Adjudicator's Determination

Pursuant to the Construction Contracts Act 2004

Adjudication Number	**34.13.01**
Prescribed Appointor	**RICS Dispute Resolution Service.**
Adjudicator	**Colin Bond** (Adjudicator 34)
Applicant:	
Respondent:	
Project:	.
Amount to be paid by Respondent	**$9,092,160.00** including GST
Due Date For Payment	Within 7 days of release of determination
Adjudication Fees Apportionment	Applicant: 50% Respondent: 50%
Date of Determination or Dismissal	14th June 2013
Payment Claim	Claimed Amount : **$14,945,599.90** including GST Dated : 25th February 2013
Notice of Dispute / Response to Payment Claim	Notice of Dispute Amount : Nil
Adjudication Application	Dated: 10th May 2013
Adjudicator Acceptance	Dated: 14th May 2013
Adjudication Response	Dated: 24th May 2013

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The Determination or Dismissal

1. I, Colin Bond, Registered Adjudicator Number 34, as the Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act* (NT) (the Act), for the reasons set out in this determination, determine that:

    a. The amount to be paid by the respondent to the applicant is $9,092,160.00 including GST.

    b. Interest is due on the adjudicated amount at a rate of 8% per annum from 30th March 2013.

    c. The respondent is to pay the amount due to the applicant within 7(seven) days of the date of the determination being released.

Background

2. The application arises from an unpaid payment claim made by the applicant on the respondent in respect of construction work carried out under a contract between the parties for the [description of works] in at the [project site], Darwin, Northern Territory (the Project).

Appointment

3. The applicant served its adjudication application on the RICS Dispute Resolution Service, a Prescribed Appointor under the Act, pursuant to section 28(1)(c)(iii) of the Act.

4. The adjudication application was referred to me as adjudicator on 14th May 2013 by the RICS Dispute Resolution Service pursuant to section 30(1)(a) of the Act.

5. The RICS Dispute Resolution Service served a notice of my acceptance of the appointment on the claimant and the respondent on 14th May 2013.

Material

6. The following material was provided to me:

    - Adjudication Application dated 10th May 2013
    - Adjudication Response dated 24th May 2013

7. On 16th May 2013 pursuant to section 34(2)(a) of the Act I requested further submissions from the applicant in respect of the service of the adjudication application on the respondent and requested the respondent to make its comments, if any, on the applicant's further submission. The following responses were received:

    - The applicant's further submission dated 20th May 2013
    - The respondent's letter dated 21st May 2013 advising that all further communications be addressed to [a third party]

8. On 4th June 2013 in accordance with clause 34(3)(a) of the Act I requested an extension from the Registrar to 14th June 2013 to make my determination. This request was accepted on 5th June 2013.

9. On 13th June 2013 I received a further unsolicited submission from the applicant and on the same date I also received a response from the respondent to the earlier submission. I have not considered either document in the process of making my determination.

Jurisdiction

10. The work executed under the construction contract is 'construction work' as defined under section 6(1) of the Act.

11. The construction contract was entered into after the commencement of the Act pursuant to section 9(1) of the Act.

12. The claimant is a party who, under the construction contract concerned and under which a payment dispute has occurred, is entitled to apply to have the dispute adjudicated pursuant to section 27 of the Act.

13. To the best of my knowledge neither of the events stated in section 27(a) or 27(b) has occurred in respect of this matter.

14. I am therefore satisfied that the adjudication application falls within the jurisdiction of the Act.

Payment Claim

15. The applicant served the respondent with its Tax invoice dated 25th February 2013 and Payment Claim as Progress Claim No. 9. Invoice number 3223 in respect of [works] standby rates and latent conditions encountered up to 25 February 2013 at the Darwin [project site] in the amount of $14,945,599.90 including GST.

16. The respondent has not denied receiving the applicant's invoice.

17. It is common ground that a construction contract exists.

18. The respondent does however state in its adjudication response that the adjudicator does not have jurisdiction to determine the bulk of the claims made by the applicant as they are out of time to be adjudicated.

19. The respondent argues that the payment claim was submitted out of time as the applicant submitted identical payment claims in previous progress claims from 2012. It is evident that this Payment Claim dated 25th February 2013 clearly includes for standby costs up to and including 25th February 2013. I am not therefore convinced that this payment claim can be identical to previous claims submitted in 2012 by the applicant.

20. I am satisfied that the payment claim has not been issued in previous months and therefore do not consider if to be out of time.

Notice of Dispute / Response to Payment Claim

21. An adjudication response was served by the respondent in accordance with section 29 of the Act and within the prescribed timeframes.

22. Pursuant to section 8(a) of the Act, the dispute is taken to have arisen on the day the amount claimed in a payment claim is due to be paid, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed.

Adjudication Application

23. Section 28(1) of the Act provides for the applicant to apply for adjudication of a payment dispute within 90 days after the dispute arises.

24. I am satisfied with the evidence provided that the payment dispute arose on 30th March 2013.

25. The applicant applied for adjudication of the payment dispute on 10th May 2013 and within the time allowed pursuant to section 28(1) of the Act.

26. The application is in writing pursuant to section 28(1) (a) of the Act.

27. The application was served on the respondent pursuant to section 28(1) (b) of the Act.

28. The application was served on RICS Dispute Resolution Service pursuant to section 28(1)(c)(iii) of the Act.

29. I am therefore satisfied that the adjudication application complies with the requirements of section 28 of the Act.

Adjudication Response

30. Pursuant to section 29(1) of the Act the respondent has 10 working days after the date on which it is served with an application for adjudication in which to prepare and serve its written response on the adjudicator and the applicant.

31. I am satisfied that the respondent served its response within the timeframes prescribed in the Act.

Reason for the Determination

32. In making this determination I have had regard to the following matters, pursuant to section 34 of the Act:

- the application and its attachments; and
- the further written submissions validly made by the parties.

Contract

33. The applicant in its adjudication application has provided a copy of the AS4000 Major Works Contract Conditions.

34. It is common ground that a Construction Contract exists between the parties for [works] in relation to the project.

Issues in Dispute

35. As discussed above, the respondent has disputed the validity of the adjudication application and payment claim for reasons as detailed in the Adjudication Response. I have addressed these issues in paragraphs 18&19 above and I am satisfied that both the adjudication application and payment claims comply with the requirements of the Act.

36. In its Payment Claim the Claimant submitted a progress payment in the sum of $14,945,599.90 (inclusive of GST). In its adjudication application the claimant is not pursuing element 2 of claim 1, basis 2 of claim 2 or element 2 of sub-claims 3.1 & 3.2.

37. The application is now for an adjudicated amount of $12,208,862.00 (plus GST) or in the alternative $9,930,362.00 (plus GST).

38. The remaining issues in dispute relate to the validity of the 3 claims contained within the Payment Claim

    a. *Claim 1* – a variation claim in relation to an alleged direction by the Superintendent on 29th October 2012 for an amount of $8,265,600.00 plus GST

    b. *Claim 2* – in the alternative to claim 1, standby costs in relation to delays to start of [works] schedule for an amount of $5,987,100.00 plus GST

    c. *Claim 3* – latent conditions for an amount of $3,943,262.00 plus GST

Valuation of issues in dispute

39. The applicant has provided a summary of costs claimed in the headings as detailed below. Each heading has also been separately analysed by the respondent and I have provided my determination in accordance with each heading.

40. Summary of claimed amount

		Primary Claim	Alternative Claim
1. Claim 1		$8,265,600.00	
2. Claim 2			$5,987,100.00
3. Claim 3		$ 3,943,262.00	$3,943,262.00
	Totals excl GST	$12,208,862.00	$9,930,362.00

41. *Claim 1* - This claim relates to a variation claim in relation to a letter issued by the Superintendent on 29th October 2012.

42. It is common ground that both parties met over three days from 1st to 3rd October 2012 in response to the four Notices of Dispute issued by the applicant to discuss the ongoing issues being encountered with the contract, particularly the delays in gaining the appropriate [works] permits.

43. It is common ground that the procurement of the [works] permits was the respondent's responsibility.

44. The approval for the works was received on 2nd October 2012, 63 days later than the contractual [works] commencement date started in the Contract for Campaign 1 i.e. 1st August 2012.

45. Contained in paragraphs 3.10-3.13 of the statutory declaration of [the applicants representative], [he] had been expressing as far back as his e-mail of 21st Dec 2011 to Mr [P] from the Respondent the significance of being able to demobilise [plant] after completion of the [works] Campaign 1 to release [the Applicant's] most valuable asset to work on other projects during the Darwin wet season.

46. The final agreed Contract states, Part 4 Scope of Works – "*it is likely that the [plant] will be demobilised upon completion of the first stage. Suitable equipment will be remobilised to carry out the second stage'.*

47. The 3-day meeting between the parties was convened to discuss and attempt to resolve the current costs being incurred as a direct consequence of the failure to secure the [works] permits and also to agree the impact on the schedule to Campaign 1 due to the delayed commencement.

48. The statutory declarations provided by the applicants [3 representatives] all confirm that a key part of the agreement discussed on 3rd October 2012 was that the applicant could permanently demobilise the [plant] from the project at the end of Campaign 1.

49. On the 29th October 2012 the Superintendent issued a letter stating that the Respondent had not released the [plant] from the project. The letter from the Superintendent stated that the applicant required the respondent's approval to demobilise the [plant] from the project and in accordance with clause 28 of the Contract directed the applicant to retain the [plant] in Darwin over the Wet Season.

50. The applicant considers that this was a direction which was contrary to the agreement reached on 3rd October 2012.

51. The applicant submits that the Superintendent's letter dated 29th October 2012 was effectively a direction under clause 28 of the Contract requiring the applicant not to remove construction plant from the site without the Superintendent's approval.

52. The applicant also considers that this direction varies the WUC under clause 36.1 of the Contract and therefore considers it is entitled to recover costs for compliance with the direction pursuant to clause 36.4.

53. In its Adjudication Response the respondent states that the applicant is not entitled to be paid costs for claim 1 as they have no entitlement to be paid over the Wet season.

54. The respondent considers that the Superintendent's letter dated 29th October 2012 did not constitute a direction to vary the scope of work but was simply a response to the applicant's decision to depart from the contractual requirements.

55. I have considered all the information provided by both parties and I am satisfied that after reading the Contract that the letter dated 29th October 2012 from the Superintendent constituted a direction under clause 28 which then varied the WUC under clause 36.1. I am satisfied that the applicant is entitled to recover its costs for compliance with this variation.

56. The delay period claimed is from 1st December 2012 to 25th February 2013 which is 87 days.

57. The Standby Rate is $4,200 per hour multiplied by the compensable hours for the delay period. I therefore determine that the standby costs for variation to be **$8,265,600** excluding GST.

58. *Claim 2 – This is in the alternative to Claim 1 above*. As I have determined a value for Claim 1 my determination for Claim 2 is **Nil.**

59. *Claim 3 – Additional costs for the geotechnical conditions experienced*. This claim relates to alleged costs to [perform the works] between 2nd October 2012 and 30th November 2012.

60. The Contract states that "*the rate for [works] in the Schedule of Rates is limited to material with a maximum UCS of 7MPa"* – however the contract does not specify a rate for [removal] of material with a UCS of greater than 7MPa.

61. The applicant submitted a "Notice of Latent Condition" dated 9th November 2012 which stated that the underlying material encountered may have UCS strength greater than 7MPa and the proportion of quartzite may be higher than 5% of the dredged volume.

62. I have reviewed all the expert reports provided within the documentation and have concluded that the applicant has not yet demonstrated that latent conditions exist or the extent of additional geotechnical conditions not envisaged at time of tender.

63. In the adjudication application at p54 paragraph (w) the applicant states that the "quantum of quartz and quartzite in the material to be [removed] has not been able to be ascertained with any degree of accuracy".

64. The applicant engaged Coffey to undertake various sampling and testing programs. In its 20 February 2013 report Coffey could not provide an opinion on the quantity of the hard material from the samples and information obtained to date. Coffey are undertaking further geophysical investigations which they recommended before a conclusion could be reached on the volume of hard material.

65. In the applicant's expert report produced by Johan Pronk, paragraph 6.1.5 states "both sampling methods that have been utilised do not give conclusive evidence of the volume of hard materials in excess of 7MPa (UCS) already [removed]".

66. I am not convinced that the appropriate geotechnical investigations have been concluded to enable an accurate assessment to be reached of what allowances for hard material should have been made by the applicant based on the information available at time of tender.

67. In addition I am also not convinced that the extent of hard material or indeed the type of material actually [removed] has been fully assessed. No conclusive argument has been presented to demonstrate the actual quantities of additional hard material dredged.

68. The statements referred to above from the applicants own expert reports do not convince me that sufficient tests of the dredged material have been completed to properly conclude the extent of any latent conditions.

69. Without this information to hand I do not consider that any reasonable assessment of the actual cost implications can be concluded.

70. The cost build for the latent condition claim also appears to be very simplistic and doesn't appear to take account of other factors which may reduce production including downtime and equipment repairs, inclement weather and the ability or otherwise to employ appropriately qualified supervision and labour.

71. The applicant's argument is based on an assumption that the reduction in the rate at which the works were performed] must be directly related to the existence of material harder than what had been assumed at tender.

72. I do not consider that the applicant has demonstrated to any degree of accuracy the type and quantity of material encountered and how this material differed from what a competent Contractor at the time of tender should have included.

73. Without this detailed information I do not consider that any attempt can be made to reasonably assess the potential costs of any latent conditions encountered during the [works].

74. For the reasons stated above I determine the value for the additional costs for the geotechnical conditions experienced to be **Nil.**

75. *My determination in relation to this adjudication is as follows:*

Summary of adjudicated

		Adjudicated amount
1. Claim 1		$8,265,600.00
2. Claim 2		*Nil*
3. Claim 3		*Nil*
	Sub-total	*$8,265,600.00*
	GST	*$ 826,560.00*
	Total	***$9,092,160.00***

Adjudication costs

76. Pursuant to section 36(1) of the Act I determine that the parties shall bear their own costs in relation to this dispute and that the costs of the adjudication shall be shared equally by both parties.

77. The adjudication costs for this determination amount to 79 hours @ $325.00 plus GST = $28,242.50 including GST and as stated in paragraph 77 above, is to be paid by the equally by both parties. Tax invoices will be issued accordingly.

Interest Costs

78. I determine that interest is payable on the adjudicated amount in accordance with clause 35(1) (b) of the Act at rate of 8% per annum from the 30th March 2013.

Confidential information

79. Pursuant to section 38(e) identify the following information, that because of its confidential nature, is not suitable for publication by the Registrar under section 54 of the Act:

a. The identity of the parties.
b. The identity and location of the project.

Signed: ……

Colin Bond – Registered Adjudicator No. 34 Dated: 14th June 2013