

**ADJUDICATOR'S AMENDED DETERMINATION**

**CONSTRUCTION CONTRACTS  
(SECURITY OF PAYMENT)  
ACT 2004  
(NORTHERN TERRITORY)**

**IN THE MATTER OF AN ADJUDICATION BETWEEN:**

**[Redacted]**

**APPLICANT**

**And**

**[Redacted]**

**RESPONDENT**

**BY**

**GRAHAM ANSTEE-BROOK (ADJUDICATOR)**

**ISSUED: 10 August 2020**

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## 1. DETAILS OF PARTIES

### **APPLICANT:**

[Redacted]

AND

### **RESPONDENT**

[Redacted]

### **ADJUDICATOR**

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## 2. ADJUDICATOR'S DETERMINATION

I Graham Ivan Anstee-Brook the appointed adjudicator in the matter of the payment dispute between [*the Applicant*] and [*the Respondent*] determine that:

- 2.1. In respect of the Applicant's claim for the return of retention money no amount is payable by the Respondent to the Applicant.
- 2.2. In respect of the Adjudicator's costs the Respondent must pay the sum of \$2500.00 to the Applicant by 17 August 2020.

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Graham Anstee-Brook  
Adjudicator

### **3. ENGAGEMENT**

- 3.1. A Contract was entered into by the Applicant and Respondent which is comprised of the following documents:
  - 3.1.1. a Subcontract between the Respondent and [a *third party*] dated 30 July 2019 (**the Subcontract**);
  - 3.1.2. a Deed of Novation novating the Subcontract from [*the third party*] to the Applicant.
- 3.2. [*The third party*] is a company that was purchased by the Applicant at the time of entry into the Subcontract.
- 3.3. The Subcontract provided for the Applicant to provide [*redacted*] electrical work including [*work details redacted*] for [*the project*] on a construct only basis (**the Works**).
- 3.4. The Works form part of the design and construction of a [*redacted*] (**Project**) being constructed in [*site details redacted*] in the Northern Territory.

### **4. APPOINTMENT OF ADJUDICATOR**

- 4.1. On 14 July 2020 I was appointed adjudicator by the Master Builders Northern Territory as adjudicator pursuant to section 30(1)(a) of the *Construction Contracts (Security of Payments) Act 2004 (CCA)*.
- 4.2. The Applicant commenced an Adjudication Application (**Application**) which was delivered to Master Builders on 11 July 2020.
- 4.3. I accepted the appointment of adjudicator and wrote to the Applicant and Respondent on 15 July 2020.

### **5. CONFLICT OF INTEREST**

- 5.1. I have no material personal interest in the payment dispute or in the Contract under which the dispute has arisen.
- 5.2. I see no reason to disqualify myself pursuant to Section 31 of the CCA.

### **6. DISMISSAL UNDER SECTION 33(1)(a) OF THE CCA**

- 6.1. I am obliged to dismiss the Application without making a determination on the merits depending on my findings of fact relating to section 33(1)(a)(i) to (iv) of the CCA. I am obliged to consider each of the sub-section to determine whether I am obliged to dismiss the Application without making a determination on the merits. *Moroney Anor and Murray River North Pty Ltd [2008] WASAT 111 at [82]*.

Section 33(1) provides as follows:

*An appointed adjudicator must within the prescribed time or any extension of it made under section 34(3)(a) –*

*(a) dismiss the application without making a determination of its merits if –*

- (i) the contract concerned is not a construction contract; or*
- (ii) the application has not been prepared and served in accordance with section 28; or*
- (iia) the dispute that is the subject of the application is also the subject of another application that has not been dismissed or determined; or*
- (iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgement or other finding about the dispute the subject of the application; or*
- (iv) satisfied that it is not possible to fairly make a determination;*
  - (A) because of the complexity of the matter; or*
  - (B) because the prescribed time or any extension of it is not sufficient for any other reasons; or*

## **7. CONSTRUCTION CONTRACT**

- 7.1. If the Contract between the parties is not a construction contract I must dismiss the Application.
- 7.2. The scope of work under the Subcontract included the construction [redacted] electrical work including [redacted] for the project. This work falls within the definition of construction work as defined in section 6 of the CCA.

I am satisfied that the subcontract is a construction contract

## **8. APPLICATION PREPARED IN ACCORDANCE WITH SECTION 28 OF THE CCA**

- 8.1. To satisfy the requirements of section 28 of the CCA:
  - 8.1.1. within 65 working days after a payment dispute arises Applicant must prepare a written application for adjudication, serve the application on the other party to the contract and on a Prescribed Appointer
  - 8.1.2. the Applicant must if the parties to the contract have appointed a Prescribed Appointer serve the application for adjudication on that Prescribed Appointer.

- 8.2. On 27 March 2020 the Applicant issued a Notice of Completion requesting a Certificate of Completion and the return of 50% of the retention being held by the Respondent. On 14 April 2020 the Respondent issued a Notice of Completion response stating that the Respondent was assessing delay costs and liquidated damages and intended to recover these from the Applicant. Subsequent to this notice the Respondent issued an Assessment of costs on 28 April 2020 claiming the sum of \$357,000.00 from the Applicant.
- 8.3. A payment dispute pursuant to the Act arose either on 15 April 2020 or on 29 April 2020. In either event the Application has been brought within time.
- 8.4. I am satisfied that the application for adjudication otherwise satisfies the requirements of the section 28 of the CCA other than for the question of service on the Prescribed Appointer.

**9. PRESCRIBED APPOINTER SECTION 28(1)(c)(ii)**

- 9.1. In the Response the Respondent contends that the Applicant has not served the Application on the agreed Prescribed Appointer and accordingly I have no jurisdiction in relation to this Application as I have not been properly appointed.

- 9.2. The following are matters not in issue between the parties.

9.2.1. The Application was served on the Master Builders Northern Territory Limited as the Prescribed Appointer; which is a named Prescribed Appointer in the Regulations of the CCA

9.2.2. The Subcontract in Appendix 1 contains the following:

<i>Item 36</i>	<i>Authorised Nominating Authority or Prescribed Appointer (Clause 23.7)</i>	<i>Royal Institute of Chartered Surveyors Dispute Resolution Service (RICS DRS)</i>
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- 9.3. *The Royal Institute of Chartered Surveyors Dispute Resolution Service (RICS DRS) is not named as such in the Regulations of the CCA however RICS Australasia Pty Ltd ACN 089 873 067 trading as RICS Dispute Resolution Service is named in the Regulations of the CCA as a Prescribed Appointer.*

- 9.4. The Subcontract at clause 23.7.4 provides as follows:

*The parties agree that any Application under the SOP Legislation must be made to the Authorised Nominating Authority or Prescribed Appointer.*

- 9.5. The Respondent contends that the Application should have been served on RICS Australasia Pty Ltd (ACN 089 873 067) trading as RICS Dispute Resolution Service.

- 9.6. After considering the submissions made by the Respondent in the Response pursuant to section 34(2)(a) of the CCA I requested further submissions from the parties.

9.7. I received further submissions as follows:

9.7.1. Further submissions from the Applicant on 2 August 2020;

9.7.2. Further submissions from the Respondent on 3 August 2020;

9.7.3. Further submissions from the Applicant and the Respondent on 4 August 2020

9.8. The CCA in section 4 provides as follows:

***Prescribed Appointer means a person prescribed as such by the Regulations***

9.9. The regulations clearly articulates the names and descriptions of prescribed appointers for the purposes of the CCA.

9.10. The Applicant contends that the entity named in the Subcontract (*Royal Institute of Chartered Surveyors Dispute Resolution Service (RICS DRS)*) is not the entity described in the Regulations and accordingly the parties to the Subcontractor did not agree an entity as a Prescribed Appointer under the CCA and accordingly the Applicant was entitled to choose any of the entities named in the Regulations as a Prescribed Appointer.

9.11. The Respondent contends that the Subcontract must be construed in accordance with the principles found in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR. The Respondent relies on the extract from [46 of *Mount Bruce*].

*The rights and liabilities of parties under a contract are determined objectively, by reference to its text, content (the entire text of the Contract as well as any Contract, document or statutory provision referred to in the text of the Contract) and purpose.*

9.12. The Respondent further contends that as the Subcontract makes reference to the CCA in numerous incidences the interpretation of clause 23.7.4 in conjunction with Item 26 of the Appendix 1 must be interpreted to mean that the entity named in Item 26 of Appendix 1 must be read as *RICS Australasia Pty Ltd* which is the entity named in the Regulations of the CCA. Further a common sense approach must be taken to determining the meaning of Item 36 of Appendix 1 and if this is done it is logical that the Respondent and Applicant intended by the entity named in Item 36 of Appendix 1 means *RICS Australasia Pty Ltd*.

9.13. The provisions of section 28 of the CCA are couched in mandatory terms – a *party to the Contract must* (emphasis added). If a failure to comply with the provisions of section 28 of the CCA require an adjudicator to dismiss the application pursuant to section 33(1) of the CCA without making a determination on the merits then the question arises as to whether Prescribed Appointer under the Regulations must be clearly and properly named.

9.14. The Prescribed Appointer to which reference is made in section 28 of the CCA is that Prescribed Appointer in the definitions at section 4 of the CCA. That



Prescribed Appointer in section 4 is the person prescribed as such in the Regulations. In further submissions from the Respondent reliance is had to *JKC Australia LNG Pty Ltd v CH2M Hill Companies Limited* [No. 2] [2020] WASCA112. The Respondent cites:

[71]

*Where a constructional choice is available it is important to consider what a reasonable business person reading the relevant clause or agreement would understand it to mean. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purposes and objects to be achieved by it.*

- 9.15. In my view the issue is not one of the construction of a contract but the issue is to be resolved by reference to the CCA. The CCA provides for a statutory regime which in certain instances such as section 28 of the CCA contain mandatory provisions. Deciding on whether the Prescribed Appointer as named in the Subcontract is the same entity as is named in the Regulations is not a matter of interpretation of a Contract and is distinguishable and therefore must be decided upon the provisions of the CCA. In my view it can only be the entity named in the Regulations that is a Prescribed Appointer.
- 9.16. I find that as the entity named in the Subcontract is not a named entity in the Regulations as a Prescribed Appointer the parties to the Subcontract did not agree on a Prescribed Appointer and accordingly the Submissions of the Respondent that there has been no proper appointment of an adjudicator are rejected.

## **10. APPLICANT'S CLAIM**

- 10.1. The Applicant's claim is for the return of retention money held by the Respondent as a performance guarantee under the Subcontract. The amount claimed is \$118,601.82 (including GST) with interest thereon at the rate of 6.25% per annum calculated from 29 July 2020.
- 10.2. One of the defences of the Respondent is that the extension of time to which the Applicant says it is entitled has no substance given the terms of the Subcontract and in any event the Respondent has a setoff claim for damages in the sum of \$357,000.00.

## **11. THE APPLICANT'S EOT ENTITLEMENT**

- 11.1. The Applicant claims an extension of time which it maintains extends the date for completion by 41 days to 1 January 2020 although the Applicant states it completed the Works on or about 13 December 2019.
- 11.2. The Respondent denies that the Applicant is entitled to an extension of time in that it did not comply with the notice provisions under the Subcontract.
- 11.3. Clause 19.21 of the Subcontract provides:

*19.21 The Subcontractor is entitled to claim and EOT only if:*

- (a) the Subcontractor is or will be delayed in reaching Completion by the Date for Completion by an Excusable Delay; and*

*(b) within the number of Business Days set out in Item 30 of when the Subcontractor should reasonably have first become aware of the Delay Event, the Subcontractor gives the Contractor's Representative a written claim setting out the background, effect and duration (or estimate duration if the Delay Event has not concluded) for an EOT.*

Relevantly 19.2.3 of the Subcontract provides:

*The Subcontractor will not be entitled to an EOT unless;*

*(a) it has issued each of the notices required by this clause 19 within the timeframe stated for each notice.*

- 11.4. The Applicant does not contend that it has issued a notice which complies with the provisions of clause 19.2.1 but relies on 5 Gantt Charts issued between 21 October 2019 and 25 November 2019 as being notices of delay. The Gantt Charts are said by the Applicant to have provided notice to the Respondent that there would be delays and the Respondent did not seek any further or better information regarding the Gantt Charts.
- 11.5. The Respondent contends that the notice provisions in the Subcontract are a prerequisite to any entitlement to an EOT and that the Applicant has not complied with these prerequisites. The Gantt Charts are not a written claim setting out the background effect duration relating to the EOT.
- 11.6. The Respondent concedes that Item 30 of Appendix A does not provide for any timeframe and accordingly as a matter of contractual interpretation any notice given under clause 19.2.1(b) of the Subcontract must be given within a reasonable time. This submission is well founded but in any event the only notices upon which the Applicant relies is the Gantt Charts.
- 11.7. I am not satisfied that the Gantt Charts satisfy the requirements of section 19.2 (b).
- 11.8. The Respondent relies on a number of Decisions including *Multiplex Construction (UK) Limited v Honeywell Control Systems Limited (No.2)* [2007] EWHC447 to support the proposition that where a contract imposes notification requirements as a precondition to making a claim the courts will insist on strict compliance and if those requirements are not met effect will be given to the consequences as provided for in the contract. In the Subcontract the consequence of not providing notices which comply with section 19.2.1 is that under clause 19.2.3 the Applicant is not entitled to an EOT.
- 11.9. I determine that the Applicant is not entitled to an EOT.

## **12. RESPONDENT'S SETOFF CLAIM**

- 12.1. The Date for Completion under the Subcontract is 21 November 2019 and as I have determined that the Applicant is not entitled to an EOT this remains the Date for Completion

- 12.2. Pursuant to clauses 20.2 and 20.3 the Applicant must indemnify the Respondent in respect of any losses costs or expenses incurred by the Respondent as a result of a delay where the Date for Completion is not met.
- 12.3. The Respondent has supported its submissions by a statutory declaration of [OD] who is a director of the Respondent and was the Contractor's Representative (**Respondent's Representative**) on the Project. Under the Contract between the Respondent and the owner of the Project the Respondent was liable for liquidated damages at the rate of \$17,000 per day.
- 12.4. The Respondent wrote to the Applicant on 14 April 2020 and 28 April 2020 advising the Applicant that it had not met the Date of Completion and that the Respondent was claiming from the Applicant the sum of \$357,000.00 by reason of liquidated damages payable under the Contract between the owner of the project and the Respondent. In response the Applicant wrote to the Respondent on 8 May 2020 setting out its view of its entitlement to an EOT.

In the Applicant's letter of 18 May 2020 it states that it is entitled to an EOT to 1 January 2020 but in any event the works under the Subcontract were *completed and energised on or about 13 December 2019*.

The liquidated damages claimed by the Respondent as being due under the contract between the Respondent and the owner of the Project is for liquidated damages from 21 November 2019 to 19 December 2019 at \$17,000 per day.

- 12.5. Even if Practical Completion under the Subcontract was achieved on 13 December 2019 the liquidated damages under the Contract between the Respondent and the owner of the Project would exceed the amount of retention.
- 12.6. In his statutory declaration at paragraph 16 [OD] states that on 10 March 2020 the owner of the Project notified the Respondent that it intended to offset Delay Damages in the amount of \$476,000.00 (excluding GST). The owner of the Project thereafter setoff this amount against a milestone payment due to the Respondent on 11 March 2020. Of the amount of \$476,000.00 the Respondent contends that 21 days of the 28 days were attributable to the Applicant's delay in achieving Completion and accordingly the Respondent has a setoff against the Claimant of \$357,000.00. The Application attaches correspondence and an invoice from the owner of the Project which supports the Respondent's position that the owner of the Project has retained from monies due to the Respondent the sum of \$476,000.00 (excluding GST).
- 12.7. I am persuaded by the Respondent that it has a legal obligation to pay the owner of the Project liquidated damages for a sum at least equivalent to the amount claimed in this Application. As I have determined that the Applicant is not entitled to an EOT the setoff by the Respondent exceeds the retention and no amount is payable by the Respondent to the Applicant.

### **13. COSTS**

- 13.1. Both parties have made submissions in relation to costs as provided for in section 36(2) of the CCA. I am not satisfied that either party *incurred costs of*

*the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party and make no order under section 36 of the CCA.*

**14. ADJUDICATOR'S COSTS**

- 14.1. An Adjudicator is entitled to payment pursuant to Section 46(1A) and that the parties to the dispute pursuant to Section 46(4) are jointly and severally liable to pay such costs.
- 14.2. I determine that the parties each pay half the Adjudicator's costs.
- 14.3. The Applicant provided a deposit for the Adjudicator's fees and disbursements and the Respondent is required to pay the Applicant half of the Adjudicator's fees and disbursements.
- 14.4. The Adjudicator's fees and disbursements are \$5000.00 and accordingly I determine that the Respondent must pay the Applicant \$2500.00 .