Determination 26.14.04

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

BETWEEN:

Applicant

and

Respondent

REASONS FOR DECISION

1. On 16 May 2014 the Applicant served two Applications dated 15 May 2014 on Master Builders Association Northern Territory ("MBANT") as prescribed Appointer under the Act. One application related to a payment dispute on the [1st project site] and the other to a payment dispute on the [2nd project site].

2. The Respondent was also served a copy of each Application on 16 May 2014. By letter from MBANT dated 16 May 2014 I was appointed adjudicator to determine both payment disputes between the parties. I received the letter on 16 May 2014 and the application documents on 19 May 2014.

3. On 27 May 2014 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I also sought submissions should either party object to the appointment. There were no objections to my appointment.

4. On 30 May 2014 I received a Response to each Application.

5. On 10 June 2014, having attended to both the Application and Response, and due to the numerous and complex issues of the matter, I wrote to the Construction Contracts Registrar and sought additional time in which to make my decision under section 34(3)(a). On that date the Construction Contracts Registrar approved my request for additional time, which gave me up to and including 4 July 2014 for the [1st] Application and up to and including 7 July 2014 for the [2nd] Application. There were no objections from the parties.

6. On 10 June 2014 I also received further submissions from the Applicant in relation to matters raised by the Respondent in both the [1st] Response and the [2nd] Response. There was some contention between the parties as to what comprises the contract. I did not seek those submissions, however the Applicant requested that I accept its further submissions in relation to both Applications under section 34(2) of the Act. To ensure procedural fairness and the rules of natural justice were upheld and that I had made available all the evidence of the matter, as reasoned by Barr J in *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20 at [42], I sought submissions from the Respondent under section 34(2)(a) of the Act. I limited the scope of those submissions to matters raised by the Applicant and requested that the Respondent's submissions be returned by 26 June 2014.

7. On 26 June 2014 I received the Respondent's submissions and later that day received substituted submissions with some minor cosmetic corrections. There were no further submissions in the matter and it was clear from the Applicant's submissions that each payment dispute was to be adjudicated *"…with respect to the relevant construction contract for each project."*

8. This determination is only in relation to the [1st] Application.

Introduction

9. This adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent to demolish eight existing houses and build four duplex houses, eight houses in all, at the [1st project site] in the Northern Territory ("Contract"). The Contract forms part of the National Partnership Agreement on Remote Indigenous Housing undertaken by the Northern Territory Government.

10. The Applicant says it is entitled to be paid its delay and variation claims in the Contract in the sum of $905,506.80 (including GST) for the additional costs it has incurred in the Contract. The Applicant's claim comprises the following components:

    (a) Delay costs – 34 days of delay time for the Superintendent's direction to suspend the work while leases were secured by the Respondent - $346,800.00 (including GST);

    (b) Windows and Screens – Superintendent's direction to replace the installed louvre windows on the four duplex houses with Breezway proprietary brand products and the additional cost of Crimsafe screens over the cost of Amplimesh screens - $43,887.20 (including GST) for the windows and $28,544.00 (including GST) for the screens at a total of $72,413.20 (including GST);

    (c) Demolition costs – additional demolition costs not allowed for in the Contract - $103,506.00 (including GST);

    (d) Verandahs – an additional cost for 8 x verandahs at $44,875.70 each not allowed for in the Contract - $359,005.60 (including GST); and

(e) Engineering Consultant's costs – additional costs associated with consulting engineering advice for various non-compliance reports - $23,764.00 (including GST).

11. The Applicant also seeks interest payable on its claim under the Conditions of Contract ("GC") 2.18 at the 90 day bank bill rate published on 1 June each year at a current rate of 2.8% per annum.

12. The Applicant has also sought the costs of the Adjudication being:

(a) the Adjudicator's costs; and

(b) the Applicant's costs,

to be paid in full by the Respondent.

Procedural Background

The Application

13. The Application is dated 15 May 2014 and comprises three volumes enclosing a general submission tabulated 1 through to 47, a construction contract submission tabulated 1 through to 23 and period contract submission tabulated 1 through to 4. The attachments include:

(a) a copy of the construction contract;

(b) a copy of the period contract;

(c) a copy of the payment claim;

(d) a rejection of the payment claim; and

(e) supporting evidence including tender documents, engineering report documents, statutory declarations, emails, photographs and general correspondence between the parties.

14. The Applicant's Payment Claim was initially submitted to the Respondent on 20 January 2014 for the sum of $1,104,805.32 (including GST). The Respondent assessed the payment claim on 28 January 2014 and rejected the claim in its entirety stating:

> *"The Principal is well within its rights to withhold payment for non-conforming works."*

and

> *"The Principal will arrange payment once formal advice is lodged and conformation of the rectification of the works has been verified, and any other matters which may limit payment claims are resolved".*

15. The Application, dated 15 May 2014 was served on 16 May 2014 and included amended details of claim, due to a calculation error of the delay days, in the sum of $905,506.80 (including GST).

16. The Application claims interest at 2.82% on any overdue payments in the Contract.

17. The Application claims costs of the adjudication, under section 36(2) of the Act, as the fees of the Adjudicator and the Applicant's costs of bringing the Application, to be paid in full by the Respondent.

The Response

18. The Response is dated 30 May 2014 and comprises two volumes, a general submission tabulated 1 to 5 and three statutory declarations, TKL with 3 attachments, DD with 1 attachment and MD with 17 attachments. The attachments include:

(a) a copy of the Panel Contract;

(b) tender response schedules;

(c) minutes of meetings;

(d) payment claim responses; and

(e) supporting evidence including, emails, drawings and general correspondence between the parties.

19. The Response does not seek costs or interest and there are no counterclaims.

20. The Response was served on 30 May 2014.

Adjudicator's Jurisdiction and the Act

21. The following sections of the Act apply to the contract for the purposes of the Adjudicator's jurisdiction.

22. Section 4 of the Act – **Site in the Territory** – the site is at a remote community [redacted] in the Northern Territory. The site map provided at Tab 7 of the Application establishes the building site in the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.

23. Section 5 of the Act - **Construction Contrac**t - the contract is a construction contract by reference to the contract documents and the parties agree that they entered into a construction contract. However, the parties cannot agree on precisely what documents and terms form the [1st] Contract.

24. The Applicant says that the Panel Contract is a stand-alone contract that pre-qualified a panel of contractors for a period of 12 months to bid on the [1st project] and other works and that the actual GC's of the [1st] Contract is the *"…Period Contract for Works and Services (Effective Date: 10 January 2011 Version No. 4.1.34)…"* ("PCWS").

25. The Respondent says *"The parties entered into a panel contract.....which incorporates the terms and conditions of the construction contract…"*, that is the PCWS plus conditions of tendering, preliminary clauses and special conditions from the "Panel Contract" and that those are the terms of the [1st] Contract. This much is clear from the Application, the Response and further submissions from the parties.

26. The initial contention between the parties in relation to the terms of the [1st] Contract is whether or not there has been a failure by the Applicant, when preparing the Application, to:

> *"…….state the details of or have attached to it:*
>
> *(i) the construction contract involved or relevant extracts of it…..".*

27. A careful reading of the PCWS terms establishes at GC 2.2 the "Formation of Contract" provisions and sets out in order of precedence the documents which will form the contract. The parties presumably read the contract document and the Applicant has included the PCWS terms in its submissions which terms clearly state what comprises the [1st] Contract. Additionally, the parties consistently refer to the Panel Contract in their submissions which, in my view, states the details of the construction contract for the purposes of the Act.

28. While not having the entire contract to hand may not be convenient for the Adjudicator, I found it unnecessary to call for a copy of the Request for Tender of the Panel Contract which, *inter alia*, included a copy of the

Special Conditions of Tendering and Contract ("SC") of the Panel Contract, as these were included in the Response at Tab MD3.

29. In reaching a landing on this point, I turned to the 'Request for Service' for the [1st project works]. While the heading on that document states it is a Request for Service, it is in fact a quotation of the works in the form of a simplified tender document, a Request for Tender ("RFT"). A careful reading of the document informs the respective tenderers in the section titled *"HOW TO RESPOND TO THIS QUOTATION"* and goes on to state:

> *"Complete the QUOTATION FORM and SCHEDULES provided. This will become your Quotation which may be lodged in any of the following ways…."*.

30. The next section titled "CONDITIONS OF CONTRACT" clearly establishes this to be a tender as it states:

> *"The Conditions of Tendering and Contract applicable to this RFT are…."*

and then refers to the PCWS and the Panel Contract as follows:

"…Period Contract – Works and Services (PCWS) V4.1.34 (January 2011) as per Panel Contract T12-1514" [my emphasis added].

It is clear from this that the Panel Contract incorporates the terms of the PCWS for the purposes of the [1st] Contract.

31. However, the whole of the terms of the [1st] Contract are not settled at this point. The [1st project] works tender also incorporates into the [1st] Contract additional Special Conditions of Contract setting out the Time for Completion, Liquidated Damages, the Defects and Liability period and Time for Commencement, as well as other site specific requirements.

32. I am of the view that the terms of the [1st] Contract are the Panel Contract incorporating the PCWS terms and the terms of the [1st project] RFT.

33. I am also satisfied that the [1st] Contract is a construction contract for the purposes of section 5 of the Act.

34. Section 6 of the Act – **Construction Work** – the work is to demolish eight existing houses and build eight new houses constructed as four duplex houses at the [1st project site] and sections 6(1)(c) and 6(1)(e) of the Act specifically provides for this type of civil work. I am satisfied that the work is construction work for the purposes of the Act.

35. Section 4 of the Act - **Payment Claim** – means a claim made under a construction contract:

> *(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations; or*
>
> *(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.*

36. The Applicant's claim, dated 16 January 2014, has been lodged as a Payment Claim on 20 January 2014 and has attached to it 10 Tax Invoices dated 24 December 2013.

37. Lodgement of a Payment Claim under the [1st] Contract is through GC 2.18 of the PCWS terms, as amended by SC 2.18 of the Panel Contract which states:

> *"The Contractor shall submit to the Superintendent a Tax Invoice every month showing the Contract value of the work carried out in the performance of the Contract and incorporated Works"*.

38. By reference to the various Tax Invoices and the Payment Claim documents, it can be seen that the Applicant's claim fulfils the

requirements under the [1st] Contract for making a Payment Claim and in so doing complies with section 4 of the Act.

39. The Applicant submits that the implied provisions of the Act are engaged as, in its view, there are no written provisions in the PCWS CGC 2.18 *"…about when and how the Principal (or the Superintendent on its behalf) must respond to a payment claim"*.

40. The Respondent submits that the [1st] Contract, which incorporates the SC 2.18.1 *"…is clearly and unequivocally a written provision enabling the Contractor to make a claim to the Principal for a progress payment for the obligations (e.g. the works and services) it has performed under the contract and a written provision about how the Principal is to respond to a payment claim made by the Contractor and when it must be made.*

41. I do not agree with the Applicant's view on this point. The [1st] Contract holds broad written terms about the making of a claim, how and by when the claim is to be paid and how and by when the Respondent is to respond to the claim.

42. I am satisfied that the Applicant's Payment Claim lodged on 20 January 2014, was a valid payment claim made under the contract and I am also satisfied that the Applicant's Payment Claim is a valid payment claim for the purposes of the Act.

43. Section 8 of the Act - **Payment Dispute** – A payment dispute arises if:

    (a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed; or

(b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or

c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.

44. The Applicant made a valid payment claim on 20 January 2014. The Respondent subsequently assessed and rejected that claim on 28 January 2014. The Applicant's Payment Claim was to be paid under the [1st] Contract provisions on or before 19 February 2014.

45. The Respondent rejected the Applicant's Payment Claim on 28 January 2014 and failed to pay the claim, in whole or part, by 19 February 2014, that is "*within thirty (30) days of receipt of claims*". The contract payment requirement of section 8 of the Act arose in *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor* [2012] NTSC 22 at para 20 where Barr J stated:

> *"In my opinion, the correct construction of s 8(a) is that the due date for payment under the contract is the only date on which a payment dispute may arise. That is the date at which the existence of the relevant fact (non-payment, rejection or dispute) is to be ascertained in order for the statutory definition to be satisfied. Therefore, even though there may be a rejection or dispute prior to the due date for payment, the "payment dispute" does not arise until the due date for payment''*.

46. The Respondent responded to the Applicant's Payment Claim of 20 January 2014 eight days after it was lodged, that is on 28 January 2014, rejecting the claim in its entirety. The Applicant then had to 'mark time' for the remainder of the thirty days to expire under the [1st] Contract payment terms SC 2.18.1.

47. In this matter a payment dispute arose between the Respondent and the Applicant on 20 February 2014, and I am satisfied that there is a payment dispute for the purposes of the Act in which the Applicant has applied for an adjudication of the dispute under section 27 of the Act.

48. Section 28 of the Act – **Applying for Adjudication** – by reference to the Applicant's documents of the Application dated 15 May 2014, served on the Respondent and the Prescribed Appointer, MBANT, on 16 May 2014.

49. In its Response, the Respondent submits that the Applicant has failed to serve all of the Application because it failed to refer to or attach all the documents of the Panel Contract in the Application attachments. The Respondent submits that, because they have not been served with the Application which *"must state or have attached to it all of the information, documents and submissions on which the party making it relies in the adjudication"*, it does not meet the provisions of section 28(2) of the Act and must therefore be dismissed.

50. I do not share the Respondent's view for the reasons set out in paragraphs 23 to 33 above. Both the Applicant and the Respondent frequently state and refer to the Panel Contract and the [1st project works] RFT in the Application and the Response documents. A copy of the Panel Contract and the [1st project] RFT was provided in the Response and extracts of the Panel Contract and [1st project] RFT was provided in the Application.

51. The issue between the parties in this payment dispute is which documents comprise the [1st] Contract. Each has a different view and each has submitted substantial argument on their respective positions on this matter.

52. I do not share the view of the Respondent on this point. Failure by an applicant to submit all the documents of a contract where they contest the

content and formation of the contract could not invalidate an application properly made under the Act. It may, however, prejudice an applicant's claims in the adjudication itself.

53. If the Respondent's position were correct, any application could easily be described as 'invalid' by a respondent claiming that an applicant must provide information which the Respondent subjectively thinks appropriate so as to fulfil the requirements of section 28 of the Act. While this position may be tactically advantageous to a respondent, it is also the case that an adjudicator has broad powers under section 34 of the Act to seek further information as he or she requires to make a determination. Under section 34(1)(b) an Adjudicator:

> *"is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator considers appropriate"*.

54. In any event, under section 34(1)(a)(i) the Adjudicator must act informally and if possible make a determination on the basis of "*the application and its attachments"*. If an applicant does not attach all the information on which it seeks to rely, it would likely be to the applicant's detriment.

55. I am satisfied that the Application is a valid Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 6.

56. Section 29 of the Act – **Responding to Application for Adjudication** – by reference to the Respondent's documents in the Response dated 30 May 2014, served on the Applicant and the Adjudicator on 30 May 2014. I am satisfied that the Response is a valid Response to the Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and by Regulation 7.

57. Having now considered the relevant sections of the Act and the Regulations, and following attendance to the documents of the Application and the Response, I find that I have jurisdiction to determine the merits of the payment dispute between the Applicant and the Respondent.

Merits of the Claims

58. The claims made by the Applicant in its Application are as follows;

(a) Delay costs – 34 days of delay time for Superintendent's direction to suspend the work while leases were secured by the Respondent - $346,800.00 (including GST);

(b) Windows and Screens – Superintendent's direction to replace the installed louvre windows on the four duplex houses with Breezway proprietary brand products and replacement of Crimsafe screens with Amplimesh screens - $43,887.20 (including GST) for the windows and $28,544.00 (including GST) for the screens at a total of $72,413.20 (including GST);

(c) Demolition costs – additional demolition costs not allowed for in the Contract - $103,506.00 (including GST);

(d) Verandahs – an additional cost of 8 x verandahs at $44,875.70 each not allowed for in the Contract - $359,005.60 (including GST); and

(e) Engineering Consultant's costs – additional costs associated with consulting engineering advice for various changes and non-compliance reports - $23,764.00 (including GST);

59. The Applicant seeks interest payable on its claim under the Conditions of Contract ("GC") 2.18 at the 90 day bank bill rate published on 1 June each year at a current rate of 2.82% per annum.

60. The Applicant has also sought the costs of the Adjudication being:

    (a) the Adjudicator's costs; and
    (b) the Applicant's costs.

61. The Respondent has no counter claims in its Response.

The Delay Costs for Superintendent's Direction - $346,800.00 including GST

62. The Applicant claims 34 days of delay costs in the [1st] Contract at the daily rate of $10,200.00 including GST, for a total stand down period directed by the Superintendent between 19 April 2013 to 23 May 2013.

63. The Respondent submits that the delay has no factual or legal basis because it occurred before the [1st] Contract was awarded to the Applicant on 21 May 2013.

64. Turning to the evidence, it can be seen that the [1st] Contract was formally awarded to the Applicant by letter dated 21 May 2013 (Tab DD1 of the Response and Tab 2 of Folder 2 of the Application).

65. Prior to that, on 12 April 2013, the Respondent advised the Applicant by mobile telephone text *"…the Procurement Review Board (PRB) has approved [1st project]"* (Tab 20 of the Application and the Statutory Declaration of [MD] at 30).

66. On 16 April 2013 the Applicant was given approval to use Lot 164 [1st project site] for:

(a) a temporary camp; and

(b) a lay-down yard.

approval was also given for connection of power and water to the existing services and *"…must comply and be approved by PWC."* (Tab MD12 of the Response and Tab 21 of Folder 2 of the Application).

67. The Applicant mobilised its plant, equipment and materials to site over the period 17 and 18 April 2013 (paragraph 6.2.2 of the Application).

68. On 19 April 2103 the Applicant was advised by email from the Superintendent that:

> *"…there is currently no contract on* [sic] *place for [1st project site], therefore Possession of Site has not been granted. Our client is still dealing with getting leases."* (Tab 6 of the Application).

69. On 24 April 2014 a meeting was held [redacted] at the Respondent's offices where the Respondent directed that all work stop and the Applicant was to demobilise all staff except security for the camp facilities, plant, equipment and materials at Lot 164 [1st project site]. The Respondent also advised the Applicant that:

> *"It is now clear that the award of the contract, at this point of time even today, does not allow sufficient time for any contractor to reasonably complete the works within the time left (10 weeks). If [the Respondent] gets approval to award the Contract, the dates will shift accordingly…….an EOT would be immediately applied to the Contract once awarded."* (Tab 7 of the Application).

70. Access to the [1st project] site was provided to the Applicant on 21 May 2013 with formal award of the [1st] Contract (Tab DD1 of the Response and Tab 2 of Folder 2 of the Application).

71. From the factual events set out in paragraphs 62 to 70 above, three key points relating to this matter are clear:

    (i) Access and mobilisation to site was given to the Applicant on 16 April 2013;
    (ii) Access and mobilisation was revoked by the Respondent on 24 April 2014; and
    (iii) Access and mobilisation to the site was reinstated on 21 May 2013.

72. The Superintendent's direction of the 24 April 2014 amounts to a direction given under GC 2.5 as amended by SC 3.4.2 to read *"Directions and Notices"* of the [1st] Contract.

73. The Applicant had no choice but to comply with the Respondent's direction as access had been revoked by direction to the [1st project] site. The Applicant had previously been granted access to mobilise its camp facilities, plant and equipment and materials which then remained on the [1st project] site under security of a skeleton staff for the period from 24 April 2013 to 21 May 2013 inclusive, some 27 days of directed stand down by the Respondent.

74. The rate of stand down in the [1st] Contract has been agreed between the parties at $10,200.00 at page 25, line item 2 under variable costs of the Applicant's tender submission (Tab MD 11 of the Response and Tab 18 of Folder 2 of the Application). The total stand down cost of the Applicant can be calculated at 27days x $10,200.00 = $275,400.00 including GST.

75. I am satisfied that the Respondent by its direction caused the Applicant stand down costs of $275,400.00 including GST and I award this sum to the Applicant.

Windows and Screens – Superintendent's Direction - $72,413.20 (including GST)

76. The Applicant has claimed that it had to replace the louvre windows following a direction from the Respondent. The Applicant also claims the additional costs it has incurred by installing 'Crimsafe' screens rather than 'Amplimesh' screens.

77. The Respondent says that the Applicant did not follow the schedule and specification that asked for proprietary brand products and, as such, the Respondent should not be liable for any costs incurred by the Applicant for not using the specified product.

The Louvre Windows

78. It is clear that the Applicant had installed Diamond Brand Louvre Windows ("Diamond Galleries") into the works. There is a lengthy evidential trail of correspondence between the parties throughout the attachments to the Application where the Applicant tries to convince the Respondent that the Diamond Galleries are acceptable and meet the specification and schedule of the [1st project] works.

79. On 30 September 2013 the Respondent directed the Applicant to replace the Diamond Galleries with the specified schedule item Altair Breezway 131 Louver Windows ("Breezway Galleries") in accordance with the [1st] Contract (Tab 12 of the Application).

80. On or about 4 October 2013 the Respondent suspended its earlier direction of 30 September 2013 and gave the Applicant an opportunity to provide technical compliance information that the alternative Diamond Galleries met the same standard and performance of the specified schedule Breezway Galleries (Tab 11 of the Application).

81. Following this suspension, there was a continuing trail of correspondence culminating in a dispute notice issued by the Applicant to the Respondent, where the Applicant attempts to convince the Respondent that the alternative Diamond Galleries are of the same standard and performance as the specified schedule Breezway Galleries.

82. On 22 November 2013, following the Applicant's failure to convince the Respondent to accept the Diamond Galleries, the Respondent directed the Diamond Galleries be replaced with the proprietary Breezway Galleries as required under the [1st] Contract (Tab 25 of the Application).

83. On that same day, 22 November 2013, the Applicant confirmed they would replace the Diamond Galleries with Breezway Galleries and should be completed by 13 December 2013 (Tab 25 of the Application).

84. The specification schedule is precise in that it specifies proprietary brand Breezway Galleries (Tab 33 of the Application and Tab MD4B of the Response) to be installed into the [1st] Contract. The Applicant did not comply with this requirement but attempted to have the Respondent accept an alternative product that they had already installed into the [1st project] works. The Respondent has directed the specification schedule be complied with under the [1st] Contract and the Applicant complied with that direction.

85. In so doing, the Applicant has claimed $43,887.20 for performing the Respondent's direction.

The Security Screens

86. The Applicant has installed 'Crimsafe" security screens into the [1st project] works despite the RFT drawings specifying 'Amplimesh' security screens. The Applicant says it should be entitled to a variation for the difference in price between the two products.

87. The Respondent says that the Applicant departed from the specification unilaterally and did not advise the Respondent or request approval from the Respondent. The Respondent also says that the Applicant overlooked the specification and cannot now expect the Respondent to accept and approve a variation so that the Applicant can bring the [1st project] works back into conformity with the specification.

88. The Applicant acknowledges it departed from the RFT drawings specifying 'Amplimesh' screens (paragraph 7.3.1 of the Application).

89. It is clear that in both instances, the louver windows and the security screens, the Applicant departed from the specification of the [1st] Contract. In so doing the Applicant cannot now expect the Respondent to pay a variation for the Applicant to conform with the specification of the Works to fulfil its contractual obligations.

90. I am of the view that the Applicant cannot, in the circumstances of its non-conformance with the specification, succeed in this claim.

91. The Applicant's claim for the louver windows and security screens fails for lack of compliance with the [1st] Contract specifications.

Demolition costs not allowed for in the Contract - $103,506.00 (including GST)

92. The Applicant claims an additional $103,506.00 including GST additional demolition costs in the [1st] Contract as a result of a mutual mistake in allocation of the demolition costs into the [1st project] RFT.

93. The Respondent says that in its [1st project] RFT the Applicant made an allowance for demolition of $5,000.00 including GST and the Respondent accepted that offer.

94. The scope of the demolition has not increased and the degree of difficulty for access and performance remains the same and has not changed throughout the Applicant's performance of the [1st] Contract.

95. In referring to the [1st project] RFT pages 37 to 35 (Tab MD 11 of the Response and Tab 18 of Folder 2 of the Application), it can be seen that each of the eight Lots has an allowance for demolition of $5,000.00 including GST. The Applicant suggests that the demolition costs were to be paid as an additional amount in excess of the unit lump sum price for the [1st project] works.

96. The Respondent maintains that the Applicant's offer was accepted on the basis that the offer was *"….to execute the whole of the specified works, including any demolition required for the lump sum price quoted per lot including the amount of $5,000.00 per lot for demolition.".*

97. There is little evidence to support the Applicant's claim for additional demolition costs payable in the [1st] Contract. The [1st project] RFT is express in what allowance of the lump sum the Applicant had made for its demolition of the eight Lots and the Respondent accepted that offer. Absent any evidence to the contrary, the quoted price for each demolition in the lump sum of the RFT stands.

98. I am satisfied that the Applicant's claim fails for lack of evidence.

Verandahs – not allowed for in the Contract - $359,005.60 (including GST)

99. The Applicant claims $359,005.60 including GST for constructing the verandah roof sections of the four duplex dwellings (eight verandah roof sections in all). In making the claim, the Applicant says that the *"…Department of Infrastructure confirmed in email correspondence dated 26 March 2013 that the carports and driveways were not included in the contract for the [1st] project (Folder 1, Tab 9)".* However, when referring to

Folder 1, Tab 9, there is no such email and after looking through the evidence in the other folders I failed to locate such an email. The evidence at Folder 1, Tab 9 is a drawing showing that the verandahs form part of the duplex dwelling the Applicant is to construct.

100. The Respondent says that the verandahs are and always were part of the Applicant's scope of work and this much can be established by reference to the drawings, in particular Drawing No. B12-14552 and B12-14554 which contain the verandah roof detail and notes for its construction (Tab MD4E of the response). The Respondent also says that the Applicant was informed of the difference between carports and the verandahs and that there was no requirement to build carports in the scope of works, only verandahs (Statutory Declaration [MD] at 57).

101. It is clear from the drawings, particularly B12-14552 and B12-1459 containing detail A thru G, that the verandahs were to be built as part of each duplex dwelling in the [1st] Contract. The Applicant has not provided any substantive evidence that could establish the verandahs did not form part of the [1st project] works. In fact, the Applicant has also provided evidence at Folder 1, Tab 9 that the verandahs actually formed part of its scope of works for the [1st] Contract.

102. I am satisfied that the Applicant's claim fails for lack of evidence.

Engineering Consultant's costs for NCR's - $23,764.00 (including GST)

103. The Applicant claims $23,764.00 including GST for additional costs incurred for the services of a consulting engineer, Davis Consulting Pty Ltd, to assist it with the Non Conformance Process ("NCR"), Diamond Louvre Windows dispute and some changes to the block walls of the building. The Applicant says that it incurred these additional costs over and above that which was normally required by the [1st] Contract.

104. The Respondent says that the Applicant was required to conform to the specified scope of work and was required to take corrective action to any NCR's in the [1st] Contract at its own cost. The Respondent had issued 14 NCRs for the Applicant's work which required the Applicant to carry out the appropriate corrective actions to bring the works back to specification or as near as possible to specification.

105. It is not in contention that the NCR corrective action was necessary by the Applicant to return the Works to specification. The only issue between the parties is who should pay for any assistance, should it be necessary, in carrying out those corrective actions.

106. The [1st project] RFT at section 6 expressly required the Applicant to undertake Quality Assurance ("QA") of the scope of work in the [1st] Contract. The QA requirements of inspection, sample test and hand over to the applicable standards and specifications fall to the Applicant as part of the [1st] Contract. The Applicant represented to the Respondent that they had a QA system in place that was capable of delivering the Works to the acceptable standard and specification required by the Respondent. The Applicant cannot now claim that as soon as the Respondent issued an NCR for a failure by the Applicant to produce conforming work in the [1st] Contract, any cost in corrective action is to be paid by the Respondent.

107. The 14 NCRs issued by the Respondent were the responsibility of the Applicant's corrective actions and any costs associated with rectification of works that were not up to specification must fall to the Applicant. The Applicant cannot benefit from a harm they have caused to themselves.

108. I am satisfied in these circumstances that the Applicant's claim fails.

Interest on the claims

109. In reconciling the claims, the amount the Respondent is to pay The Applicant is $275,400.00 (including GST).

110. The interest rate payable under the [1st] Contract GC 2.18 as amended by SC 2.18 at the 90 day bank bill rate published on 1 June each year at a current rate of 2.82% per annum.

111. Interest is not calculated on the GST component of the amount the Respondent is to pay the Applicant and GST is not payable on an amount awarded in a determination under Goods and Services Tax Determination 2003/01.

112. I award interest of $2,611.33 on the sum payable, excluding GST, from 19 February 2014, the date of due payment, to 4 July 2014, the date of determination, pursuant to section 35 of the Act.

Summary

113. In summary of the material findings, I determine:

(a) the contract to be a construction contract under the Act;
(b) the work to be construction work under the Act;
(c) the site to be a site in the Northern Territory under the Act;
(d) the claim to be a valid payment claim under the Act;
(e) the dispute to be a payment dispute under the Act;
(f) the delay costs to stand in the sum of **$275,400.00 including GST**;
(g) the windows and screens variation to fail;
(h) the demolition variation to fail;
(i) the verandah variation to fail;

(j) the engineer consultant costs variation to fail.

(k) Interest awarded in the sum of **$2,611.33**.

114. Accordingly, I determine that the amount to be paid by the Respondent to the Applicant is **$278,011.33 (including Interest and GST)**.

115. This sum is to be paid to the Applicant by the Respondent on or before 18 July 2014.

Costs

116. I have not found either the Application or the Response to be without merit and I do not consider the Applicant's conduct in bringing the Application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.

117. I make no decision under section 36(2) of the Act. The parties must bear their own costs.

Confidential Information

118. The following information is confidential:

(a) the identity of the parties;

(b) the identity of the principal; and

(c) the location and nature of the works.

DATED: 4 July 2014

Rod Perkins

Adjudicator No. 26