an obligation on the Respondent to pay the Applicant in accordance with clause 42.1 and is completely silent on The Applicant's ability to make a claim for payment post-termination.[16]

29. The Respondent says that:

29.1. the progress claim process ceased upon the Respondent terminating the Subcontract for convenience and absent of any express terms with respect to how the Subcontractor can claim for payment in the circumstances where the Subcontract has been terminated for convenience, the implied terms set out in the Act form part of the Subcontract.[17]

29.2. Section 18 of the Act incorporates the implied terms in Schedule 1, Division 3 of the Act, which:

29.2.1. permits a contractor to make a progress claim at any time after the contractor has completed its obligations;

[16] Response [6.13].
[17] Response [6.16] and [6.17]; *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386 at [39].

29.2.2. does not permit a contractor to make subsequent payment claims for obligations that it has completed and for which it has already claimed for; and

29.2.3. does it permit a contractor to make subsequent payment claims for obligations it has completed but for whatever reason it did not include in an earlier payment claim after it completed such obligations.[18]

30. The Respondent provides a detailed analysis The Applicant's payment claims 12, 13, 14, 16 and 17[19] and submits that by that analysis, it is clear that:[20]

30.1. the amounts that the Applicant is claiming in PC17 are for amounts in respect of obligations have been performed and for which the Applicant has already claimed for in earlier payment claims; and

30.2. the amounts that the Applicant now claims in PC17 should have been claimed by the Applicant as part of its earlier payment claims issued following the completion of such obligations, and not approximately 5 to 6 months after the Applicant completed its obligations, and after the Applicant has issued 4 earlier payment claims (being Payment Claims #12, #13, #14 and #16).

30.3. in the alternative, the Adjudicator should find that PC17 is a re-agitation of The Applicant's earlier payment claims (including Payment Claim #12, #13, #14, and #16), which is not also permitted.

Consideration: PC17 is a re-agitation of earlier claims which is not permitted

31. With due respect to the carefully considered submissions at paragraph [6.36] to [6.117], for the reasons which follow it is unnecessary for those submissions to be repeated. The Respondent's is a 'slippery slope fallacy' which fails at the first step. I do not accept that clause 45A.3(b) does not provide for any express terms with respect to how the Subcontractor can claim for payment in the circumstances where the Subcontract has been terminated for convenience.

[18] Response [6.27].
[19] Response [6.36] to [6.117].
[20] Response [6.118] to [6.124].

32. Clause 45A.3, properly construed, provides for the ability to claim as well as the obligation to pay. The clause is rendered sterile if it is construed so that it only deals with payment and not the ability to claim. To construe otherwise would give rise to a commercial absurdity. Clause 45A.3 provides rights as well as obligations and operates following a termination for convenience, by providing that the Main Contractor does not have to pay if certain conditions hold true, but in all other circumstances, must pay the Subcontractor for works undertaken and certain specified costs incurred in accordance with clause 42.1.

33. Further, clause 42.1 itself sets out the terms of claim for payment and payment and not simply one or the other. Clause 45A.3 simply limits the items for which the Main Contractor is obliged to pay in a circumstance of a termination for convenience, where otherwise further amounts may be claimable and payable.

34. Finally, it is noted that section 7A(2)(a) of the Act explicitly permits re-agitated claims by the words "[a] payment claim may include a matter: (a) that was included in a previous payment claim".

35. I do not accept this challenge to jurisdiction.

6. There is no construction contract as defined under the Act

36. The Respondent submits that the Adjudicator has no jurisdiction as the alleged contract the subject of the Application is not a construction contract pursuant to section 33(1)(a)(i) of the Act because:

    36.1. the letter of intent was not a contract;

    36.2. the early works letter was not a contract;

    36.3. the Subcontract was not a contract;

    36.4. the deed was not a contract for construction work; and

    36.5. the agreement regarding payment of risk money was not a contract, or in the alternative if there was a contract (which is denied) it was not a contract for construction work.[21]

[21] Response [7.1] and [7.2].

37. The Respondent refers to sections 5(1), 6(1)(c), 27, 33(1)(a)(i) and the references to 'construction contract' in those contexts and submits that to satisfy the definition of construction contract under the Act, the Applicant must establish:

    37.1. firstly, that there was a valid contract between the Applicant and the Respondent, which may be written, oral, or partly written and partly oral; and

    37.2. secondly, if the Adjudicator is satisfied that there was a valid contract between the Applicant and the Respondent (which is denied by the Respondent), that the alleged contract places an obligation upon the Applicant to carry out the obligations in connection with construction work in satisfaction of section 5(1)(a) to (d) of the Act.[22]

38. The Applicant submits that the contract is comprised of, namely:

    38.1. the letter of intent dated 9 April 2021 (**LOI**);

    38.2. the early works letter dated 24 June 2021 (**Early Works Letter**);

    38.3. the AS2545 (**Subcontract conditions**);

    38.4. the deed of settlement entered into on or about 13 May 2021 (**Deed**); and

    38.5. the agreement regarding payment of the risk money emerging as part of discussions around 7 November 2021 (**Risk Money Agreement**).

39. To properly assess the Respondent's challenge, it is necessary to deal with The Applicant's contentions regarding the formation of what, it says, the 'construction contract' to which the Act applies, is in this case.

The Applicant's contentions regarding the 'construction contract' to which the Act applies

40. The Applicant's contentions as to the formation of the contract rely on the evidence of [name redacted], the Project Director at the Applicant who was responsible for negotiating the Applicant's participation in the project and was the Applicant's representative in tendering for the project and onsite project delivery.[23]

41. The Applicant says:

[22] Response [7.5] to [7.12].
[23] Declaration of [BO] dated 12 April 2023 (the [O] Declaration).

41.1. The Principal engaged the Respondent as the main contractor for the project, who in turn the engaged the Applicant as its subcontractor in respect of part of the works.[24] The Principal and the Applicant had no direct contractual relationship; however, there were direct lines of communication established between them.[25]

41.2. The Applicant initially approached the Respondent in early 2021, to encourage it to tender for the project. The Respondent indicated it was already in discussion with the Principal and invited the Applicant to establish a joint venture.[26]

41.3. After initial discussions, it was evident the Principal did not wish to contract with a joint venture but was willing to engage the Respondent and the Applicant in a head contractor – sub-contractor relationship.[27]

41.4. The Respondent issued the Applicant with the LOI, which was stated to serve as an interim document before the subsequent agreement was to be executed between the two parties.[28]

41.5. On 24 June 2021, although the Respondent had not executed an agreement with the Principal, it gave the Applicant the Early Works Letter granting approval to commence mobilisation and early works for the project.[29] The letter stated in part:

> "The purpose of this Early Works Letter of Engagement from [the Respondent] is to grant approval for [the Applicant] to commence the mobilisation for the project works at [the project site] and agrees to the following amount as part of this early works engagement up to a maximum of **$5,657,573.20 plus GST** to mobilise, establish and commence the required early works procurement activities.
>
> This value relates to 10% of the total price for:
>
> a. C0003 - $2,850,697.30

[24] Application [5.6].
[25] Application [5.7].
[26] Application [6.2], [6.3].
[27] Application [6.4].
[28] Application [6.5].
[29] Application [6.6].

b. C0013 - $ 602,691.40

c. C0014 - $2,204,184.50

These Early Works Packages above are to be performed in accordance with the Scope of Works and associated Documentation provide for Pricing to [the [the Applicant] by [the Respondent]."[30]

41.6. The Applicant was engaged to perform works under different work packages, pursuant to the Early Works Letter, the following of which are relevant to the Adjudication:

41.6.1. C003: construction of the [project infrastructure details redacted];

41.6.2. C013: construction of the [project infrastructure details redacted]; and

41.6.3. C014: construction of [project infrastructure details redacted].[31]

41.7. The Applicant says that it commenced the works in C003 and C014 (which together formed Work Order 01 (**W01)**) and C013 (which formed Work Order 03 (**W03)**) on 24 June 2021.[32]

41.8. On 24 September 2021, the Respondent provided the Applicant with a proposed form of subcontract for the W01 and W03 works, based on an amended AS2545-1993 (**Subcontract conditions**).

41.9. The Applicant accepted that the proposed form of subcontract would form the basis of their agreement. However, there were disagreements between the parties regarding several scope and commercial items and at no time was there a formally executed contract.[33]

41.10. the Deed was entered into by the Applicant and the Respondent on or about 17 May 2022 (**Deed**) which:[34]

41.10.1. expressly acknowledged that the parties had an agreement for the Applicant's performance of the works; and

[30] Annexure BO-6 to the [O] Declaration.
[31] Application [6.7].
[32] Application [6.8]-[6.11].
[33] Application [6.13].
[34] Application [6.14], typo correction at Response [7.51].

41.10.2. acknowledged the "excluded claims" of the Applicant that had not been resolved.

41.11. Some of those excluded claims addressed items which were the subject of the commercial disagreement regarding the contract, such as, the Subcontract conditions not including any terms addressing the concept of "risk money".[35] Despite the Respondent subsequently acknowledging the agreement, and the need for it to be included in the Subcontract, the Subcontract conditions was never amended, nor executed.[36]

42. The Applicant says that the Subcontract under which the parties were bound is not clear cut, but that the day-to-day administration of the claims relevant to this Adjudication were per the Proposed Terms.[37]

43. The Respondent provides separate submissions in respect of each of the documents that the Applicant alleges form the contract to support a submission that each of these documents individually is not a 'construction contract' for the purposes of the Act.

The Respondent's contentions regarding the Subcontract

44. The Applicant submits that:

44.1. the LOI, was not a 'construction contract' for the purposes of the Act and only directed and permitted the Applicant to commence planning activities and to provide support to the Respondent. The Respondent says that the wording utilised by the letter of intent makes it clear that this document was not a valid contract between the Applicant and the Respondent. Instead, the letter can be properly characterised as a letter which foreshadowed the possibility of a contract subsequently being formed. It said the letter is distinguishable from the letter in *Decor Ceilings Pty Ltd v Cox Constructions Pty Ltd (No 2)* [2005] SASC 483, in which Besanko J found a legal of intent to be contractual (at [35], [36] and [59]), because the essential terms were not agreed at that time, such that the letter was within the third category in *Masters v Cameron* (1954)

[35] Application [6.15].
[36] Application [6.17].
[37] Application [6.18] – [6.19].

91 CLR 353 where the intention of the parties was not to make a concluded bargain at all, unless and until they executed a formal contract.[38]

44.2. the Early Works Letter from the Applicant to the Respondent only governed the Applicant and the Respondent's relationship from commencement until (at the earliest) 24 September 2021 (as is set out at paragraph 6.19(b) of the Applicant's submissions). The Respondent submits that the essential terms were not entirely agreed in the early works letter because the large majority of the terms and conditions were to be reviewed and were not subject to agreement between the Applicant and the Respondent and there was no certain payment terms, only a maximum figure described.[39]

44.3. as to the Proposed Terms, the Respondent submits that at common law, an agreement cannot be binding unless the parties have reached agreement on those terms which are legally necessary to constitute a contract. Further, the Respondent submits that the parties did not intend for the Subcontract conditions to be a binding contract given the parties failed to agree over key scope and commercial items, in addition to their respective rights and entitlements which governed their agreement. Accordingly, the Subcontract conditions were incomplete and the Subcontract plainly does not represent an agreement between the parties.[40]

44.4. as to the Deed, the Respondent submits that the Deed cannot be considered a construction contract as it does not create an obligation for construction work under section 5(1) of the Act. It also specifically denies the Applicant's submission that the Deed includes additional terms to which the parties were to be bound, including releases and the preservation of certain "excluded claims", as the Deed can only be characterised a separate agreement and not a part of the 'contract' as alleged by the Applicant.[41]

44.5. as to the alleged risk money agreement, the Respondent says that it did agree to pay risk money and, in any event, it could not form a valid contract for the

[38] Response [7.16] to [7.32].
[39] Response [7.33] to [7.40].
[40] Response [7.41] to [7.50]. The Respondent refers to the decision of *Toyota Motor Corp Australia Ltd v Ken Morgan Motors Pty Ltd* [1994] 2 VR 106 at 130 in support.
[41] Response [7.51] to [7.64].

purposes of the Act. The Respondent provides in a later section a detailed analysis as to why it says there is no agreement and if there was an agreement (which is denied), it was an agreement to agree and is not legally binding. In respect of section 5(1) of the Act, the Respondent says that the alleged agreement for risk money cannot be classified as construction contract as an alleged agreement as to the division or sharing of "risk money" is not a contract under which the Applicant is obliged to carry out construction work, or to supply to the construction site goods that are related to construction work, or to provide on or off the site professional services that are related to the construction work or to provide on-site services that are related to the construction work.

Consideration: no construction contract as defined under the Act

45. The traditional rules for contract formation determine that there is a moment of contract where - an offer has been accepted - and assume the pre-contract bargaining period does not generally generate any enforceable obligations. The rules also determine what the express content of the contract is. Generally, a contract comes into being when and where an acceptance of an offer is communicated to the offeror. Therefore, the terms of the offer determine the express content of the contract. However, the traditional rules do not always provide a definitive answer to a question of contract formation.

46. The courts in Australia have adopted a global approach to negotiations between parties. On this approach, the task is to ask whether, objectively and having regard to the totality of dealings between the parties, they should be considered to have entered into a contractual relationship without enquiring too closely into the formalities of offer and acceptance. Where there have been protracted or imprecise negotiations, the task is to objectively ascertain from the dealings between the parties whether they intended to make a concluded bargain or not.

47. If the parties have expressly indicated that the negotiations are “subject to contract”, then there is a presumption that that contractual relations will not be established unless and until a formal contract has been executed, however, each matter will turn on its own particular facts. Where the intention of the parties is equivocal, a contract may be inferred from the conduct of the parties although it is difficult in formal terms to say that an offer has been accepted. This may more readily occur when the negotiations have been

protracted and one or both of the parties have materially committed themselves to the project.

48. In this case, each of the LOI, the Early Works Letter, Subcontract conditions and the Deed taken together (as opposed to separately) gives rise to an irresistible inference as to the existence of a contract under which the Applicant had an obligation to carry out one or more of the obligations referred to in section 5(1) of the Act. The precise terms of that agreement are a separate matter, but the circumstances are such, that it is not at all difficult to conclude that the relatively undemanding test in section 5 of Act has been met.

49. As to the alleged risk money agreement, it is unnecessary at this stage to consider whether this is part of the agreement, a standalone or no contract at all. A finding that a construction contract which meets the section 5(1) definition is sufficient to establish jurisdiction.

50. I do not accept this challenge to jurisdiction.

7. The payment claim is not compliant with the requirements of the Contract

51. The Respondent submits that PC17 is not compliant with the requirements of the Subcontract, which is a jurisdictional issue. It says that if the relevant payment claim is not compliant with the Subcontract, it is not a valid payment claim for the purposes of the Act and there is no jurisdiction to decide the dispute.[42]

52. The Respondent says that there are two requirements under the Subcontract which the Respondent submits the Applicant has failed to comply with in submitting the Payment Claim. These requirements under the Subcontract are:

    52.1. firstly, the Applicant failed to submit, prior to the submission of the Payment Claim, a completed statutory declaration in accordance with clause 42.1B; and

    52.2. secondly, the Applicant failed to provide, within the times and in the manner required by the Subcontract, a report in relation to performance of the work by

[42] *Inpex Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45; *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd & Anor* [2009] NTSC 48; *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 29 NTLR 1; *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford* [2008] NTSC 42; *Delmere Holdings Pty Ltd v Green* [2015] WASC 148; *Bocol Constructions Pty Ltd and Keslake Group Pty Ltd* [2017] WASAT 15.

the Applicant under the Subcontract in accordance with clause 42.1B, the definition of 'Claim Precondition' at clause 2 and the clause 27B.

53. As an alternative to its submission that the implied terms in Schedule 1, Division 3 of the Act, are engaged for section 45A.3 of the Subcontract, the Respondent says that clause 42.1 of the Subcontract conditions makes provision for payment claims, certificates, calculations and time for payment and includes clause 42.1B which provides conditions for a Payment Claim in addition to those set out in clauses 42.1 and 42.5. 'Claim Preconditions' are defined in clause 2 and include "any other condition or event specified as being a "Claim Precondition" has been satisfied by the Subcontractor". The Respondent says that clause 42.1B(e) is such a condition and requires "as a Claim Precondition, the Subcontractor shall submit, one Business Day prior to the submission of a claim for a progress payment, a completed statutory declaration in the terms set out in Annexure Part K relating to that claim for a progress payment or the final payment claim and any other information required under Clause 43." This requirement is also referred to in the clause 2 definition of 'Claim Precondition'.[43]

54. The Respondent also notes that the definition of 'Claim Precondition' under clause 2, clause 27B makes provision for Subcontractor's Reports and provides an extensive list of the kinds of reports contemplated by the clause. The Respondent notes that clause 27B provides that "the Subcontractor shall not be entitled to submit any Claim for payment, whether under the Subcontract or otherwise, for any month (or fortnight) in which it has not provided to the Superintendent the report required by this Clause, and the provision of such a report at least one Business Day before the applicable progress payment claim is a Claim Precondition."

55. The Respondent relies on paragraph 3.3 of the [L] Declaration and asserts that the Applicant has:

    55.1. failed to submit, prior to the submission of the Payment Claim, a completed statutory declaration in accordance with clause 42.1B; and

    55.2. failed to provide, within the times and in the manner required by the Subcontract, a report in relation to performance of the work by the Applicant

[43] Response [8.1] to [8.12].

under the Subcontract in accordance with clause 42.1B, the definition of 'Claim Precondition' at clause 2 and the clause 27B.

56. The Respondent submits that for a payment claim to be a payment claim under a construction contract for the purposes of the Act, it must be a valid payment claim *under the construction contract*, which necessarily requires strict compliance with the requirements of the relevant construction contract.[44]

Consideration: payment claim is not compliant with the requirements of the Contract

57. The difficulty with the Respondent's submission regarding the Claim Preconditions is that the terms operate to exclude, modify or restrict the operation of the Act and as such have no effect pursuant to section 10 of the Act.

58. Section 10 provides that a provision in an agreement or arrangement (whether a construction contract or not and whether in writing or not) that purports to exclude, modify or restrict the operation of this Act has no effect. The section applies unless the construction contract is a "high value construction contract" to which section 10A of Act applies.

59. The construction contract in this case is not a high value construction contract[45] and therefore, section 10 of the Act will have the effect that those clauses specifying Claim Preconditions will be rendered of no effect.

60. I do not accept this challenge to jurisdiction.

8. A full copy of the payment claim has not been attached to the Application

61. The Respondent submits that a full and *bona fide* copy of the Payment Claim has not been included with the Application and as a result, the Adjudicator has no jurisdiction to

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[44] Response [8.28] referring to *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd & Anor* [2009] NTSC 48 at [27]*; K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd (2011)* 29 NTLR 1*; Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford* [2008] NTSC 42*; Delmere Holdings Pty Ltd v Green* [2015] WASC 148*; Bocol Constructions Pty Ltd and Keslake Group Pty Ltd* [2017] WASAT 15.

[45] Section 4A provides that a high value construction contract means a construction contract under which the amount payable for construction work is equal to or greater than the amount prescribed by regulation. Reg. 5 of the *Construction Contracts (Security of Payments) Regulations 2005* provides that the amount prescribed is $500 000 000.00.

determine the Adjudication Application pursuant to section 33(1)(a)(ii) of the Act as the Application does not contain a Payment Claim as required by section 28(1) of the Act.[46]

62. Specifically, the Respondent says that behind Tab C of the Application, the Applicant has purportedly included a copy of the Payment Claim. It says that there are multiple documents included therein which have not been separately named or labelled. The first page of this bundle, is a printout of an email from [SN] (of the Applicant) to [AVL] dated 15 December 2022.[47]

63. Further, the Respondent submits that provision of files via hyperlink does not amount to valid service and valid service of an adjudication application is an essential requirement of section 28 of Act.[48]

64. I do not accept this challenge to jurisdiction. The difficulty with the Respondent's argument is that when the 15 December 2022 is read in full, it is apparent that the link contains the submission from Batch Mewing Lawyers which has been provided in hard copy. Further, whilst the payment claim may have been served via hyperlink, the Application was not. There is no requirement that a Payment Claim be 'served'.

65. I do not accept this challenge to jurisdiction.

9. Conclusion about jurisdiction

66. I am satisfied that I have jurisdiction to determine the payment dispute for the following reasons:

    66.1. the contract is a "construction contract" within the meaning of the Act;

    66.2. the exclusions under section 6(2) of the Act do not apply;

    66.3. the Payment Claim is a 'payment claim' within the meaning of s. 4 of the Act;

    66.4. a 'payment dispute' arisen within the meaning of s. 8 of the Act;

    66.5. the Application been served and prepared within 65 days of the payment dispute arising;

    66.6. the matters in dispute are not too complex to determine;

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[46] Response [9.1] to [9.10].
[47] Response [9.11] to [9.14].
[48] *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46; *Conveyor & General Engineering Pty Ltd v Basetec Services* [2014] QSC 30.

66.7. the Application otherwise comply with the requirements of the Act and the Regulations; and

66.8. the Application is not subject to an order, judgment or other finding (s. 33(1)(a)(iii) of the Act).

67. The Respondent issued the Payment Schedule was issued on 23 September 2022 and 65 working days from 23 December 2022 is 12 April 2023. The Adjudication application was made by 12 April 2023.

68. I am satisfied that the Application is properly before me, complies with the requirements of time and form in the Act, and I have jurisdiction to determine it.

C. THE MERITS OF THE APPLICANT'S CLAIMS

69. Having concluded that I have jurisdiction to do so, I turn to consider and determine the Application on its merits.

70. In PC17, the Applicant claimed $5,344,831.94 (plus GST).

71. In the Certificate 17, the Respondent certified $53,760.74 (plus GST), on account of its:

71.1. rejection of a large number of the Applicant's termination and demobilisation cost claims;

71.2. rejection of the Applicant's entire direct plant stand-down claim;

71.3. rejection of the Applicant's entire stand-down preliminaries claim; and

71.4. rejection of the Applicant's entire claim for risk money.

72. A breakdown of the amounts claimed, amounts certified and the amounts sought in this adjudication are set out below.

Description	Claimed amount	Claimed amount	Difference
Demobilisation costs for W01	$699,519.98	$40,729.85	$658,790.13
Demobilisation costs for W03	$50,924.49	$13,030.89	$37/893.60
W01 plant & equipment stand down costs May 2022	$1,688.427.66	$0	$1,688,427.66
Stand down suspension costs (preliminaries) May 2022	$2,305.407.62	$0	$2,305,407.62
Risk money	$600,552.19	$0	$600,552.19

The Applicant's Revision of claims	-	-	-$926.424.98
Subtotal:	**$5,344,831.94**	**$53,760.74**	**$4,364,646.22**

73. Each of these is dealt with below.

10. Demobilisation Costs for WO1

(a) The Applicant's submissions

74. On 28 April 2022, the Respondent provided notice to the Applicant that the Contract was terminated for convenience under clause 45A of the Contract.[49] At this time, the Applicant had various pieces of plant and equipment which remained on-site and would need to be demobilised. On 31 May 2022, the Respondent directed the Applicant to remove its plant, equipment, and personnel from the Site. Consequently, the Applicant began the process of demobilising the Site.[50]

75. The Applicant claims payment of costs incurred in demobilising WO1.[51] It says that the Subcontract contemplates these costs, which have been validly claimed and supported in PC17.

76. The Applicant states that the termination by the Respondent was pursuant to clause 45A.1 of the Subcontract conditions which provides:

> The Main Contractor may, in its absolute discretion, for any reason (and without any obligation to provide any reason) and at any time (including in conjunction with the exercise of any other rights it may have), by three days' written notice immediately terminate this subcontract.

77. Having received a notice under cl 45A.1, the Applicant's obligations are detailed in clause 45A.2:

> Upon receipt of a notice of termination in accordance with Clause 45A.1, the Subcontractor shall immediately:
>
> (a) cease the part, or the whole, of the work under the Subcontract, as the case requires; and
>
> (b) comply with any directions by the Main Contractor's Representative, including to the extent directed to:

[49] Application [19.1].
[50] Application [19.3] – [19.4].
[51] Application [19.5].

…

(ii) remove from the Site persons, Constructional Plant, materials and other things which are not required by the Main Contractor;

…

78. The Applicant was directed to demobilise on 31 May 2022. Clause 45A.2 provides that the Applicant was required to immediately comply with the direction of the Respondent after receipt of a termination notice, including a direction to remove plant and equipment.[52]

79. The Applicant says that the Respondent was delayed in issuing this direction, but submits that this does not impact:

79.1. the obligation upon the Applicant to comply with the direction; or

79.2. the Applicant's ability to claim its costs.[53]

80. The Applicant submits it is entitled to its claim for demobilisation costs for WO1 pursuant to clause 45A.3 which states:[54]

> Subject to the Main Contractor/s rights under or in connection with the sub contract, including without limitation the rights to withhold or set off payment and recovery of damages, following a termination for convenience, the Main Contractor shall:
>
> (a) if the Subcontractor:
>
> (i) is subject to an act of insolvency as defined in cl 44.11;
> (ii) has not provided a statutory declaration in accordance with cl 44.15;
> (iii) has provided a statutory declaration which the Subcontractor is required to provide in accordance with the Subcontract and such statements are determined by the Main Contractor (acting reasonably) to be untrue, false or misleading (as applicable),
>
> the Main Contractor shall not be required to make any further payment to the Subcontractor; or
>
> (b) in all other circumstances, pay the Subcontractor in accordance with cl 42.1:
>
> (i) for work executed prior to the date of termination, the amount which would have been payable if the termination had not

[52] Application [20.5].
[53] Application [20.6].
[54] Application [21.1].

occurred and the subcontractor had made a claim for payment on the date of termination;

…

(iv) the applicable contractual payment due to the Subcontractor for any work properly performed after the termination;

(v) to the extent that para (iii) does not apply, the reasonable direct costs of complying with any directions given by the main contractors representative upon, or subsequent to, termination;

and the Main Contractor shall not otherwise be liable to the Subcontractor for any cost, loss, expense or damage incurred by the Subcontractor as a consequence of, or in connection with, the Subcontract, the Work, or the termination and the Subcontractor otherwise may make no claim, other than a claim that was properly made in accordance with the Subcontract prior to the date of termination.

81. The Applicant submits their entitlement under the Subcontract conditions is expressly preserved as an "excluded claim" in the Deed: Item 5 of Schedule 2 of the Deed.[55]

82. The Applicant states that it is not insolvent, has not been requested to provide a statutory declaration confirming its solvency (but could do so on request) and does not believe that there is a dispute in respect of the truth of its statutory declarations (and in any event, confirms that they were true).[56] The Applicant also submits that at no time has it sought, or obtained, the Respondent's prior written consent to break lease costs under subclause (iii).[57]

83. In these circumstances, the Applicant submits it is entitled to payment in accordance with clause 45A.3, which includes:

83.1. payment for works performed previously unpaid for; and

83.2. the reasonable direct cost of complying with any directions given by the Main Contractor's Representative upon, or after, termination.[58]

84. The Applicant says that it was required to incur the following to completely demobilise from Site and thus comply with the Respondent's direction:[59]

[55] Application [21.2].
[56] Application [23.3].
[57] Application [21.4].
[58] Application [21.5].
[59] Application [22.7] (a) – (e).

84.1. freight costs incurred to transport demobilised plant and equipment from Site to either point-of-hire or its depot in [redacted], QLD, over 3,500 km away.[60]

84.2. hire cost of plant and equipment while it was either on Site awaiting demobilisation or being used for other demobilisation efforts, such as repairs or cleaning of the Site.[61]

84.3. operational costs incurred to engage contractors to assist with demobilisation and to continue to operate project offices and facilities to support staff and contractors while demobilisation efforts proceeded.

84.4. repair costs incurred to affect repairs to its hired plant and equipment, which had been stood-down on Site for five months and needed to be returned to point-of-hirer in and as-hired condition. [62]

84.5. travel costs incurred to transport its staff to and from Site to assist with demobilisation.[63]

85. The Applicant submits these costs were necessarily incurred to demobilise from the Site and thus comply with the Respondent's directions. Without incurring these costs, the Applicant would have been unable to vacate the Site, or comply with the demobilisation direction.[64]

86. The Applicant submits that the Respondent's reasons for rejecting the payment of demobilised costs are flawed.[65] It says that the Respondent's rejection is put on the following bases:

86.1. the costs the Applicant claims are not direct;

86.2. the Applicant has not provided sufficient evidence to support the claims; and

86.3. the Applicant has no entitlement to the claimed costs.[66]

87. The Applicant rejects these reasons in circumstances where it says that:

---

[60] Para. [13] and [14] of the [S] Declaration.
[61] Para. [15] of [the S] Declaration.
[62] The circumstances in which the Applicant is entitled to these costs is further outlined in [15] to [17] of the [S] Declaration.
[63] The relevance of these costs is detailed at [18] of the [S] Declaration.
[64] Application [22.8].
[65] Application [23].
[66] Application [23.1].

87.1. it has confined its claim to costs directly and reasonably incurred to comply with the demobilisation direction under cl 45A.3; and

87.2. it has gone to great lengths to include all relevant evidence on the demobilisation costs incurred in PC17.[67]

88. The Applicant submits that under clause 45A.3 they are entitled to the direct costs of complying with the direction. Direct costs are those costs which are readily traceable to a particular activity in question, which is contrasted to indirect costs which are difficult to trace to an activity.[68] The Applicant cites *Amplitude Australia* at [263], where Doyle J held:

> There are some costs that obviously fall into one or other category. For example, the cost of project staff and materials required for a particular project are direct costs of that project. In the present case, where the cost object is the services required to produce the products, the cost of the staff engaged in performing the services, and the cost of the consumables, freight, sterilisation, and packaging necessary to perform those services, are examples of direct costs. On the other hand, the cost of directors and management personnel, administration staff, accounting services and insurance, are not generally regarded as the direct costs of any particular project or cost object. These costs, which are in the nature of corporate overheads, are generally regarded as indirect costs. [69]

89. Accordingly, it says that direct costs are costs arising from performance of a specific activity, whereas indirect costs are not necessarily linked to a particular or activity.

90. The Applicant submits that no cost item in PC17 for the demobilisation of WO1 could be characterised as 'corporate overhead'.[70] The costs claimed are directly related to the demobilisation and are not overhead company costs.[71] The Applicant says that the $1,349,585.03 in costs claimed for this line is significantly less that the actual costs incurred of $1,668,433.91.[72]

91. The Applicant sets out the basis of entitlement to specific categories of costs as summarised below.

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[67] Application [23.2].
[68] Application [23.3] – [23.4]; citing *Australian Orthopaedic Fixations Pty Ltd v Amplitude Australia Pty Ltd* [2017] SASC 88 (***Amplitude Australia***).
[69] Application [23.5]; citing *Amplitude Australia* [263], Doyle J.
[70] Application [23.7] – [23.8].
[71] Application [23.9].
[72] Application [23.11] – [23.12].

(i) Freight, hire and travel costs

92. The Applicant submits that the requirement to purchase freight was a 'direct consequence' of compliance with the demobilisation direction, and there is a clear causal nexus between the direction and the requirement to purchase shipping containers etc. and engage staff to facilitate these activities.[73]

93. The Applicant claims it is a 'rational consequence' of requesting a Queensland-based civil contractor to demobilise from a remote sire that a variety of freight, hire and travel costs would be required to undertake the operation needed to effect total demobilisation with sufficient expedition. The Applicant asserts the costs would not have been incurred if the Applicant had not received the direction to demobilise.[74] Moreover, it says that the costs associated with hired plant equipment on Site requiring demobilisation are direct costs, as they were hired for the sole purpose of the Project.[75]

94. As such the Applicant asserts the relevant hire charges cannot be considered an indirect cost with no causal nexus to the Project.[76]

(ii) Operational Costs

95. The Applicant asserts that the costs incurred to operate its project facilities (e.g., electricity, rates, utilities) during demobilisation were expended by its staff to facilitate demobilisation efforts.[77]

96. The Applicant claims these costs cannot be characterised as indirect as they have been "thrown away" as a direct consequence of demobilisation and were unable to be utilised on any other project in that period.[78]

[73] Application [23.15].
[74] Application [23.16].
[75] Application [23.17].
[76] Application [23.18].
[77] Application [23.19].
[78] Application [23.21].

(iii) Repair costs

97. The Applicant claims that costs incurred to repair on-site plant and equipment involved purchasing consumables such as tyres, oils, lubricants, and small parts.[79] It claims these costs are claimed to be directly linked to the Project as they were necessarily incurred in the circumstances.[80]

(iv) Travel Costs

98. The Applicant submits that the cost of travel incurred to transport its staff to and from Site to assist with demobilisation is directly linked to the Project.[81]

99. The Applicant claims these costs can be contrasted to indirect costs, as staff were needed to be on-Site to conduct works as directed by the Respondent and prepare the Applicant's plant and machinery for demobilisation.[82] The Applicant asserts these costs would not have been incurred if the staff had not been transported to the Site.[83]

100. The Applicant submits that I should reject the Respondent's assertion that the Applicant has not provided enough evidence to prove its claims, as it is 'unfounded and incorrect'.[84] The Applicant submits they went to great lengths to "prove-up" entitlement to demobilisation costs in PC17, including the Applicant providing the Respondent with tabbed evidence for each line item, with relevant invoices, consignment notes, daywork sheets and supporting information.[85]

101. The Applicant also provided the Respondent with a log detailing when every item of plant and equipment was demobilised. The Applicant considers this level of evidential detail should be more than sufficient for the Respondent to identify and value the claimed costs.[86]

[79] Application [23.24].
[80] Application [23.25]; para. [17] of the [S] Declaration.
[81] Application [23.28].
[82] Application [23.29].
[83] Application [23.30].
[84] Application [23.33] – [23.34].
[85] Application (n1) [23.35] – [23.36].
[86] Application [23.37] – [23.38].

102. The Applicant submits that the Respondent's position that it is not entitled to demobilisation costs is untenable.[87] The Applicant asserts that in circumstances where the Respondent has paid over $5.4 million for mobilisation, it is absurd to suggest that $690,794.90 (being the $650,065.05 previously accepted and the additional $40,729.85 now awarded) is a reasonable amount for demobilisation.

(b) The Respondent's Submissions

103. The Respondent submits that if I find that the Application and PC17 are valid under the Act (which is denied), then the Applicant is not entitled to the amounts claimed for the demobilisation costs for W01.[88]

104. The Applicant has claimed a total of $699,519.98 (excl. GST) in PC17 for demobilisation costs, which have been indicated as the reasonable direct costs incurred by complying with the direction to demobilise.[89]

105. The Respondent certified in Certificate 17 the amount of $40,729.85 (excl. GST), as being payable for this matter, thereby disputing the amount claimed by the Applicant. The Respondent assessed the cost to the Applicant of completing demobilisation, and the total amount of this assessment is on page 3 to 5 of Certificate.[90] The amounts in dispute are contained in Certificate 17 and Mr [NL], an independent consultant, has declared in his statutory declaration that he has assessed the amounts claimed by the Applicant and has verified that the amount certified by the Respondent in Certificate 17 are the only amounts payable.[91]

106. As set out Certificate 17, the Respondent submits that the balance of the amount claimed by the Applicant is not payable because:

    106.1. the costs claimed are not reasonable direct costs of complying with a direction in accordance with clause 45A.3(b)(v) of the Subcontract;

    106.2. the Applicant has failed to substantiate its claim for these costs by failing to produce evidence that supports its claims, and by failing to produce evidence as reasonably requested to support its claims;

[87] Application [23.40] – [23.41].
[88] Adjudication Respondent Submissions Part C, [11.1].
[89] Response [11.3].
[90] Response [11.4].
[91] Response [11.5].

106.3. the Applicant has failed to provide the facts relied upon to support its claim, sufficient to enable verification and assessment of its claims; and

106.4. the Applicant has failed to produce records required to be maintained by the Applicant in respect of carrying out the demobilisation activities the Applicant says were completed and for which it claims payment in accordance with cl 8A.1 of the Subcontract.[92]

107. The Respondent submits that for the reasons set out below, I must find that the Applicant is not entitled to the total amount claimed in the Payment claim for demobilisation costs.

(i) Contractual Provisions in respect of costs payable on termination

108. Clause 45A.1 of the Subcontract expressly provides that the Respondent can terminate the Subcontract at its absolute discretion (i.e., for convenience), and the nature of the claims which the Applicant is (and is not) entitled to make if the Subcontract is terminated on that basis.[93]

109. The Respondent asserts that the Subcontract was terminated at its absolute discretion, pursuant to this clause. That termination is not controversial and is accepted by the Applicant.[94]

110. Following a termination for convenience under clause 45A.1, clause 45A.2 sets out the Applicant's obligations which apply to termination for convenience, and clause 45A.3 sets out circumstances in which payment is due to the Applicant following a termination for convenience. The Respondent highlights the following in Clause 45A.3: [95]

> Subject to the Main Contractor's rights under or in connection with the Subcontract, including without limitation the rights to withhold or set off payment and recovery of demands, following a termination for convenience, the Main Contractor shall:
>
> …
>
> (b) In all other circumstances, pay the Subcontractor in accordance with cl 42.1:
>
> (iv) the applicable contractual payment due to the Subcontractor for any work properly performed after the termination.

[92] Response [11.6] (a) – (d).
[93] Response [12.1].
[94] Response [7].
[95] Response (n67) [12.4].

(v) to the extent that paragraph (iii) does not apply, the reasonable direct costs of complying with any direction given by the Main Contractor's Representative upon, or subsequent to, termination;

111. The Respondent claims that the reference in clause 45A.3(b)(v) to paragraph (iii) must be a typographical error, as there is no logical connection between paragraph (iii) and paragraph (v). It says that clause 45A.3(b)(v) should instead refer to paragraph (iv), such that in respect of works carried out by the Applicant post termination, the Applicant is entitled to either:

111.1. the amount stated in the Subcontract for any work properly performed; or

111.2. where no amount is stated in the Subcontract, the reasonable direct costs of complying with a direction.[96]

112. As such, (v) must be read as applying when there is no contractually stated amount in respect of that activity.

113. The Respondent submits that there is no contractually stated amount for the demobilisation of WO1. Therefore, subject to there being a direction and compliance with that direction reflecting the reasonable direct costs actually incurred, the Applicant is entitled to be paid demobilisation costs for WO1 in accordance with cl 45A.3(b)(v) of the Subcontract.[97]

114. The Respondent submits that a claim by the Applicant could only succeed in this Adjudication if both:

114.1. a direction was made by the Respondent upon or subsequent to termination which the Applicant was required to comply with under clause 45A.2 of the Subcontract; and

114.2. the costs claimed in the Payment Claim are the reasonable direct costs incurred by the Applicant in complying with that direction under clause 45A.3(b)(v) of the Subcontract.[98]

115. The Respondent asserts that cl 45A.3 of the Subcontract requires that to enliven the Applicant's entitlement under the clause, the Applicant is obliged to substantiate its

[96] Response [12.5].
[97] Response [12.7].
[98] Response [12.8].

claim, including providing satisfactory evidence in respect of work carried out and the quantum of the work that was completed. The Applicant has failed to fulfil this obligation both in PC17 and Application, despite repeated requests to do so.[99]

116. The Respondent asserts that, in respect of the Application:

116.1. the costs claimed in respect of demobilising WO1 are not direct costs incurred by the Applicant in complying with a direction;

116.2. in the alternative, the costs claimed are not reasonable costs incurred in complying with a direction;

116.3. in the further alternative, there is a lack of evidence and any justified explanation in the Application regarding the costs claimed for the demobilisation of WO1, such to enable a proper assessment and quantification of the Applicant's claims. The material that has been presented by the Applicant is either lacking to substantiate its claims, or demonstrates that the claims cannot be substantiated, and therefore the Applicant has failed to discharge its obligation in substantiating its claim.[100]

(ii) Termination and direction to demobilise.

117. The Respondent issued to the Applicant the Notice of Termination pursuant to cl 45A.1 of the Subcontract on 28 April 2022.[101] Subsequently, on the same date, the Respondent emailed the Applicant to request a copy of its demobilisation plan and/or schedule and advising the Applicant to consider the integrity of the roads as paramount as they needed to be left in compliance with the Project's environmental permit.[102]

118. The Applicant confirmed receipt of the Notice of Termination by letter dated 13 May 2022.[103] In the letter the Applicant confirmed:

118.1. the Subcontract was terminated pursuant to cl 45A.1;

118.2. the Applicant had not received any direction from the Respondent regarding its obligations under the Subcontract, including to demobilise; and

[99] Response [12.9].
[100] Response [12.10].
[101] Response [13.1]; a copy of the Notice of Termination is also attached at Tab 13 of the Response.
[102] Response [13.2]; a copy of this letter is attached at Tab 43 of the Response.
[103] Response [13.3]; a copy of this letter is attached at Tab 44 of the Response.

118.3. in the absence of receiving any further direction, the Applicant was proceeding to prepare plant, equipment, and materials for demobilisation.[104]

119. The Respondent asserts that from 28 April 2022, the Applicant was consistently requested to provide a copy of its demobilisation plan, so that required demobilisation plans were carried out in such a way that any outstanding works could be completed before particular plant and equipment was demobilised.[105] The Respondent claims it was not until 21 June 2022 that the Applicant provided a copy of its demobilisation plan, by which stage they had already commenced carrying out demobilisation on Site.

120. The Respondent asserts that for the Applicant's Adjudication Application to succeed, I must find that:

120.1. the Applicant complied with the direction to demobilise from Site and then it carried out the demobilisation activities that it now claims payment for; and

120.2. the Applicant's claims for costs in respect of demobilisation other reasonable direct costs of complying with that direction, and not:

120.2.1. costs that were incurred before the direction was given to demobilise from Site as these cannot be reasonable direct costs of complying with a direction;

120.2.2. costs incurred by following a direction, but which are not costs that are reasonable direct costs of complying with that direction and therefore cannot be claimed; and

120.2.3. costs that cannot be substantiated by sufficient evidence, such to enliven the Applicant's entitlement to these costs in accordance with cl 45A.3(b)(v) of the Subcontract.[106]

121. The Respondent submits that I will not be satisfied in respect of the required findings outlined above, for the reasons below.[107]

[104] Response [13.4].
[105] Response [3.7].
[106] Response [13.10] (j) – (k)(iii).
[107] Response [13.11].

(iii) Reasonable and direct costs in complying with a direction.

122. The Respondent submits that the Applicant has not referred in its Application to any case authorities judicially concerned with the meaning of the words 'reasonable direct costs' in the context of clause 45A.3 of the Subcontract conditions.[108]

123. The Respondent asserts that the case authorities relied upon by the Applicant[109] do not consider the nature of direct costs in direct contemplation of the language used in the Subcontract.[110] The Respondent suggests that I instead consider *Santos Ltd v Fluor Australia Pty Ltd (No 1)*[111], and *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd*[112], which distinguish direct and indirect costs more directly.[113]

124. Ultimately, the Respondent concludes that the classification of costs as being direct or indirect has not been consistently applied by courts and are apparently subject to interpretation in the context of the project, and provisions of the contract.[114] It says that having regard to contractual obligations and the classification of costs as it outlines, whereby there is no universally accepted definition, a contextual interpretation is required[115], the Respondent has addressed each line item claimed by the Applicant in its Adjudication Application in respect for demobilisation costs for WO1, as outlined below.[116]

(iv) The Respondent's position on the Applicant's entitlement

Item 1: Freight Costs

In Certificate 17, the Applicant addresses the Applicant's[117] entitlement to freight costs amounting to $475,099.73 (excl. GST).[118] It notes that the Applicant has indicated that this amount has been claimed for the costs associated with removing plant and equipment

[108] Response [14.2].
[109] *Australian Orthopaedic Fixations Pty Ltd v Amplitude Australia Pty Ltd* [2017] SASC 88 (***Australian Orthopaedic Fixations***); *CH2M Hill v State of NSW* [2012] NSWSC 963 (***CH2M Hill***).
[110] Response (n67) [14.3].
[111] [2020] QSC 372; see copy at Tab 49B of the Response.
[112] [2006] NSWSC 223; see copy at Tab 49C of the Response.
[113] Response [14.13], [14.14].
[114] Response [14.15].
[115] See [37.13.1.4].
[116] Response [14.16].
[117] Application [23.15] – [23.18]; [S] Declaration [13] – [15].
[118] Response [15.1] – [15.2].

from the Site in compliance with the direction to demobilise and that for this to occur, the Applicant had to either:

124.1. hire a float to travel to and from the Site to transport heavy machinery; or

124.2. demobilise plant and equipment remaining at the Site by prepaid post; and

that given the challenge of the Site [redacted] location, they could not have complied had they not freighted plant and equipment and incurred these costs.[119]

125. The Respondent accepts that the Applicant is entitled to the reasonable direct costs incurred by reason of the direction to demobilise. However, the Respondent submits I must determine the amount payable for this line item is $nil, as:

125.1. the costs claimed are not made out on the evidence;

125.2. the costs claimed in respect of this item are not direct costs incurred by the Applicant in complying with a direction;

125.3. in the alternative, the costs claimed in respect of this item and not reasonable costs incurred by the Applicant in complying with a direction;

125.4. in the further alternative, there is an astounding lack of evidence and any justified explanation regarding costs claimed for this item, to an assessment and quantification.[120]

126. Adopting Mr [S's] sub-categories relating to the freight costs sought by the Applicant, the Respondent asserts as follows.[121]

A. Float hire for the transport of the Applicant's plant and equipment

127. The Respondent submits that I must reject Mr [S's] claim to these costs because the evidence indicates that the Applicant commenced demobilising from Site before a direction was given and before 1 June 2022, that being the date the Applicant states it commenced demobilisation procedures.[122] Thus, where costs are incurred before directions are received, I cannot be satisfied that the costs were directly incurred in compliance with the direction.[123] In respect of these costs, the Respondent submits that

[119] Response [15.4].
[120] Response [15.5] (a) – (d).
[121] [S] Declaration [14.5].
[122] Response [15.10].
[123] Response, see Annexure A for detailed analysis [15.11].

the freight costs claimed, equating to a total sum of $104,104.00, should be automatically rejected as it would be nonsensical to find that these costs were necessarily incurred in compliance with a direction, given that they pre-date the direction being given.[124]

128. Further, the Respondent asserts that there was no contractual reason for the Applicant to commence demobilisation before a direction was given, and the evidence produced is such that the Applicant did in fact do so. Thus, the fact they commenced demobilisation prior to direction is entirely a matter for it.[125]

129. The Respondent says it is evident the Applicant knew it was required to demobilise and that – at a minimum – it could have (and did) commence the preparation for that activity without receiving a direction. It says that this is evident by the fact that the Applicant prepared a demobilisation plan and actively demobilised a large amount of plant and equipment before receiving a direction.[126]

130. The Respondent says that even if I find the float hire costs were directly incurred by the Applicant, they remain unreasonable as they have not been substantiated to enable proper assessment.[127] It says there is a lack of evidence or justification of the costs claimed for this item, to enliven the Applicant's right to claim them under cl 45A.3(b)(v).[128]

B. Freight or postage of plant and equipment from Site

131. The Respondent notes that Mr [S] deposes that there was a large quantity of smaller plant and equipment which was required to be removed from Site to comply with the direction and that the Applicant incurred postage and postage costs in removing these items from Site and return to their point of origin.[129] The Respondent says these costs were not directly incurred as they are not directly referrable to, or traced to, carrying out demobilisation on Site, but rather, are appropriately classified as indirect costs incurred in supporting and facilitating demobilisation,[130] are not reasonable and cannot be substantiated.[131]

[124] Response [15.12].
[125] Response [15.13].
[126] Response [15.14].
[127] Response [15.15] (b).
[128] Response [15.18].
[129] [S] Declaration [14.17].
[130] *Australian Orthopaedic Fixations* [262].
[131] Response [15.20].

132. The Respondent says the Applicant has not produced evidence indicating these items were on Site, that these items related to the Project, and if they were, why they could not have been removed when this the Applicant employee demobilised from Site.[132]

C. Preparation of P&E on Site to be freighted and the fuel costs for the Applicant's trucks

133. The Respondent notes that Mr [S] stated that the Applicant needed to freight machine parts from Site to repair plant and equipment that had sat idle for 4-months due to suspension and the subsequent termination of the Project.[133] The Respondent asserts that I should find that these costs were not directly incurred as they are not directly referrable to, or traced to, carrying out demobilisation, but are rather indirect costs incurred in supporting and facilitating the process[134], are unreasonable and unsubstantiated.[135]

134. The Respondent says that the invoices relied upon by the Applicant do not contain any details regarding the machine parts reportedly being sent to Site, that these parts were sent for demobilisation purposes, or that they were used and/or required for purposes of the Project.[136]

135. For these reasons, the Respondent asserts that I cannot be satisfied that these costs were reasonably and directly incurred in demobilising from Site, such to enliven their entitlement to claim costs under cl 45A.3(b)(v) of the Subcontract.[137]

136. The Respondent submits that I should determine the amount payable in respect of 'freight costs' is $nil.[138]

Item 2: Hire Costs

137. The Applicant claim to be entitled to hire costs incurred,[139] which equate to $99,278.76 (excl. GST), and have been assessed in the Payment Schedule.[140]

138. The Respondent submits that I must find the amount payable to be $nil, as:

138.1. the costs claimed are not made out on the evidence in the Application;

[132] Response [15.22].
[133] Response [15.23], see [S] Declaration [14.19] (a).
[134] Response (n113).
[135] Response [15.24].
[136] Response.
[137] Response (n67) [15.26].
[138] Response [15.28].
[139] Adjudication Application [23.15] – [23.18]; [S] Declaration [15.1], [15.19].
[140] Response [15.29] – [15.30].

138.2. they are not direct costs incurred in complying with a direction;

138.3. in the alternative, the costs are not reasonable costs incurred;

138.4. in the further alternative, there is an astounding lack of evidence or justified explanation regarding these costs by the Applicant, to enable me to properly assess and quantify this claim.[141]

139. The Respondent submits that the evidence suggests the Applicant commenced demobilising from Site prior to receiving a direction, and that as such I must reject these costs, as the fact that they chose to do so early is entirely a matter for the Applicant.[142]

140. The Respondent says further that it is unjustifiable for the Applicant to claim some of these demobilisation costs because they were incurred due to the road being damaged between [different parts of the project site], which was caused by the Applicant moving large equipment offsite in January 2022.[143] The Respondent says that it cannot be liable for these costs in respect of the claimed period of plant and equipment hire, when that plant and equipment was on Site and unable to be used, or demobilised, due to the road damage.[144] The Respondent says the Applicant is attempting to claim costs resulting from its own failures, and impermissibly attempting to characterise them as reasonably and directly incurred.[145]

141. The Respondent submits that due to an astounding lack of evidence and any justified explanation by the Applicant respecting the costs claimed for this item and I must find that these costs were not reasonably and directly incurred, and do not enliven the Applicant's entitlement to these costs under cl 45A.3(b)(v) of the Subcontract.

Item 3: Operational Costs

142. The Respondent rejects the Applicant's claimed entitlement to 'operational costs' incurred in compliance with the direction to demobilise, the claimed costs equating to $69,947.96 (excl. GST), which have been assessed in Certificate 17.[146]

[141] Response [15.33]; [L] Declaration paragraphs [4.68] to [4.85].
[142] Response [15.38], [15.41].
[143] Response [15.43].
[144] Response [15.45].
[145] Response [15.50].
[146] Response [15.58] – [15.60].

143. The Applicant claims these as costs incurred to operate its project facilities during demobilisation, such as electricity, rates and utilities relating to its workshop and office.[147] The Applicant has also claimed that the costs were necessarily incurred to prepare machinery, receive further directions and for its personnel to rest and prepare for demobilisation.[148]

144. The Respondent believes these claims to be nonsensical, as these costs cannot be considered as direct and reasonable costs incurred in demobilising in circumstances where:

    144.1. there is no contractual requirement for the Applicant to have an office or workshop, or to use these for the purposes of carrying out works, including demobilising; thus, it would not be a site office for purposes of the project;

    144.2. the use of an office and workshop by the Applicant as a base for demobilisation is entirely a matter for it; it is a site office with no affiliation to the Project. Thus, any costs incurred resulting from this office cannot be considered direct nor reasonable; and

    144.3. there is no evidence to suggest the office and workshop were not used for the purposes of other projects.[149]

145. Further, the Applicant has failed to produce evidence supporting the submissions that:

    145.1. the costs for these facilities were only incurred due to necessity for the Applicant's personnel to use in preparing machinery for demobilisation;

    145.2. the costs for these facilities were only incurred due to necessity for the Applicant's personnel to use to receive direction as to the procedure and form of demobilisation activities; the Respondent says this cannot be maintained as cl 45A.2(b) does not require direction to be given following termination; and

    145.3. that the costs for these facilities were incurred due to necessity for the Applicant's personnel to use as a place to rest and prepare for demobilisation; it is unclear to the Respondent why the Site could not be used for this purpose.

[147] Adjudication Application [23.19].
[148] Application [23.20].
[149] Response [15.63] (a) – (d) (iii).

146. The Respondent submits that I should find that the costs claimed for these items were not reasonably and directly incurred by the Applicant in demobilising according to cl 45A.3(b)(v) of the Subcontract; Thus, the Respondent asserts I should determine the costs payable are $nil, as the Applicant's entitlement has not been enlivened on the evidence.[150]

Item 4: Repair Costs

147. The Applicant for 'repair costs' incurred in demobilising from Site, the claimed costs amounting to $22,119.31 (excl. GST), which have been assessed in the Payment Schedule, where it was found that no payments were certified as being due and payable to the Applicant.[151]

148. The Applicant claims this amount for the costs of repairing plant and equipment to demobilise them from Site, and that the costs were incurred between the period of receiving the direction and completing demobilisation.[152]

149. The Respondent asserts that I cannot determine these costs to be payable, as:

149.1. they are not made out on the evidence in the Application;

149.2. they are not direct, nor, in the alternative, reasonable costs incurred in compliance with the direction;

149.3. in the further alternative, the costs were incurred by the Applicant in respect of suspension, and are not costs directly incurred in complying with a direction; and

149.4. in the still further alternative, the lack of evidence and any justified explanation to support this claim mean that I cannot properly assess and quantify them as payable.[153]

150. The Respondent states that the Applicant's choice not to remove this particular plant and equipment, which it says sat idle on Site for over 5-months, even when the evidence suggests the Applicant removed other plant and equipment, is entirely a matter for the Applicant.[154] The Respondent submits that it appears the Applicant is strategically

[150] Response [15.68] – [15.69].
[151] Adjudication Application [23.24] – [23.27]; [S] Declaration [17.1] – [17.19]; Response [15.70] – [15.72].
[152] Response [15.73].
[153] Response [15.74] (a) – (e).
[154] Response [15.77].

claiming costs 'incurred' as a 'reasonable' and 'direct' result of complying with a direction, where it fits the Applicant's narrative.[155]

151. The Respondent submits that as the road damage was at the Applicant's fault,[156] attempts to claim costs for repairs to this plant and equipment, when they could not have otherwise been removed on Site, are attempts to claim costs only attributable to the Applicant's failures.[157]

152. The Respondent submits that if I am to find these costs were directly incurred in compliance with a direction to demobilise, I should find that these costs are unreasonable and unsubstantiated by the Applicant[158] in circumstances where:

    152.1. the Applicant has not produced evidence to support the submission that the damage did not constitute 'reasonable wear and tear', nor any evidence suggesting the damage was caused following the receipt of the direction;

    152.2. the Applicant is liable for the works under the Subcontract, as well as damage caused by the Applicant in carrying out outstanding works under cl 16.1 of the Subcontract, including rectification of loss or damage caused by it under cl 16.2; and

    152.3. Where the Applicant claims repair costs resulting from idle plant and equipment on Site for over 5-months, it is liable for costs incurred during the wet season suspension period under cl 34.6(d) of the Subcontract; and

    152.4. Where the Applicant is contractually liable for these costs, the Applicant has no justified explanation as to how it is 'reasonable' for the Respondent to be liable for the costs in repairing the plant and equipment.[159]

153. For the reasons above the Respondent submits I should determine that the amount payable for this item is $nil.[160]

[155] Response [15.78].
[156] See [L] Declaration [4.12].
[157] Response [15.82].
[158] Response [15.85].
[159] Response [15.85] (a) – (d).
[160] Response [15.87].

Item 5: Travel Cost

154. The Applicant claims an entitlement to 'travel costs', being in the amount equating of $7,899.38 (excl. GST), assessed in Certificate 17 as not payable.[161]

155. The Applicant has indicated this amount was claimed for costs of transporting employees and contractors to and from Site, to either facilitate demobilisation, or to be demobilised from Site, and that they were incurred between receiving the direction and completing demobilisation.[162]

156. The Respondent asserts that I must determine the amount payable for this item is $nil, as:

156.1. the costs claimed are not made out on the evidence in the Application;

156.2. the costs were not directly incurred in compliance with a direction or, in the alternative, are not reasonable costs incurred; and

156.3. in the further alternative, there is an astounding lack of evidence and any justified explanation for these costs, to enable me to assess and quantify the claim.[163]

156.4. The Respondent submits that these costs are not directly referrable to, or traced to, carrying out demobilisation activities on Site;[164] rather, they are appropriately classified as indirect costs incurred in supporting and facilitating demobilisation, which are too remote to be captured under cl 45A.3(b)(v).[165]

156.5. the Applicant sought to substantiate the costs it claims for this item by reference to various invoices,[166] which the Respondent rejects as the costs were evidently incurred prior to the Applicant receiving a direction, and thus do not enliven the Applicant's entitlement under cl 45A.3(b)(v) of the Subcontract.[167]

[161] Adjudication Application [23.28] – [23.32]; [S] Declaration [18.1] – [18.13].
Response [15.88] – [15.90].
[162] Response [15.91].
[163] Response [15.92] (a) – (d).
[164] *Australian Orthopaedic Fixations* [262].
[165] Response [15.95].
[166]Response [15.96]; [S] Declaration [18.2], see Annexures NS-35 – NS-37.
[167] Response [15.99].

156.6. The Respondent requests I note the evidence that in respect of annexures NS-35, NS-36, and NS-37, the invoices contained therein, added together, equate to a sum of $5,972.45, which represents $1,926.93 less than the sum claimed by the Applicant for this item; therefore, the Applicant has failed to substantiate the claimed amount.[168]

157. For this item, the Respondent submits I should find the costs claimed were not reasonably nor directly incurred by the Applicant in compliance with the direction, and thus there is no enlivened right to claim them under cl 45A.3(b)(v) of the Subcontract.[169]

(v) Consideration and conclusion on Demobilisation Costs for W01 $658,790.13

158. To determine the Applicant's entitlement to the claimed amount it is first necessary to consider whether there is a contractual basis for the claim and once so satisfied, whether the claim is substantiated and to what about.

159. The parties point to clause 45A .3 as the contractual basis for any entitlement to demobilisation costs. As a matter of construction of that clause, the Respondent notes that the reference in clause 45A.3(b)(v) to 'paragraph (iii) must be a typographical error, as there is no logical connection between paragraph (iii) and paragraph (v). I accept that this is the correct construction so that in respect of works carried out by the Applicant post termination, the Applicant is entitled to either (a) the amount stated in the subcontract for any work performed; or (b) where no amount is stated in the subcontract, the reasonable direct costs of complying with the direction. I also accept that as such (v) must be read as applying when there is no contractually stated amount in respect of that activity.

160. There is no contractually stated amount demobilisation of W01. As such, subject to there being a direction and compliance with that direction reflecting the reasonable direct costs actually incurred, the Applicant is entitled to be paid in its demobilisation costs in respect of W01 in accordance with clause 45A.3(b)(v) of the Subcontract.

[168] Response [15.106].
[169] Response [15.107].

161. The Respondent states that the Applicant entitlement to claim demobilisation costs is premised on its right to claim these costs pursuant to clauses 45A.2 and 45A.3 of the Subcontract. I accept that. However, the Respondent further submits that the trigger for entitlement is the direction given to demobilise such that costs incurred before a direction was given cannot be claimed because these costs cannot be said to be reasonable direct costs of complying with the direction. The issue is of some significance because there was a delay between the issue of the notice of termination on 28 April 2022 and the Respondent's direction to demobilise on 31 May 2022 and the Respondent asserts that some of the demobilisation costs claimed by the Applicant were incurred prior to the direction to demobilise. I do not accept this characterisation of the operation of clause 45A.3(v). In my view, the trigger for entitlement under the clause may be either, the notice of termination which amounts to a 'direction' (as defined under clause 2 of the Subcontract) or some other formal direction. Having received the notice of termination, it was appropriate for the Applicant to prepare for and commenced the mobilisation from site. To suggest otherwise, stretches a reasonable interpretation of the language used in the clause noting in particular that the clause refers to '*complying with any direction given by the Main Contractor's Representative upon, or subsequent to, termination*'. This suggests that from the time of termination and going forward any direction issue which causes the subcontractor to incur costs gives rise to an entitlement.

162. In addition to these issues of entitlement identified above, the Respondent rejects the claim for demobilisation costs for W01 on the basis that:

    162.1. the costs claimed are not made out on the evidence;

    162.2. The costs claimed are not direct costs incurred by the Applicant in complying with a direction, such as to enliven entitlement to costs under cl 45A.3(b)(v) of the Subcontract;

    162.3. the costs claimed are not reasonable costs incurred, such to enliven entitlement to costs under cl 45A.3(b)(v) of the Subcontract; and

    162.4. there is a lack of evidence and any justified explanation in respect of the costs claimed for demobilising W01, such as to enable a proper assessment and quantification.[170]

[170] Response [16.1] (a) – (d).

163. The table below sets out my determination of the different heads of claim in respect to demobilisation costs for W01.

164. **On the basis of my findings set out in the table below (and taking into account the overpayment of $15,555.00, I find that the Applicant is entitled to a payment of $656,863.20 in respect of the demobilisation costs of W01.**

Demobilisation Cost W01

Type of Cost	Quantum	The Applicant's claim	The Respondent's rejection	Conclusion
Freight Costs	$475,099.73	The Applicant asserts the costs would not have been incurred if the Applicant had not received the direction to demobilise. It says that the costs associated with hired plant equipment on Site requiring demobilisation are direct costs, as they were hired for the sole purpose of the Project.	In respect to <u>float hire</u>: • the Respondent says the Applicant commenced demobilising from Site before a direction was given and before 1 June 2022. • unreasonable as they have not been substantiated to enable proper assessment. In respect to <u>freight or postage of P&L</u>: • appropriately classified as indirect costs incurred in supporting and facilitating demobilisation. • are not reasonable and cannot be substantiated. In respect to <u>preparation of P&E and fuel costs</u>: • indirect costs incurred in supporting and facilitating the process. • are unreasonable and unsubstantiated.	The [S] Declaration explains at paragraphs [14.1] to [14.34] the basis upon which these costs have been claimed as well as supporting documents including invoices of the costs incurred and paid. I have already rejected the Respondent's contention regarding the timing of the demobilisation costs. I reject the Respondent's assertion that the claim is not substantiated. I also reject the Respondent's assertion that these costs are appropriately classified as indirect costs incurred in supporting and facilitating demobilisation. These costs would not have been incurred had the termination notice and the demobilisation direction not been given. **I am satisfied that has established an entitlement to be paid $475,099.73 in respect to freight costs.**

Hire Charges	$99,278.76	Between receiving the direction on 31 May and the Applicant completing demobilisation activities on 21 July 2022, the Applicant incurred Hire Costs for all plant and equipment remaining at the Site until demobilisation was completed. The costs were incurred subsequent to termination and were directly and reasonably incurred in order to comply with the direction.	The evidence suggests the Applicant commenced demobilising from Site prior to receiving a direction, and the fact that they chose to do so early is entirely a matter for the Applicant. It is unjustifiable for the Applicant to claim some of these demobilisation costs were incurred due to the road being damaged between [different parts of the project site], which was caused by the Applicant moving large equipment offsite in January 2022.	I have already rejected the Respondent's contention regarding the timing of the demobilisation costs. In relation to the damaged road and the Respondent's submission that the Applicant cannot claim for hire costs due to a delayed start to demobilisation, I reject this assertion. The fact remains that the road repairs were necessitated at that time because of the need to demobilise. If the Project had continued the Applicant may have been responsible for any costs associated with the repair of the road, but the fact remains that the costs were incurred when they were because of the need to demobilise. **I have reviewed the invoices annexed to [the S] Declaration and am satisfied that the Applicant has established an entitlement to be paid $99,278.76 in respect of hire charges.**
Operational Costs	$69,947.96	The Applicant asserts that the costs incurred to operate its project facilities (e.g., electricity, rates, utilities) during demobilisation were expended by its staff to facilitate demobilisation efforts. The Applicant claims these costs cannot be characterised as indirect as they have been "thrown away" as a direct consequence of demobilisation and were unable to be utilised on any other project in that period.	There is no contractual requirement for the Applicant to have an office or workshop, or to use these for the purposes of carrying out works, including demobilising; thus, it would not be a site office for purposes of the project. The use of an office and workshop by the Applicant as a base for demobilisation is entirely a matter for it; it is a site office with no affiliation to the Project. Thus, any costs incurred resulting from this office cannot be considered direct nor reasonable.	[The S] Declaration at [16.16] explains that the Applicant's [redacted] office and workshop was stationed at [redacted] and at [16.17] the use the facility served during demobilisation. At [16.25] to [16.31], [S] explains and substantiates the labour costs incurred with [redacted]. **I have reviewed the invoices annexed to [the S] Declaration and am satisfied that the Applicant has established an entitlement to be paid $69,947.96 in respect of operational costs.**

Repairs	$22,119.31	The Applicant claims for the costs of repairing plant and equipment to demobilise them from Site, and that the costs were incurred between the period of receiving the direction and completing demobilisation.	The Applicant's choice not to remove this particular plant and equipment, which it says sat idle on Site for over 5-months, even when the evidence suggests the Applicant removed other plant and equipment, is entirely a matter for the Applicant. The Applicant has not produced evidence to support the submission that the damage did not constitute 'reasonable wear and tear', nor any evidence suggesting the damage was caused following the receipt of the direction.	At [17.8] [S] states that between 10 March and 31 May, the Applicant's heavy machinery stood idle at the Site, degrading. As a consequence of the prolonged stand-down, the Applicant's plant and equipment was not in standard working condition at the time it was required to be demobilised. He stated that the repairs necessary cannot be considered ordinary wear and tear and that the equipment was required to assist in demobilisation. **I have reviewed the invoices annexed to the [S] Declaration and am satisfied that the Applicant has established an entitlement to be paid $22,119.31 in respect of repair costs.**
Travel	$7,899.37	The Applicant claims this amount for the costs of transporting employees and contractors to and from Site, to either facilitate demobilisation, or to be demobilised from Site, and that they were incurred between receiving the direction and completing demobilisation.	The Respondent rejects these costs on the basis: • the costs are not directly referrable to carrying out demobilisation activities on Site but are indirect costs incurred in supporting and facilitating demobilisation, which are too remote to be captured under cl 45A.3(b)(v). • the costs were evidently incurred prior to the Applicant receiving a direction, and do not enliven the Applicant's entitlement under cl 45A.3(b)(v). Further, it notes that the invoices in annexures NS-35, NS-36, and NS-37, total $5,972.45, which is $1,926.93 less than the sum claimed by the Applicant.	I have already rejected the Respondent's contention regarding the timing of the demobilisation costs. I find that the costs are directly referrable to demobilisation. I agree that the amount should be $5,972.45. **I have reviewed the invoices annexed to [the S] Declaration and am satisfied that the Applicant has established an entitlement to be paid $5,972.45 in respect of travel costs.**

11. Demobilisation Costs for WO3

165. The Applicant says that at the time of the termination for convenience, it had various plant and equipment intended for WO3 works, which remained on-site and required demobilisation.[171] The Applicant was directed on 31 May 2022 to remove plant, equipment, and personnel from Site, causing the Applicant to commence the long and costly process of demobilisation.[172]

166. It says it has claimed the costs necessarily incurred in demobilising WO3, and the amount claimed is $37,893.00.[173]

167. The Applicant submits that:

    167.1. those costs are contemplated in the Contract;

    167.2. those costs have been claimed validly in the Payment Claim;

    167.3. those costs are supported by the Payment Claim; and

    167.4. The Respondent has no valid reason for refusing the claim.[174]

168. The Applicant submits that as per cl 45A.2, upon receipt of a notice of termination for convenience under cl 45A.1, the Applicant must cease works and comply with any direction provided by the Respondent. A direction to remove plant and equipment is expressly contemplated by that clause.[175]

169. The Applicant restates its position that any delay by the Respondent in issuing this direction does not impact:

    169.1. the obligation upon the Applicant to comply with the direction; or

    169.2. the Applicant's ability to claim its costs.[176]

170. The Applicant states that cl 45A.3 read alongside cl 45A.3(b)(v) states that following a termination for convenience, the Respondent shall pay the Applicant the reasonable direct costs of complying with directions given by the Respondent after termination.[177]

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[171] Application [25.2]; [S] Declaration [21] provides additional details.
[172] Application [25.3]; [S] Declaration [20] provides additional details.
[173] Application [24.4].
[174] Application [25.5] (a) – (d).
[175] Adjudication Application [26.1] – [26.3].
[176] Application [26.5].
[177] Application [27.1].

171. To address the requirements of cl 45A.3, the Applicant restates that it:

171.1. is not insolvent;

171.2. has not been requested to provide a statutory declaration confirming solvency, but could do so if requested;

171.3. does not believe there is a dispute regarding the truth of its statutory declarations (and in any event, confirms they were true); and

171.4. has not sought or obtained the Respondent's prior written consent to break lease costs.[178]

172. The Applicant asserts they are entitled to payment pursuant to cl 45A.3, including:

172.1. Payment for works already performed and unpaid for; and

172.2. The reasonable and direct costs of complying with nay direction given by the Main Contractor's Representative upon, or following, termination.[179]

173. The Applicant says that cl 45A.3 states that the Applicant is entitled to the reasonable direct costs of complying with the Respondent's directions in and after a termination for convenience.[180]

174. Following termination, on 31 May 2022, the Respondent provided the Applicant with a direction to demobilise from Site. To comply, the Applicant had to remove plant and equipment from Site, causing it to incur various necessary demobilisation costs.[181]

175. The Applicant asserts that cl 45A.3 provides the Applicant with entitlement to the amounts claimed within PC17, as they are claimed to have been directly and reasonably incurred to demobilise.[182]

176. The Applicant submits it was required to incur the following costs:

176.1. The cost of arranging float transport for DZ202 from Site to [redacted].[183]

[178] Application [27.2] (a) – (d).
[179] Application [27.3].
[180] Adjudication Application [28.1].
[181] Application [28.2] – [28.3].
[182] Application [28.4]; [S] Declaration provides detailed evidence.
[183] Application [28.6] (a); [S] Declaration [22] provides additional details.

176.2. The hire costs of the Posi Truck and Hino Truck from [deleted] for the month of May.[184]

177. The Applicant submits that these costs were reasonably incurred in demobilisation, and comply with the Respondent's direction; thus, the Applicant claims entitlement to these costs under cl 45A.3(b)(v).[185]

178. The Applicant submits that I should reject the Respondent's bases for rejection; they have argued the costs are not direct, there is insufficient evidence to support the Applicant's claims, and that the Applicant has no entitlement to these costs.[186]

179. The Applicant submits these reasons are incorrect in circumstances where:

179.1. the Applicant has confined its claim to costs directly and reasonably incurred to comply with the direction; and

179.2. the Applicant has gone to great lengths to include all relevant evidence in its possession, via a series of tabs that accompanied the Payment Claim submission.[187]

180. The Applicant asserts that these costs cannot be considered as a "corporate overhead" in circumstances where:

180.1. they are costs arising from plant and equipment being at the Site and used for the Project;

180.2. the costs pursued by the Applicant are the cost of float transport of heavy machinery off-site and external hire charges for other machinery used for the Project up until that machinery was demobilised to its point of hire;

180.3. the costs cannot be characterised as inherent company costs that would have been incurred irrespective of demobilisation; and

180.4. rather, they are costs that have been "thrown away" during the demobilisation process and their expenditure has not provided the Applicant with any tangible or lasting benefit.[188]

[184] Application [28.6] (b); [S] Declaration [23] provides further details.
[185] Application [28.7] – [28.8].
[186] Application [29.1] (a) – (c).
[187] Adjudication Application (n1) [29.2] (a) – (b).
[188] Application [29.6] (a) –(d).

181. Thus, the Applicant asserts that the Respondent is incorrect in its characterisation of these costs as indirect, to the Project or to demobilisation. The Applicant notes that it has considered its internal cost reporting system to determine its actual demobilisation costs, similarly to with the WO1 demobilisation costs.[189] In doing so, it calculates the actual costs for WO3 demobilisation are $121,463.83, whereas only $68,377.49 has been claimed in total (including the amount already approved by the Respondent).[190]

182. The Applicant also considers with respect to the evidence issue, that I should reject the Respondent's assertion that it is insufficient, as the Applicant has gone to great lengths to prove its entitlement and considers that the tabbed evidence of invoices, alongside the detailed log of demobilisation, should be more than sufficient.[191]

183. The Applicant concludes its submissions regarding demobilisation costs for WO3 with the argument that the Applicant is entitled to $37,893.00 (excl. GST) for the reasons outlined above, and that I should prefer the Applicant's position on this matter as amount:

    183.1. paid by the Applicant for WO3 demobilisation exceeds the amount now claimed; and

    183.2. claimed is significantly lower than the amount the Respondent ought to have anticipated as being the reasonable costs incurred, noting the rates in the Subcontract and the amounts paid by the Applicant for mobilisation.[192]

184. On the other hand, the Respondent submits that the Applicant is not entitled to demobilisation costs for WO3 for the following reasons:[193]

    184.1. the Applicant has claimed a total of $50,924.49 (excl. GST) and has indicated these are the reasonable direct costs incurred in compliance with the direction to demobilise;[194] and

[189] Application [29.7] – [29.8].
[190] Application [29.9] – [29.10].
[191] Adjudication Application (n1) [29.13] – [29.18].
[192] Application [30.1] (a-d) – [30.2] (a-b), [30.3].
[193] Adjudication Response (n67) [17.1].
[194] Response [17.3].

184.2. the Respondent certified the amount of $13,030.89 (excl. GST) as being payable in respect of these costs but disputes the amount of $37,893.60 (excl. GST), [195] which have been verified by Mr [L].[196]

185. The Respondent says that the Applicant has not established an entitlement to the amount claimed on the basis that:[197]

185.1. to enliven the Applicant's claim under cl 45A.3 of the Subcontract, the Applicant is obliged to substantiate its claim, including producing satisfactory evidence of the work carried out and the quantum of the work carried out.[198] The Respondent asserts that the Applicant has not discharged this obligation, and has consistently failed in PC17 and the Application to substantiate its claims despite repeated requests.

185.2. the costs claimed for demobilising WO3 are not direct costs incurred in compliance with a direction;

185.3. in the alternative, the costs claimed are not reasonable costs incurred;

185.4. in the further alternative, the material the Applicant presented either substantiates or demonstrates that its claims cannot be substantiated.[199]

Consideration of demobilisation costs for W03

186. The table below summarises the amounts in dispute in respect of each line item (cross referenced with the line item number in PC17) for this claim:

Item Reference	Description	Amount claimed by Applicant	Amount approved by Respondent	Amount in dispute
INV-3762	redacted	$41,146.60	$9,000.00	$32,146.60
INV-1335	Posi truck daily hire May	$5,425.00	Nil	$5,425.00
INV-1335	Daily truck hire - May	$5,425.00	Nil	$5,425.00
Less overpayment by the Respondent				($5,103.00)
			Total amount in dispute	**$37,893.60**

[195] Response [17.4]; the Respondent's assessment is set out on page 3 of 5 of the Payment Schedule.
[196] Response Tab 34A and Response [17.6].
[197] Response [17.8].
[198] Response [18.9].
[199] Response [18.10] (a) – (c).

187. The Respondent's basis for rejecting these costs is based in part on its assertion that the costs were incurred prior to the receipt of the direction to demobilise. I have already rejected this argument in respect to the demobilisation costs for W01 and also do so in respect to these costs.

188. Further, the Respondent says that the claims lack substantiation. I reject this assertion and consider that the explanation and calculation provided by Mr [S] as to the appropriate rate to be applied is sound.

189. **I find that the Applicant is entitled to a payment of $37,893.60 in respect of the demobilisation costs of W03.**

12. Plant and Equipment Stand Down Costs for WO1

190. The Applicant submit in respect of its claim for stand down costs:

190.1. those costs are contemplated by the Subcontract;

190.2. those costs have been validly claimed in PC17;

190.3. those costs are supported by PC17; and

190.4. the Respondent has no valid reason for refusing the claim.[200]

191. The Applicant says that:

191.1. pursuant to cl 34.1(b) of the Subcontract, the Respondent suspended its works for the Wet Season from 24 December 2021 to 31 March 2022.[201] The Wet Season was defined in this clause as generally the period between November to April.[202]

191.2. pursuant to cl 34.4 of the Subcontract, the Applicant was to bear the cost for any 'Wet Season' suspension.[203]

[200] Application [31.6].
[201] Application [32.1].
[202] Application [32.2].
[203] Application [32.3].

191.3. both parties planned for the wet season to be suspended, which was recorded in the agreement. Outside of the Wet Season suspension, any further or additional suspension could give rise to entitlement for the Applicant subject to other contractual provisions.[204]

192. The Applicant says that while Wet Season was ongoing, the Respondent issued a further direction extending the Wet Season suspension to 30 April 2022. The Applicant takes no issue with this initial suspension or the extension.[205]

193. However, the Applicant notes that its obligations following the termination notice were governed by cl 45A.2(a) and (b)[206], which required the Applicant to immediately case works and comply with the Respondent's subsequent directions.[207] Accordingly, the termination notice had the effect of suspending the Applicant's works until further direction was given. While this was not expressly stated to be a suspension direction, it achieved those ends in substance and there was no other alternative, reasonable interpretation for the Applicant to adopt other than it was suspended until given a direction to demobilise.[208]

194. In this regard, the Applicant submits that this scenario is comparable to that which occurred in *BMD Major Projects Pty Ltd v Victorian Urban Development Authority.*[209] It says that here, the Respondent has given a notice that on its face directs the Applicant to cease works and indicates to the Applicant that it will be permitted to recommence at a later, undisclosed date.[210] Consequently, the Applicant was suspended during the month of May while it was stood down by the Respondent pending further direction.[211]

195. The Applicant submits it is entitled to the cost of the May suspension because:

195.1. The suspension was directed due to an act or omission of the Respondent, being that the Applicant was effectively suspended due to the Respondent's omission in failing to provide a further direction after its termination, which effectively required the Applicant to be suspended for a full calendar month.

[204] Application [32.5] – [32.6].
[205] Application [32.7] – [32.8].
[206] Application, see paragraph F.20.3.
[207] Application [32.10].
[208] Application [32.12] – [32.13].
[209] [2007] VSC 409; see Adjudication Application [32.15] – [32.19].
[210] Adjudication Application [32.20].
[211] Adjudication Application [32.23].

195.2. Alternatively, the suspension was directed for the Respondent's convenience, as:

195.2.1. the Wet Season suspension ceased on 30 April 2022, the Applicant submits there was no other basis upon which the Respondent could suspend;

195.2.2. the Respondent's termination notice stated that the Subcontract had been terminated for no other reason than for its convenience; and

195.2.3. as a practical consideration, the Applicant was effectively suspended during this period for the Respondent's convenience while it undertook to review and establish its own position *vis a vis* the Principal;

195.2.4. the suspension caused the Applicant to incur more cost than otherwise would have been incurred but for the suspension, as stand-down costs would not have been incurred if the Applicant had been immediately directed to demobilise from the Site; and

195.2.5. it has taken all reasonable steps to mitigate the effects of the delay, but there is limited it can do in circumstances where it cannot access the Site to take control over its plant and equipment.[212]

196. In the Application, the Applicant has revised its claim down from $1,688,427.66. The difference of $117,767.26 is to account for a small amount of unintended overlap between this claim and the claim for preliminaries.[213] The Applicant submits that if, for some reason, that preliminaries claim is not accepted, then the full amount of this claim should be accepted.[214]

[212] Application [33.2] (a) – (d).
[213] Application [34.1] – [34.2].
[214] Application [34.4].

197. The Applicant submits that the May suspension costs ought to be valued in accordance with cl 40.5(c) of the Subcontract, which allows for reasonable rates and prices to be used as a basis for valuation.[215]

198. In that regard, the Applicant has cited *CMC v WICET*[216], where Flanagan J considered at [226]:

> Where neither clauses 40.5(a) nor 40.5(b) apply clause 40.5(c) states that reasonable rates or prices shall be used in any valuation made by the Principal's Representative. In *Danidale Pty Ltd v Abigroup Contractors Pty Ltd* Habersberger J stated that a reasonable rate is assessed by having regard to what a party would have had to pay under a normal commercial arrangement and to the cost of the work actually performed…[217]

199. The Applicant submits that as cl 40.5(c) contemplates a valuation exercise by reference to reasonable rates or prices, not an assessment of actual costs, it is entitled to rely on its stand-down rates as a basis for valuation, as the rates are commercially reasonable.[218]

200. Thus, without evidence to the contrary, the Applicant asserts that it is impossible for the Respondent to maintain that its stand-down rates are unreasonable, when *CMC v WICET* established that 'a reasonable rate is assessed by having regard to what a party would have had to pay under a normal commercial arrangement'.[219]

201. The Respondent's rejection of the stand-down costs pursued relies on the following bases:

    201.1. the Applicant has not provided evidence or records to demonstrate its costs in accordance with cl 8A.1 and 42.1;

    201.2. the Applicant has not established that the stand-down rates are reasonable direct costs under cl 45A.3;

    201.3. there are numerous cost overlaps;

    201.4. final claim requirements have not been complied with;

    201.5. suspension for 'wet season' does not provide contractual entitlement for stand down costs;

[215] Application [38.4].
[216] [2017] QSC 85.
[217] Application [38.5].
[218] Application [38.6.
[219] Application (n219) at [226].

201.6. suspension costs are not valued under cl 40.5 without a variation submitted under that clause; and

201.7. the Deed prohibits the Applicant from claiming the costs of suspension.[220]

202. The Applicant submits that I should reject these reasons as they are incorrect in circumstances where:

202.1. the Applicant is not required by the Contract to provide documentary evidence the Respondent contends as the valuation process under cl 40.5 is rate based and does not involve an 'inquiry into invoices'. In this respect, the Applicant has referred me to the detailed submissions at [34] – [38], which in summary submit that:

202.1.1. the appropriate calculation basis for the suspension costs is cl 34.4;

202.1.2. the Respondent was aware of, and expressly requested the stand-down rates and should not now be able to argue that a totally different basis for valuation applies; and

202.1.3. case law provides that a valuation of suspension costs under cl 40.5 is expressly not required to involve a process of invoice and direct-costs reconciliation;

202.2. The Respondent suggests that as the Applicant seeks to value its claim under cl 40.5, the variation process under cl 40 must be followed. The Applicant argues this is not the case, as cl 34.4 expressly states that cl 40.5 is to be used for valuation, and no other reference to a variation is required to be submitted.

202.3. The May suspension followed the Respondent's termination of the Contract, and thus the stand-down costs arising from that suspension are also costs arising from or a consequence of termination of the Contract. The deed of settlement expressly carves out claims "as a consequence of termination of the arrangements between the Respondent and the Applicant'.[221]

[220] Response [22] to [30]; Adjudication Application [39.1] (a) – (g).
[221] Adjudication Application [39.2] (a) – (g).

202.4. According to the Respondent, if I find that the Adjudication Application and the Payment Claim are valid under the Act (which is denied), then for the reasons as set out below, the Applicant is not entitled to the amounts claimed for plant and equipment stand down costs for WO1 in the amount of $1,570,660.40.[222]

Consideration of P&E stand down costs for W01

203. The Applicant is claiming the cost of each plant and equipment which remained suspended on site throughout the month of May 2022. It says that the effect of the notice of termination was to suspend its works on clause Site. Clause 34.4 deals with the Applicant's entitlement to suspension costs. Clause 34.4 provides for a valuation under clause 40.5 of the Subcontract, being the provision for the valuation of variations.

204. The Applicant says that clause 40.5 requires a rate-based valuation process. The Applicant says that in circumstances where there is no specified stand-down rates or schedule of rates in the Subcontract, you it is appropriate to value in accordance with reasonable rates.

205. The Applicant relies on the [N] Declaration for an analysis and comparison of the Applicant's stand down rates and plant stand down rates adopted by other similar sized civil contractors.

206. The Respondent's rejection of this claim is based on a submission all that there is no entitlement because there was no suspension of the Subcontract and if there was a suspension, the Applicant is only entitled to its direct reasonable costs of complying with the direction to demobilise.

207. I have significant difficulty accepting the Respondent's assertion that the termination notice did not operate as a suspension of the works. It seems plain to me that it did. Indeed, had the Applicant continued works despite the termination notice, the Respondent could justifiably reject a claim for payment for those works in the face of that notice.

208. Although suspension of works is not referred to in the termination notice it is apparent that this was intended. As such, I reject this basis of the Respondent's argument.

[222] Adjudication Response [22.1].

209. Further, I reject the Respondent's construction of clause 34.4 as being limited in its application to only suspensions made explicitly under that clause. The words '*by reason of any suspension under this clause*' are not intended to limit the operation of the clause to only a suspension made pursuant to clause 34.1. If that had been the intended operation of the clause he would have expressly said so.

210. Finally, I am satisfied that a rates-based the valuation process is appropriate and that the method adopted by [N] is an orthodox one and a proper means of valuing the cost of stand down for the month.

211. **I am therefore satisfied that the Applicant is entitled to a payment of $1,570,660.40 in respect of W01 plant and equipment stand down costs for May 2022.**

13. Preliminaries Costs

212. The Applicant submits that the Subcontract entitles it to claim suspension costs – where the suspension is for the whole of the Site and all the works, it is only natural that the Applicant would be entitled to all its costs, including for preliminaries.[223]

213. The Applicant goes on to argue:

    213.1. the claim is contemplated by the Subcontract;

    213.2. the claim has been validly claimed in PC17; and

    213.3. the Respondent has no valid reason for refusing the claim.[224]

214. As the Applicant has previously set out elsewhere, where there is a termination for convenience, cl 45A.3 states that:

    214.1. So long as the Applicant:

        214.1.1. is not subject to an act of insolvency as defined in cl 44.11;

        214.1.2. has provided a statutory declaration confirming its solvency if requested by the Respondent; or

        214.1.3. has not provided a false or misleading statutory declaration;

    214.2. Then the Respondent must pay:

[223] Adjudication Application [41.3]; [S] Declaration at [32] and [N] Declaration C for additional details re the Applicant's preliminaries claim.
[224] Response [41.5].

214.2.1. for work executed prior to the date of termination, the amount payable if the termination had not occurred and the Applicant had made a claim for payment on the date of termination; and

214.2.2. the applicable contractual payment due to the Subcontractor for any work properly performed after the termination.[225]

215. Regarding the preliminary matters as set out in cl 45A.3, the Applicant reiterates:

215.1. it is not insolvent;

215.2. it has not been requested to provide a statutory declaration confirming solvency; and

215.3. does not believe that there is a dispute in respect of the truth of its statutory declaration.[226]

216. Those matters being established, the Applicant submits it is entitled to its claim over the May preliminaries costs for the following reasons:

216.1. suspension costs are to be determined in accordance with clauses 34.4 and 40.5 which requires an assessment on the basis of reasonable rates and prices;

216.2. to the extent that cl 45A.3 limits the Applicant's entitlement to costs, on any reasonable interpretation a suspension directed by the Respondent which contemplates the Applicant's plant, equipment and personnel being stood down should be considered 'work' and the Applicant is therefore entitled to claim suspension costs under subclause 45A.3(b)(v) as:

> The applicable contractual payment due to the Subcontractor for any work properly performed after the termination.

216.3. to the extent the above argument is not accepted, the Applicant is entitled to its suspension costs under subclause 45A.3(b)(v), given the Respondent's termination notice clearly had the effect of directing the Applicant from suspending works, and the Applicant would accordingly be entitled to its 'reasonable direct costs' because of that direction, which these costs are.[227]

[225] Response [42.1].
[226] Response [42.2].
[227] Response [42.3].

Thus, the Applicant asserts its entitlement to payment under cl 45A.3.[228]

217. The Applicant originally claimed $2,305,407.62 for preliminaries for the month of May, and the claim for these costs has been calculated as a simple claim recovery for one month of preliminaries, using the preliminaries rates identified in the Contract.[229]

218. The Applicant submits that the monthly preliminaries rate are contract rates that the Respondent agreed to and incorporated into the Subcontract.[230]

219. In preparing for the Adjudication, the Applicant has decided to reduce the value of its preliminary claim to $1,496,749.90 (down from $2,305,407.62).[231]

220. The Applicant submits this decision was made without prejudice to the Applicant's position that the full amount ought to be payable.[232]

221. The Applicant says that the Respondent's reasons for rejecting payment are flawed. It says that in rejecting the Applicant's claim, the Respondent has relied on reasons identical to those relied on for the rejection of the Applicant stand-down costs claim, as outlined previously.[233] The Applicant submits that I should reject the Respondent's reasons for much the reasons addressed previously, being that:

    221.1. the Applicant is not required to provide the documentary evidence the Respondent contends as the valuation process under clause 40.5 is rate based and does not involve an 'inquiry into invoices', and in this respect, the Adjudicator is referred to the detailed submissions at sections H.34 through H.38; and

    221.2. the Applicant disagrees with the Respondent's position regarding reasonable direct costs, because the Applicant does not seek payment of "reasonable direct costs". The Applicant's primary position is, that clause 45.3(b)(iv) applies which only requires a valuation on the basis of a 'contractual payment'. This results in an assessment against clause 34.4 and 40.5 which the Applicant has already addressed.

[228] Response [42.4].
[229] Response [43.1] – [43.2].
[230] Response [43.13].
[231] Response [44.1].
[232] Response [44.2].
[233] Response [45.1].

222. The Applicant states that the May suspension has no relation to the Wet Season suspension period which ended on 30 April 2022. The Applicant does not claim for the period of the suspension which relates to the Wet Season and it is absurd to argue that the suspension contingent on termination was for some reason a "Wet Season" delay.

223. The Applicant notes that the Respondent suggestion that because it seeks to value its claim under clause 40.5, the variation process dictated by clause 40 must be followed. This is not the case. Clause 34.4 expressly states that clause 40.5 is to be used for valuation. It does not require that the balance of clause 40 be required with. Indeed, clause 40.5 itself does not even provide this and instead states:

> Where the Subcontract provides that a valuation shall be made under Clause 40.5, the Main Contractor shall pay...an amount ascertained by the Main Contractor's Representative as follows...

224. The Subcontract provides that a valuation shall be made under clause 40.5 and accordingly, the allowance is to be made. No other reference to a variation is required to be submitted.

225. The May suspension followed the Respondent's termination and thus the stand-down costs arising out of that suspension are also costs that arise out of or are a consequence of termination. The Deed expressly carves out claims "as a consequence of termination of the arrangements between the Respondent and the Applicant." [234]

226. The Applicant also rejects the Respondent's suggestion that the Applicant's costs are excessive, as the costs are based on rates and prices accepted by the Respondent.[235]

Consideration of stand down suspension costs (preliminaries) May 2022

227. I reject the Applicant's claim for stand-down preliminaries for one of reasons articulated by the Respondent. That being that the preliminary costs are not "reasonable direct costs" under clause 45A.3(v).

228. I accept the Respondent's submission that to be characterised as direct costs the costs must be 'directly referable to, or readily traced to, the activity or cost object in question'.[236] Preliminary costs for site establishment, and offside office and the fit out of offices and the other items claimed by the Applicant under this head of claim cannot be

[234] Response [45.2] (a) – (g).
[235] Response [45.3].
[236] See Doyle J in *Australian Orthopedic Fixations* at [262].

described as direct costs. They are not costs directly referable to all readily traced to, the activity or cost object in question being the suspension of the works.

229. The very nature of preliminaries puts them into a different category to those costs which I have determined the Applicant is entitled to. The preliminaries cost is an indirect cost which if the Project had run to completion, would have been recovered by the Applicant over the period of the Project. In a termination for convenience situation the clause 45A.3(b)(v) seeks to exclude costs of an indirect nature. I therefore reject the entirety of the Applicant's preliminaries claim.

14. Risk Money

230. The parties had each made details submissions regarding the Applicant's claim for risk money.

231. Notwithstanding both of those arguments, there is a fundamental difficulty with this claim. That is that it relies on an agreement purportedly reached between the Applicant and the Respondent about the collection of contingency or risk money over the Project through the rates charged by the Applicant.

232. The fundamental difficulty arises because even if I were to make a finding about the existence of this contract, it could only ever be a separate contract to the construction contract which I have jurisdiction to consider. It would therefore be beyond my jurisdiction to make a findings about entitlement said to arise from another, separate contract.

233. On the basis that I do not consider that I have jurisdiction to make any findings about the existence or otherwise of this separate agreement, or any entitlement which might arise under it, I decline to make any findings regarding it.

D. COSTS, INTEREST AND CONFIDENTIALITY

15. Costs

234. Both the Applicant and the Respondent submits that the other should pay the whole of the adjudicator's costs.

235. The default position in relation to costs in adjudications pursuant to the Act, is that the parties must '*bear their own costs*' in relation to the adjudication of the dispute pursuant to section 36(1) of the Act. However, under section 36(2) of the Act, an adjudicator has discretion to make determination on costs against a party, where satisfied that the other party has incurred costs of the adjudication because of '*… frivolous or vexatious conduct on the part of, or unfounded submissions by …*' the first mentioned party.

236. Section 46(5) also provides that as between themselves, the parties involved in a dispute are liable to pay the costs of an adjudication of the dispute in equal shares.

237. Neither party can be said to have engaged in frivolous or vexatious conductor made unfounded submissions. There is nothing in the conduct or submissions of either party which would attract the attention of section 36(2) of the Act.

238. In this Application, each party must '*bear their own costs*' in relation to the adjudication and each party should contribute 50% to my fees.

16. Interest

239. Pursuant to section 35(1) of the Act, an Adjudicator may determine that interest must be paid on the amount the subject of the determination, either in accordance with the terms of the relevant contract or otherwise from the date the payment dispute arose up to the date of the determination at a rate not greater than that prescribed by the Regulations.

240. There is no prescribed rate in the Subcontract. clause 7 of the Schedule to the Act provides that interest to be paid from the day after the relevant amount is due until it is paid. The rate of interest is that prescribed by the Regulations. Regulation 9 prescribes the rate as that applicable under section 85 of the *Supreme Court Act 1961* (NT), which is currently 8% per annum.

241. I am satisfied that the appropriate rate is that prescribed by the Regulation.

242. Therefore, under section 35(1)(a) of the Act, the Respondent should pay interest at the rate of 8% per annum on the GST exclusive amount, not the GST inclusive amount from 15 Business Days after 23 December 2022 onwards, being the date that payment was due, but not paid in accordance with clause 42.1 of the Subcontract.

17. Confidentiality

243. Neither party submits that the subject matter of this dispute is confidential.

E. DETERMINATION

1. In accordance with section 38(1) of the Act, I determine that the amount to be paid by the respondents to the applicant is **AUD $2,265,417.20**.

2. Interest accrues on the sum to be paid at a rate of 8% per annum from the due date onwards.

3. There is nothing in the conduct or submissions of either party to attract the attention of section 36(2) of the Act.

4. I draw the parties' attention to the slip rule in section 43(2) if I have made a miscalculation or other correctible error.

Dated: 12 June 2023

NICHOLAS FLOREANI KC
Registered Adjudicator